

UNIT 3 LEGAL STUDIES
AOS 2: THE VICTORIAN CIVIL
JUSTICE SYSTEM
SUMMARY NOTES FOR THE SACS & EXAMS



**WRITTEN BY A STUDENT WHO OBTAINED
A PERFECT STUDY SCORE**

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Chapter 6 – Introduction to the Victorian Civil Justice System

6.1 – Introduction to the Civil Justice System

- Civil justice system is a set of methods, process and institutions used to resolve civil disputes

Civil cases in Victoria

- Law-making power held between six states and two territories of the Commonwealth of Australia
- Allows them to have:
 - o Its own system of resolving disputes
 - o Its own civil laws
 - o Its own rules for determining civil disputes
 - o Its own courts and other dispute resolution bodies

Parties to a civil dispute

- The **plaintiff** – party who commences civil action, they are the aggrieved party
- The **defendant** – party who is alleged to have infringed the rights or caused wrongdoing
- Can have multiple plaintiffs or defendants
- If successful, plaintiff will obtain a remedy to cover for their losses, aimed to restore them to their original position before the wrongdoing
- Civil remedy can include damages, which is an amount of money paid by the defendant to the plaintiff.
- Parties to a civil dispute can be the following:
 - o Individual suing or being sued in their own name, or a group of individuals suing or being sued together
 - o A corporation
 - o Government body

Children

- A child under 18 years can sue someone through a litigation guardian, known as a 'next friend'
- Usually a parent or guardian, bringing action on behalf of them which is called representative action
- Children can also be sued, but their extent of their legal liability depends on the child's level of maturity and the behaviour expected of a child of that age

Employers

- If an employee infringes a person's rights while acting in the course of his/her employment, then the aggrieved can sue the employer
- Concept of vicarious liability, which is the legal responsibility of a third party for the wrongful acts of another
- Employers have a right, ability and duty to control the activities of their employees

Dispute resolution bodies

- Three main types:
 - o Complaint bodies, such as Consumer Affairs Victoria
 - o An ombudsman, such as the Public Transport Ombudsman, who have the power to investigate and report on complaints relating to administrative action taken by government departments and other authorities
 - o Tribunals, such as the Victorian Civil and Administrative Tribunal
 - o Courts

Types of civil disputes

- Family law
 - o Relationships between parents, children and other family members and carers
- Defamation
 - o Saying or publishing material which causes damage to another person's reputation
- Trespass
 - o When someone goes onto another person's land without permission
- Breach of contract
 - o Someone has failed to do something they promised in a legally binding agreement
- Nuisance
 - o People that have lost enjoyment or use of property
- Negligence
 - o Someone owes a duty of care to another and breaches that duty, causing harm or loss

6.2 – The Principles of Justice

Fairness

- *All about the processes of the civil justice system, judges and the parties and how it facilitates impartiality.*
- An unbiased process and hearing
 - o Both parties should know the case against them and be given the opportunity to present their case
 - o The dispute resolution processes should operate so that neither party is disadvantaged, and that people are treated impartially without fear or favour
 - o Should be able to understand court processes and be able to participate in the hearing or trial
- Every step should be fair
 - o Includes pre-trial procedures or mediation before the final hearing
- Judges, magistrates and juries should be impartial and decide on the basis of facts, not on any bias
- For example, if the plaintiff claims that the defendant signed a contract and breached that contract, the defendant should have an opportunity to know what documents and evidence support those claims.

Equality

- *The equal treatment of individuals, equal rights and responsibilities, disregarding their personal characteristics*
- All people should be treated the same before the law, with an equal opportunity to present their case
- No person or group is favoured or disadvantaged based on their attributes – free from prejudice
- Protected under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, states that every Victorian has the right to be equal before the law and the right to equal protection of the law without discrimination

Access

- *The ability to utilise legal institutes and resources available to them, as well as understanding and using their rights*
- People should be able to understand their legal rights, and should be able to pursue their claims
- Should be able to get information and use the procedures, methods and institutions that resolve a civil dispute.
- Growing problem is the number of people who do not have a lawyer due to the high cost.
- Being self-represented party limits the individual to fully understand and utilise their rights.

6.3 Key Concepts in the Victorian Civil Justice System

The burden of proof

- The party who carries the responsibility to substantiate their claim
- Plaintiff carries the burden since they brought the case against the defendant and therefore must show that the defendant was in the wrong
- Can be reversed when defendant makes a counterclaim against the plaintiff

The standard of proof

- The degree of which the facts must be proven by the plaintiff
- In civil cases, it is on the balance of probabilities – most probably or most likely in the right, and the other party is most probably in the wrong

Representative proceedings

- Also known as a class action
- Group of people all have claims against the same party
- It can be commenced if:
 - o Seven or more people have claims against the same person
 - o Those claims relate to the same, similar or related circumstances, and
 - o The same issues need to be decided
- A lead plaintiff who represents the group and the group members are part of the group

Types of representative proceedings

- Shareholder class actions, where shareholders of a company may make a claim about being misrepresented about the state of the company's affairs
- Product liability class actions, where consumers who have purchased a good or service have all suffered the same loss or damage
- Natural disaster class actions, where the group members have suffered loss or damage as a result of a natural disaster

Benefits of representative proceedings

- Group members can share the cost
- It is a more efficient way of the court dealing with a number of claims, saving court time and the time of court personnel
- People can pursue civil actions that they might not be able to afford an individual case, and this gives them access to the courts to resolve their disputes
- In certain circumstances, a litigation funder may be prepared to fund the class action on behalf of the people who have suffered loss. They do this in return for a percentage of any settlement or damages awarded, thus increasing the ability of the group members to pursue a claim even when they don't have the funds themselves.

6.4 Relevant Factors when Initiating a Civil Claim – Negotiation and Costs

Negotiation options

- **Negotiate a resolution of the dispute directly with the defendant**
- Parties interact directly with each other to try and resolve the dispute
- With or without legal representation
- Possible options include:
 - o **Facilitated negotiation**, arranging between themselves, with or without legal representation, an independent third party, such as a **mediator**, to help resolve the dispute. Independent third party is neutral and impartial, assists the parties to come to their own agreement
 - o Arranging negotiation through a body such as the Dispute Settlement Centre of Victoria, or FMC Mediation and Counselling Victoria

When negotiation may not be an option

- One or both of the parties **does or do not want to resolve the dispute**, or is not interested
- There have **already been attempts** to negotiate the dispute, and they have failed
- One of the parties has been **harmed or threatened** by the other party, there has been violence involved or there is distrust/fear
- It is **unlikely that negotiation will result in a successful outcome**
- There is a **significant power imbalance** between the parties, so the parties are not on an equal footing to be able to negotiate

The benefits of negotiating

- **Avoid costs, time and the stress** involved in commencing a formal civil action
- The parties have **control over the outcome**, as opposed to it being decided for them by a third party
- The parties may be **more prepared to accept an outcome** that they have helped come to, as opposed to a decision that has been imposed formally by a court or another dispute resolution body such as a tribunal

Costs

- **Fees for legal representation**
 - o Solicitor and barristers are costly
 - o Costs depends on
 - **Complexity** of the case
 - **The court** in which the matter will be held
 - The **size** of the case
 - The **length** of legal proceedings
 - The **expertise** of the lawyers and barrister
 - o High cost prohibits many people who wish to take a civil issue to court – **must be worth pursuing**

- **Disbursements**
 - Out of pocket expenses incurred as part of a legal case
 - Issuing a claim in court will incur a number of disbursements including court fees, mediation fees and fees for expert witnesses
 - Court fees
 - Court filing fees – in the Magistrates’ Court, filing fees are between \$145 and \$680. Filing fee in the County Court is over \$800, and from \$1000 to more than \$4000 in the Supreme Court
 - Court hearing or trial fees – the plaintiff needs to pay for every day of the hearing. Range between \$520-2000
 - Jury costs – if jury is involved, the party who chooses to have a trial before a jury will incur cost. County and Supreme Court daily cost ranges from \$550-1000+
 - Mediation fees
 - Both parties share costs of the mediator.
 - Mediator fees vary, but can be between \$2000-20000 per day
 - Expert witness fees
 - Plaintiff’s claim may require an expert to give an opinion, depending on the nature of the claim.
- **Adverse costs order**
 - If the plaintiff initiates a claim in court, and is unsuccessful, then not only will they have to pay for their own legal costs, but they may be ordered to pay for some of the defendant’s cost
 - General rule is that a successful party should receive an order from the court that his or her costs are paid by the losing party
 - Can deter a plaintiff from initiating a civil claim. However, it is a risk that the plaintiff needs to consider before initiating a civil claim.
- **The availability of legal aid**
 - VLA provides some assistance to people seeking legal advice and representation for some civil disputes.
 - Focuses on those who need it the most
 - For example, not available for business and commercial disputes, employment disputes, disputes on behalf of corporations, internal disputes in organisations and wills and deceased estates
 - Most people are not eligible to receive legal aid.
 - For example, the Productivity Commission in 2014 estimated in its Access to Justice Arrangements report that only **8 per cent of households would likely meet the tests for legal aid.**
- In summary, the plaintiff must consider:
 - **How much it will cost** to have the dispute resolved
 - Whether **they have the money** to pay for those costs
 - Whether **they are eligible for legal aid** or free legal assistance through other means
 - Whether they have the money to pay for the costs of the defendant if an **adverse costs order** is made
 - What the risks are if they are ordered to pay the other side’s costs and cannot afford to do so

6.5 Relevant Factors When Initiating a Civil Claim – Limitations, Liability and Enforcement

Limitation of actions

- The restriction placed on the time within which a civil action can be commenced
- For most types of claims, the plaintiff will need to commence the proceeding within a certain number of months or years.
- If the time is passed, then the defendant can raise the defence that the plaintiff is out of time and can no longer bring the claim
- **Rationale for imposing limitations**
 - o The defendant **does not have to face an action** after a significant amount of time
 - o **Evidence is not lost**, and people can still remember what happened
 - o Disputes can be resolved **as quickly as possible**, so as to promote social cohesion
- If the time period is passed, the plaintiff will be prevented from obtaining any remedy. **But it is up to the defendant to raise it as a defence.**
- Time limitations:
 - o **Defamation – 1 year**
 - o Breach of contract – 6 years
 - o **Under tort law – 6 years**
 - o **An action to recover land – 15 years**
- In 2015, Victoria **removed limitation periods** for persons who suffered **physical or sexual abuse as a minor**, or **psychological abuse** that arose out of that abuse.

The scope of liability

- Possible defendants
 - o Employers
 - o Insurers
 - o Persons involved in wrongdoing (principle of accessorial liability)
- **Employers**
 - o Principle of **vicarious liability** means that an employer may become liable for the actions of its employee
 - o In order to establish liability, the plaintiff needs to prove that **the employee was in fact an employee**, and that he or she was **acting in the course of employment** when the events leading to the claim occurred.
 - o Connection between the act and employment
- **Insurers**
 - o An insurance policy is an arrangement by which an insurer agrees to provide compensation to the insured if the insured suffers some form of loss.
 - o Types of insurance:
 - Insurance for directors and officers of companies
 - Public liability insurance (insurance for injury to a third party or their property)
 - Worker's compensation (insurance that may be paid to an employer who suffers injury during their employment)
 - o When plaintiff sues a defendant, **that defendant is often insured**
 - o Plaintiff **cannot make direct claim** against the defendant's insurer
 - o If plaintiff is successful, the defendant will then **claim on the insurer for loss**
 - o Insurers often run cases in the name of the defendant because they will be making the payment in the end

- **Person involved in wrongdoing**
 - Aided, abetted or procured the wrongdoing
 - Induced or urged the wrongdoing
 - Were in any way, directly or indirectly, a party to the wrongdoing
 - Conspired with others to cause the wrongdoing
 - **Accessory liability**
 - Plaintiff may sue somebody else who was involved in the wrongdoing
- **Extent of the defendant's liability**
 - Plaintiff **must consider and raise the extent** to which the defendant is liable.
 - Defendant may argue that if they are found liable, they are only liable for **a portion of the plaintiff's loss or damage**
 - Negligence claims, when the defendant may claim **contributory negligence**
 - Plaintiff may be in part to blame for the harm done
 - Defendant may also argue that someone other than the plaintiff was liable, and therefore try to reduce his or her liability

Enforcement issues

- Normally, there are two ways that a plaintiff will obtain a settlement or remedy:
 - By settling with the defendant before the court or tribunal hands down a decision
 - By obtaining a remedy from a dispute resolution body such as a court
- However, sometimes if the court orders an amount of money to be paid to a plaintiff, the defendant does not pay.
- Therefore, plaintiff needs to consider whether the defendant is able to pay, and if so, whether or not the defendant will pay:
 - The defendant **may be bankrupt**
 - Even if the defendant is not bankrupt, he or she may **still be unable to pay**
 - If the defendant is a company, **that company may not have any assets**
 - The defendant may be **overseas or uncontactable**

Chapter 7 – Resolving a Civil Dispute

7.1 Consumer Affairs Victoria (CAV)

- One of the dispute resolution services known as complaints bodies.
- Complaints body is an organisation that is established by parliament to resolve formal grievances

Purpose of Consumer Affairs Victoria

- Advises the Victorian Government on consumer legislation, provides information and guidance to educate people about consumer laws
- **Provides consumers and traders, and landlords and tenants, with a dispute resolution process**
- Help people settle their disputes **efficiently and constructively, without any cost**, and assist them in agreeing on the resolution of the dispute without imposing a decision

Dispute resolution methods used

- **Conciliation**
 - o Method of dispute resolution which uses an independent third party to help the disputing parties reach a resolution
 - o However, **this agreement is not legally binding**
- **Conciliator is the third party**
 - o Does not make the decision on behalf of parties
 - o Listens to facts, makes suggestions and helps the parties come to their own decision
 - o They **can explore possible solutions** with the parties
 - o Conciliator may have **specialist knowledge** of the nature of the dispute
- **May sign a deed of settlement**
 - o When parties come to a decision
 - o Can be enforceable through a court if one party does not follow through with their promises
- Primarily over the phone, but can provide in-person conciliation
- **Power to commence civil proceedings**
 - o Can also institute proceedings on behalf of a person in relation to a consumer dispute in certain circumstances

Appropriateness of Consumer Affairs Victoria

1. Whether the dispute is within CAV's jurisdiction
 2. Whether the dispute is likely to settle
 3. Whether there are other or better ways to resolve the dispute
- CAV will not conciliate disputes that the courts or the Victorian Civil and Administrative Tribunal (VCAT) have already decided on, or in a pending case
 - Only accept complaints if the person complaining has first tried to resolve the dispute themselves
 - **Whether the dispute is within Consumer Affairs Victoria's jurisdiction**
 - o The supply of goods and services
 - o Residential tenancies
 - o Retirement villages
 - o Owners' corporations
 - o If a party has a civil dispute that does not fall under these categories, then CAV has no power to assist

- **Whether the dispute is likely to settle**
 - There has been **no delay** in the person to complaining to CAV
 - CAV's database of complaints **does not show that the other party has previously refused to participate in conciliation**
 - The person complaining has **not contributed to the dispute through inappropriate behaviour**
 - The dispute is **not overly subjective**
 - The trader **hasn't already made a reasonable offer** that was rejected by the consumer
- **Other or better ways to resolve the dispute**
 - Whether they **will be able to, or have tried to, resolve the dispute themselves**
 - Whether the dispute is **best resolve by a court or tribunal making a binding order** on the parties, rather than reaching a resolution themselves
 - Whether the other party is unlikely to **take the conciliation process seriously, or may not show up**, so issuing a claim in a court or tribunal is more likely to force them into realising the seriousness of the dispute
 - Whether one party would **prefer the formality of the tribunal or court processes** to resolve the dispute
 - Whether the matter is **too big or complex** to be appropriate for CAV
 - Whether resolution of the matter is **urgent, so a court is a better option**

Strengths and weaknesses of CAV

- **Strengths**
 - Fairness
 - CAV **ensures procedural fairness** by allowing both sides the opportunity to present their case and rebut the other side's case
 - CAV aims to **conciliate disputes in a timely manner**, so parties do not have to wait months or years
 - The conciliation process is **informal**, can be done over the phone, **removing anxieties** people have with formalities of a courtroom
 - CAV **assesses disputes individually, case by case**, reducing waste of time and resources on disputes that are clearly unlikely to be resolved through conciliation
 - Equality
 - Its conciliation service is **free, accessible** to all Victorians
 - Access
 - Conciliation process offered by CAV ensures that **parties reach a resolution themselves**
- **Weaknesses**
 - CAV's role is **limited to mainly consumer and landlord disputes**. Narrows the range of disputes it covers even further – *Access*
 - CAV has **no power to compel parties to undergo conciliation**. If one party is willing but the other is not, then they may not be able to use CAV's dispute resolution services
 - CAV also has **no powers to enforce any decisions** reached by the parties in conciliation, unless they enter a binding agreement, one of the parties may simply ignore the outcome - *Fairness*
 - CAV is **not appropriate for large and complex disagreements**, including those with difficult legal questions or several different parties, which can only be resolved by a court or tribunal which has greater expertise in the law.

7.2 The Victorian Civil and Administrative Tribunal

- Tribunals are **dispute resolution bodies** which deal with a **limited area of law** and **build up expertise** in that area.
- **Less formal** than the courts, intended to be **cheaper** and **more efficient** way
 - o For example, strict rules of evidence such as hearsay may be accepted in tribunals
- Receive over **85000** claims per year
- Terms used for parties are:
 - o **Complainant:** (the plaintiff)
 - o **Respondent:** (the defendant)

Structure of the Victorian Civil and Administrative Tribunal

- Governing body:
 - o President (a judge of the Supreme Court)
 - o A number of vice-presidents (judges from County Court)
 - o Deputy presidents
 - o Senior **members** and ordinary **members**
- Divided into four divisions:
 - o **Administrative**
 - Deals with **professional conduct inquiries** and applications from people seeking a **review decision made by government** and other authorities
 - Lists:
 - Legal Practice
 - Planning and Environment
 - Review and Regulation
 - o **Civil**
 - Deals with range of civil disputes relating to **consumer matters, domestic building works, owners' corporation matters, retail tenancies, sale and ownership of property**, and use or flow of water between properties
 - Lists:
 - Civil Claims
 - Building and Property
 - Owners Corporations
 - o **Human Rights**
 - Relating to **guardianship and administration, equal opportunity, racial and religious vilification, health and privacy information, disability matters** and decisions made by the Mental Health Tribunal
 - Lists:
 - Guardianship
 - Human Rights
 - o **Residential Tenancies**
 - Tenancy disputes, including disputes between **residential tenants and landlords**, rooming house owners and residents, caravan park owners and residents, and site tenants and owners
 - List:
 - Residential Tenancies

Purpose of VCAT

- Provide **low-cost, accessible, efficient** and **independent** tribunal delivering high-quality dispute resolution processes
- Each list deals with a limited area of law, **building up expertise in those areas**
- Uses various dispute resolution methods
- If matter does not settle, there will be a formal hearing
- Formal hearing, a member of VCAT will make a **binding decision on parties**

Low cost methods of resolving disputes

- Provides a low-cost method of resolving disputes in a number of ways:
 - o Small amount for filing their claim, although they do vary from list to list.
 - o As of 2018 1 July, **standard fee was \$62.70 for smaller claims**
 - o Changed its fee structure to **three tiers**
 - Corporate tier (businesses with annual turnover of \$200,000 or more)
 - Standard tier (individuals and small businesses)
 - Health card holders tier
 - o No hearing fees for **small civil claims less than \$15000**
 - o Parties **do not have to go through pre-trial procedures** which can often add to the legal costs incurred by the parties
 - o Parties can represent themselves, **more than 80% of people represent themselves** at VCAT

The accessibility of the VCAT

- Various venues across the state at
 - o Bendigo, Geelong and Shepparton
- Use of **telephone and video** conferences
- Allowing people to lodge certain documents online
- **Informal nature** encourages people to feel they can use the tribunal

Efficiency of VCAT

- 2015-16, the Civil Claims List had a **median wait time of 10 weeks (now is 8 weeks)**
- Residential Tenancies list had a **median wait time of 2 weeks**
- Planning and Environment List had a **median wait time of 6 months**
- **Focused on technology** and upgraded its computer systems to ensure greater efficiency and handling claims

Independence of VCAT

- Members are independent, and will act as unbiased adjudicators
- Supported by Court Services Victoria, which is independent of parliament and government

Dispute resolution methods used at VCAT

- **Mediation**
 - Co-operative method
 - Parties discuss issues involved, develop options, consider alternatives and reach an agreement through negotiation
 - Mediator does not interfere with discussion, but only aids discussion and ensuring both parties are heard, does not suggest a solution
 - Not legally binding, but settlement can be enforceable through the courts.
 - **Short mediation and hearing**
 - Civil Claims List valued at less than \$3000 may be listed for **short mediation and hearing (SMAH)**
 - Conducted by qualified VCAT staff
 - If dispute is not settled at mediation, then matter goes to hearing on the same day before a different VCAT member
- **Compulsory conferences**
 - **Confidential meetings** during which the parties discuss ways to resolve their dispute **in presence of a VCAT member**
 - Use a **conciliation process**, VCAT member may suggest forms of settlement and explores likely outcomes of the case if it goes to the hearing
- **A final hearing before a member**
 - For when the matters are not settled yet through the other methods
 - Parties will be given an opportunity to present their case, **include giving and hearing evidence**
 - VCAT member will oversee the hearing and **make a binding decision** on the parties
 - Procedures are held with as **little formality** and technicality as possible
- **Orders**
 - VCAT can:
 - Require a party to pay money
 - Require a party to do something, such as perform work, carry out repairs or vacate premises
 - Require a party to refrain from doing something
 - Declare that a debt is or is not owing
 - Review, vary or cancel a contract
 - Dismiss a claim
 - Decisions of VCAT are **binding on the parties** and can be enforced
- **Appeals**
 - Appeals can only be made on a **question of law**.
 - If presided over by the President or vice-president, appeal will be heard in the Court of Appeal
 - All other appeals heard in Trial Division of the Supreme Court

7.3 An Evaluation of VCAT

Appropriateness of VCAT

- **VCAT's jurisdiction**
 - o Often parties have no choice but to bring their disputes to VCAT, because it has **exclusive jurisdiction** to hear certain types of claims
 - o Types of claims that can be heard by VCAT:
 - Purchases or sales of goods and services
 - Disputes between tenants and landlords
 - Owner's corporations
 - Discrimination, sexual harassment, victimisation or vilification
 - Domestic building works
 - Lawyers, lawyers' conduct and provision of legal services
 - The flow of water between properties
 - Retail tenancies
 - o VCAT also has a review jurisdiction to revisit decisions made by certain authorities
- **Disputes that VCAT cannot hear**
 - o Representative proceedings
 - o Disputes between employers and employees
 - o Disputes between neighbours
 - o Disputes between drivers in car accidents
 - o Disputes between tenants and tenants
 - o Disputes involving federal or state law where VCAT has not been given any power to hear the matter

Other or better ways to resolve disputes

- Whether the parties are able to **resolve the dispute themselves**
- Nature of the **fees**, some lists have the same or higher fees than court
- Whether the parties wish to have **greater avenues of appeal**
- Whether one or more of the parties are **unlikely to take VCAT seriously**, and so a court is a preferred dispute resolution body
- Whether the matter is of a **complexity or size** that is not appropriate for VCAT
- Whether the party prefers the court to resolve the dispute because of **the doctrine of precedent**

Strengths and weaknesses of VCAT

STRENGTHS

- Normally **cheaper**,
- **Speedy resolution** of disputes
- An **informal** atmosphere
- **Flexibility** of VCAT's hearing process ensure fairness and equality for an unrepresented party
- **Specialised jurisdiction**, therefore developing expertise in those areas
- Parties are **encouraged to reach a resolution** between themselves
- Smaller claims benefit from the **more streamlined process**
- A decision made in a final hearing is **binding** on the parties

WEAKNESSES

- Higher costs of taking a matter to VCAT due to **increased use of legal representation**
- For **large and complex civil claims**, including class actions, VCAT is not an appropriate forum to resolve the dispute
- There is a **limited right to appeal** VCAT decisions
- VCAT has suffered **long delays** (Planning and Environment List wait is 6 months)

7.4 The Purposes of Civil Pre-Trial Procedures

Types of pre-trial procedures

1. Pleadings

- A series of documents filed and exchanged between the parties to a court proceeding
- Set out and clarify the claims and the defences of the parties and help to define the issues that are in dispute
- Two main documents:
 - o **Statement of claim**
 - filed with the court by the plaintiff, and formally given to defendant
 - sets out in detail the claims made against the defendant and the remedy sought by the plaintiff
 - o **Defence**
 - Filed by the defendant
 - Sets out the defendant's response to each of the plaintiff's claims
- **Cannot make new claims or defences if they are not included in the parties' pleadings**, except with leave of the court or with the consent of the other party
- **Purposes of pleadings**
 - o Aims to achieve **procedural fairness** by ensuring the other side knows what the claim or the defence is about
 - o Compel each party to **state the material facts** and particulars they are relying on to prove their claims and defences. **Avoids taking an opponent by surprise.**
 - o Give the court a written record of the case, **allows them to understand the issues** so it can manage the trial and pre-trial procedures
 - o **Set the limits to the dispute**, enables other procedures such as discovery to be confined to the issues in the dispute
 - o Assist in reaching **an out-of-court settlement** where appropriate. For example, if a claim or defence is so compelling, it may force the other party to pursue a strategy to settle the claim before trial

2. Discovery of documents

- Enables parties to get copies of documents that are relevant to the issues in dispute
- Relevant documents are listed in a formal document and the other side is entitled to inspect those documents. For example:
 - o If the plaintiff claims that there is a **written contract**, you would expect that the plaintiff will have a **copy of that contract**
 - o If the plaintiff claims to have **suffered physical injuries**, you would expect there to be **medical records** which show the nature and extent of the injuries
 - o If the plaintiff claims to have suffered loss because of **payment of medical expenses**, then they should be able to show **invoices and receipts** of those medical expenses
 - o If plaintiff claims to have suffered **abuse and humiliation** in a workplace because of **emails being sent around**, those **emails** must be made available for the other side

- **Purposes of discovery**
 - Require parties to **disclose or reveal all relevant documents** to the other side so that all parties have access to the documents, ensuring fairness in the process
 - Reduce the **element of surprise** at trial and avoid a trial by ambush
 - Allow each party to **determine the strength of the other side's case** and their own likelihood of success
 - Each party and the court have all the **relevant material and documents** required to achieve a just outcome
 - Assist in reaching **an out-of-court settlement** where appropriate
- 3. Exchange of evidence**
- Two types of evidence: lay and expert evidence
- **Lay evidence**
 - Laypersons or ordinary people give lay evidence
 - They give evidence about what they know about **the factual circumstances**
 - Depending on what the court has ordered, laypersons might give evidence as follows:
 - **As a witness outline** – an outline is a **brief description of the topics** the witness will give evidence on when they attend trial. Gives chance for other parties **to know what the evidence will be about**
 - **By filing a witness statement** – A witness statement is the **written form of evidence** that the witness would have given orally. A witness who provides a witness statement may only need to attend trial for cross-examination and re-examination
 - **Orally** – The witness will need to attend trial and will be asked questions under oath or affirmation. They do not have to provide a witness outline or statement before giving that evidence
 - Three types of examination of witnesses
 - First is examination-in-chief
 - Opened ended questions by the party who called witness
 - Followed by cross-examination
 - Other party tests the accuracy of the evidence
 - Then re-examination
 - Can clarify any existing evidence
- **Expert evidence**
 - **To give an opinion** about an issue in the case
 - Submitted through a written report by an independent expert
 - Not allowed to argue the case for the party, but must only give **an opinion within their area of expertise**
 - They are there to tell the truth and have a primary duty to the court
 - Often used for cases involving personal or mental harm, and in cases involving loss or damage

- **Purpose of exchange of evidence**
 - Reduce the element of surprise at trial
 - Allow each party to determine the strength of the other side's case and determine their likelihood of success
 - Provide both parties the opportunity to rebut the other side's expert evidence
 - Allow the defendant to understand the amount of damages that the plaintiff is seeking to enable the defendant the opportunity to consider whether it may be better to settle the matter out of court

Summary of the purpose of pre-trial procedures

- **Ensure procedural fairness by allowing the other side to know what the claim or defence is about, or requiring the parties to disclose all relevant documents**
 - Pleadings
 - Discovery of documents
- **Avoid taking an opponent by surprise by disclosing material facts, particulars, documents or evidence**
 - Pleadings
 - Discovery of documents
 - Exchange of evidence
- **Give the court a written record of the case**
 - Pleadings
- **Set the limits to the dispute**
 - Pleadings
- **Assist in reaching an out-of-court settlement**
 - Pleadings
 - Discovery of documents
 - Exchange of evidence
- **Allow a party to determine the strength of the other side's case**
 - Discovery of documents
 - Exchange of evidence
- **Provide opportunity to another party to rebut the other side's evidence**
 - Exchange of evidence

7.5 Reasons for a Victorian Court Hierarchy

Administrative convenience

- Cases can be distributed according to their seriousness and complexity
- Minor civil disputes (less than \$100 000) can be heard in the Magistrates' Court
 - o Heard faster and less expensive
- More complex and serious civil disputes are heard in the County Court and the Supreme Court, which have unlimited jurisdiction
 - o Take longer to hear, more experienced judges

Appeals

- Grounds of appeal in a civil case include:
 - o A point of law (question of law) – where some law has not been followed, for example, the court heard inadmissible evidence
 - o A question of fact – whether the facts of the case had been applied appropriately to reach the decision
 - o The remedy awarded- the way in which a court enforced a right, or the order that was made by another court
- If there was no hierarchy, there would be no higher court to review a decision that a party believes has had been made in error
- A higher court can review a lower court's decision
- Requiring leave to appeal – court's consent to hear an appeal, requiring the party to satisfy the court that there is a reasonable chance of success

Summary of the civil jurisdiction of the Victorian courts

- **Supreme Court (Court of Appeal)**
 - No original jurisdiction
 - Appellate jurisdiction
 - With leave, on a **question of law**, question of **fact or an amount of damages**, from a single judge of the County Court or Supreme Court. On a question of law from VCAT when the President or a vice-president made the order
- **Supreme Court (Trial Division)**
 - Original jurisdiction
 - Unlimited in all civil claims
 - Appellate jurisdiction
 - **On a question of law** from the **Magistrates' Court and from VCAT**
- **County Court**
 - Original jurisdiction
 - Unlimited in all civil claims
 - Appellate jurisdiction
 - No appeals, unless given power under a specific Act of Parliament
- **Supreme Court**
 - Original jurisdiction
 - Claims of up to \$100 000
 - No appellate jurisdiction

7.6 The Responsibilities of the Judge and the Jury in a Civil Trial

The Judge

- Responsibilities of the judge
 - **Manage the trial**
 - Powers of **case management**, ensuring the trial is conducted in a **just, timely and efficient manner**
 - Power **to give directions** and orders in the trial, ask a witness to clarify his or her evidence, and hand down rulings throughout the trial where necessary
 - **Decide on the admissibility of evidence**
 - Responsible of deciding which evidence is to be permitted under the rules, and can exclude evidence from the trial
 - **Attend to the jury (if there is one)**
 - May need to address the jury during trial, give directions to the jury, and sum up the case to the jury at the conclusion of trial
 - **Determine liability and the remedy**
 - If there is no jury, the judge must decide whether the plaintiff has established his or her claim against the defendant, and if so, what remedy, if any, should be awarded.
 - **Decider of facts**
 - Generally, reserve their decision for a later time, normally give it as a written reason, known as 'judgements'.
 - **Make a decision on costs**
 - Judge will decide which party should bear the costs
 - General rule is that working out costs is left to the end, and the successful party is entitled to costs, but that is not always the case

The Jury

- Do not have to be used, but can be in these two situations:
 - o **Either the plaintiff or the defendant** can specify during the pleadings stage that they **wish to have the proceeding tried by a jury**, though the court can still direct that the trial be without a jury if it decides a jury is not required. The party who wishes a civil dispute to be tried by a jury **must pay the applicable fee**
 - o The court may order that a proceeding be tried with a jury, though this is rare
- Composition of a jury:
 - o Made up of six jurors
- Responsibilities of a civil jury
 - o **Be objective**
 - Must be unbiased and bring an open mind to the task, putting aside any prejudices or preconceived ideas
 - Must not have any connections with any of the parties
 - o **Listen and remember the evidence**
 - Evidence can be complex, so they are allowed to take notes to help them remember information
 - Must not undertake their own investigation of what happened
 - o **Understand directions and summing up**
 - Judge will give directions to the jury about issues or points of law, and will sum up the case at the end
 - Jurors must listen carefully to the directions and summing up
 - o **Decide on liability and, in some cases, damages**
 - Decider of the facts on the balance of probabilities

7.7 The Responsibilities of the Parties and Legal Practitioners in a Civil Trial

The parties

- Main parties are the plaintiff and the defendant
- In representative proceedings, the lead plaintiff will represent the group members
- Each party controls its own case and has complete control over decisions about how the case will be run, as long as the rules of evidence and procedure are followed – known as “party control”.
- *Civil Procedure Act 2010 (Vic)* was introduced to reform and modernise the laws and processes relating to civil proceedings in court, as well as to impose some overarching obligations on the parties and their legal practitioners
 - o These obligations are designed to improve standards of conduct
 - o Some of these include, act honestly, cooperate, do not mislead or deceive
- Responsibilities of the parties
 - o Plaintiff has the burden of proof, unless the defendant issues a counterclaim
 - o **Make opening and closing addresses**
 - Both parties give an opening and closing address, to outline and summarise the case
 - Plaintiff first, then defendant
 - o **Present the case to the judge or jury**
 - Most of the trial is taken up with presenting their case through lay witnesses and expert witnesses

- **Comply with overarching obligations**
 - 10 overarching obligations
 - Include obligations to use reasonable endeavours to resolve disputes, disclose the existence of critical documents at the earliest reasonable time, and act in a way that minimises delay and does not mislead or deceive anyone in relation to the dispute

Legal practitioners

- Role of preparing and conducting a case
- Their most important duty is the **duty to the court and the administration of justice**
- Responsibilities
 - **Make opening and closing addresses**
 - If a party is legally represented, the legal practitioner will present the opening and closing addresses
 - Solicitor prepare the submissions, and the barrister presents them orally in court
 - **Present the case to the judge or jury**
 - Barristers will ask the witnesses questions, either through examination in chief, cross-examination or in re-examination
 - They have a responsibility of presenting the case in a manner that is in the best interests of their client, but still must comply with their overarching obligations
 - **Comply with overarching obligations**
 - Subject to the same obligations under the *Civil Procedure Act*

Summary of responsibilities of key personnel

- **Judge**
 - Act as an impartial umpire, ensuring a fair trial and parties are treated equally. However, may have unconscious biases – *Fairness, Equality*
 - As there is not normally a civil jury, the judge will decide on facts as well as law, ruling on liability and remedies - *Fairness*
 - Has significant powers of case management to ensure the just, timely and cost-effective resolution of issues in dispute – *Access*
 - Does not overly interfere in the procedure - *Fairness*
 - May overly interfere, risking a mistrial
 - Cannot overly assist a self-represented party
- **Jury**
 - Randomly picked and has no connection with the parties - *Fairness*
 - Only decide on facts before them and cannot make their own enquiries
 - Must try to remain objective, although everyone has unconscious biases
 - Decision-making is shared
 - May inadvertently come across information not put at trial, risking unfair outcome
 - Difficult role to listen to and remember all the evidence
 - Jury directions can be complex
 - Juries tend to be inconsistent and unpredictable in assessing damages

- **Parties**
 - Party control enables parties to make decisions about evidence to put forward and submissions to make
 - Party control means parties get to choose how they present the case which depends on their own abilities to do so. However, vital evidence may be missed
 - Unrepresented party can cause delays
 - Highly complex procedures which are difficult to understand without legal representation
 - Parties may feel stressed or inconvenienced because of party control and the way trials are conducted
 - Are required to comply with overarching obligations, but may be difficult to prove they are not
 - Party control means they get to choose the evidence to put before the court
- **Legal practitioners**
 - Have responsibilities to put client's case forward in its best light
 - Must not mislead the court, and must comply with overarching obligations
 - Add to the costs of a trial
 - Better legal representation may mean a better outcome

7.8 Judicial Powers of Case Management

- Two main sources of those powers of case management are:
 - The rules of the court, being the *Magistrates' Court General Civil Procedure Rules 2010 (Vic)*, *County Court Civil Procedure Rules* and the *Supreme Court Rules*
 - The *Civil Procedure Act 2010 (Vic)*
- Overarching purpose of the *Civil Procedure Act* is:
 - To facilitate the **just, efficient, timely and cost-effective resolution of the real issues in dispute**

Power to order mediation

- Judge or magistrate has the power to make an order referring a civil proceeding, or a part of a civil proceeding, to **mediation**
- Power given to judge through Section 66 of the *Civil Procedure Act 2010 (Vic)*
- Court rules also enable a judge to refer the parties to mediation, for example, from rule 50.07 of the Supreme Court Rule
- The court can either order that a court officer act as the mediator or order the parties arrange the mediation privately
- Can be ordered **any time of the proceeding**, and can also attend **more than one** if there is a prospect that a further mediation may help settle the dispute
- Power to order mediation assists with **prompt and economical resolution** of a dispute
 - With the assistance of a mediator, parties may realise that there is a benefit to settling the dispute early and before trial, without spending the costs of going to trial

Power to give directions

- *Civil Procedure Act* states that the court may give **any direction or make any order** it considers appropriate at any stage of the proceeding
- Also stated in Rule 34.01 of the Supreme Court Rules, stating that in any stage of the proceeding, the Supreme Court can give any direction for the conduct of the proceeding
- Judges can **actively manage** civil proceedings
- Sanctions can be imposed on a party who fails to comply with a direction
- **What is a direction?**
 - An instruction given by the court to one or more of the parties, which **imposes an obligation on a party** to do something by a certain time or specifies how a civil proceeding is to be conducted
 - For example, filing a document, attending court, or attend mediation by a certain time
- **Directions before trial**
 - Judge has powers to give directions to the parties about:
 - The **conduct of proceedings**
 - **Timetables or timelines** for any steps to be undertaken
 - Participating in any **method of dispute resolution**, such as mediation
 - **Expert evidence**, including directions about limiting expert evidence to specific issues
 - The allowance for a party to **amend a pleading**
 - **Discovery**, including relieving a party from the obligation to provide discovery, or limiting discovery
 - Directions can be given at any time, but can be given during **directions hearings**, which is a pre-trial hearing before a judge or an associate judge
- **Directions during trial**
 - Judge has the power to make directions during a trial or hearing about the conduct of the hearing
 - Types of directions that a court can give include directions about:
 - The **order in which evidence is to be given**, or who will go first in addressing the court
 - **Limiting the time** to be taken by a trial
 - **Limiting the examination of witnesses**, or not allowing cross-examination of particular witnesses
 - **Limiting the number of witnesses** that a party may call
 - **Limiting the length or duration of the parties' submissions** to the court
 - **Limiting the number of documents** that a party may tender into evidence
 - **Evidence**, including whether it should be given orally or in writing
 - **Costs**, including whether a particular party should bear the costs

7.9 Courts as Dispute Resolution Bodies

Appropriateness of courts as dispute resolution bodies

- Whether the dispute falls within the court's jurisdiction
- Whether there are other or better ways to resolve the dispute
- **Jurisdiction**
 - Both County and Supreme Court have unlimited jurisdiction
 - Magistrates' Court jurisdictional limit is \$100,000
 - VCAT has **exclusive jurisdiction** over some matters, so courts cannot hear them:
 - Domestic building disputes
 - Retail tenancies disputes
 - Residential tenancies disputes
 - Planning disputes
- **Other or better ways to resolve a dispute**
 - Whether they are able **to resolve the dispute themselves** through negotiation or mediation
 - **The costs of taking a matter to court**, and whether CAV, VCAT or a private method might be better
 - Whether they are prepared to **accept the risks and uncertainty** involved with a third party making a decision on the dispute. This includes the possible risk of an **adverse costs order**
 - Whether they have **access to and are able to afford legal representation**, which is likely to be necessary to undertake pre-trial procedures and for trial
 - Whether they are **comfortable with the formalities** of the courtroom and the rules of procedure
 - **The size and complexity** of the matter
 - Whether the proceeding is a **class action** that needs to be determined by the Supreme Court
 - The **time** it will take to have the matter heard in court
 - Whether they are prepared to have their dispute **aired in an open hearing**

Strengths and weaknesses of courts as dispute resolution bodies

- **Strengths:**
 - The court hierarchy allows for **administrative convenience**
 - The **court hierarchy** allows for more serious and complex cases to be heard in the higher courts, and lower courts to deal with less complex and minor claims
 - The court hierarchy also enables courts to **specialise in certain areas of law**
 - The court provides opportunities to the parties to reach an **out-of-court settlement**
 - Various **pre-trial procedures**
 - Use of judicial power to **order parties to mediation** assists in providing opportunities to settle
 - The court allows the parties to **determine the strengths and weaknesses** of each other's case
 - **Pre-trial procedures** help the parties decide if they admit certain facts or issues that are in dispute
 - Parties must **disclose critical documents** early

- The court seeks to **achieve procedural fairness** through the way it conducts proceedings
 - Judges can **give any directions** to ensure civil dispute is resolved
 - Judge is responsible to **ensure rules of evidence** are followed
 - The judge is an **expert in law, legal processes and cases**
 - The court hierarchy allows for parties to **appeal a case** where an error has been made
 - The use of jury **safeguards against misuse of power** by having the state decide on liability
 - **Party control** means that parties are more likely to be **satisfied with the outcome**, and the judge is not able to interfere with the way a case is presented
- Procedures and laws **apply equally to all**
 - Pre-trial procedures **apply equally and do not discriminate** against particular groups
 - Judicial powers of case management are **applicable to all parties** and not just to a select few
 - Both self-represented litigants and parties represented by legal practitioners will **be subject to the same procedures and laws**
- It allows **interaction between the court and the parties**, which ensures fairness and equality
 - Pleadings provide the court with a written record of the claims and defences, allowing the judge to be across the issues
 - Directions of hearings provide opportunities for the parties to communicate with the court about issues that need to be resolved or orders that need to be made
 - The roles of parties and the judge in a civil trial ensures that they work together to resolve the dispute
 - Parties are able to engage legal practitioners who are familiar with the courtroom and trial process, and will enable better interaction with the court
- The use of the jury allows a **reflection of community values** in the decision-making
 - The jury is able to take into account the social, moral and economic values of the time, and make a decision from the point of view of the ordinary person in the street, rather than the legal reasoning that a judge may bring to a decision
- **Weaknesses**
 - The costs in having a dispute resolved in courts may **restrict access to the courts to resolve the disputes**, and may jeopardise parties being treated equally because of their socio-economic status
 - Costs associated with completing pre-trial procedures
 - Engage legal representation
 - Spend money in preparing and researching the case
 - Legal practitioners are expensive
 - Fees for jurors
 - Many of the procedures are **complex and difficult to understand without a lawyer**
 - Highly complex and difficult to understand, requiring legal assistance
 - Judicial orders and directions can be complex and difficult to understand

- The way that courts resolve disputes can be stressful
 - Stressful environment due to the many rules of procedure
 - Courtroom formalities can make parties uncomfortable
- Judges cannot overly interfere or help a party, which may be unfair for parties
 - Judges are impartial referees and do not interfere investigation
- Jurors are not experts in the law or evidence, which may jeopardise a fair outcome
- Jurors do not have to give reasons for their decision, and deliberations are secret
- The role and responsibilities of the parties and legal practitioners may mean that the outcome is based on how a party presents their case, and not on who is actually liable

	CAV	VCAT	COURTS
THE THIRD PARTY			
Is there a third party who makes a decision	No	Yes, if dispute proceeds to a final hearing	Yes, if dispute proceeds to a final hearing
Role of third party	Conciliator: Facilitates discussion and suggests options and possible solutions. Usually someone with specialist knowledge in the field	Member/Vice-president/President: Hears all the evidence at a final hearing and makes a binding decision	Judge/jury: Hears all the evidence at a final hearing or trial and makes a binding decision
Is the decision binding?	No, though terms of settlement may be enforceable	Yes	Yes
PROCESSES AND PROCEDURE			
Is the resolution of the dispute conducted in private?	Yes	No, unless the parties settle before the final hearing	No, unless the parties settle before the final hearing or trial
Are there rules of evidence and procedure?	No	Generally, more flexible	Yes
Are there pre-trial procedures?	No	Generally, no	Yes
Is there a jury?	No	No	Only if the judge or one of the parties requires it
TYPES OF DISPUTES			
Are there restrictions on jurisdiction	Yes	Yes	Yes, for Magistrates' Court
Types of civil disputes heard?	Disputes between tenants and landlords and consumers and traders	Various types of disputes, including small claims , residential tenancies claim and retail tenancies	All types of claims , including complex claims
Can they hear representative proceedings?	No	No	Yes, Supreme Court
Appropriate for large complex claims?	No	No	Yes, Supreme Court
DISPUTE RESOLUTION METHODS USED			
Use of mediation	No	Yes	Yes
Use of conciliation	Yes	Yes	Generally, no
Use of arbitration	No	No	Yes, in Magistrates' Court

7.10 Methods Used to Resolve Civil Disputes – Mediation and Conciliation

- Mediation, conciliation and arbitration are dispute resolution methods that can be used by the parties without going to CAV, VCAT or the courts
- Very few civil cases initiated in court will proceed to a final hearing or trial. Estimated that fewer than 5 per cent of cases will proceed to hearing.

Mediation

- A cooperative method of resolving disputes that is widely used by courts, tribunals and other dispute resolution bodies
- Tightly structured, joint problem-solving process
- Parties discuss the issues involved, develop options, consider alternatives and try to reach an agreement through negotiation.
- Mediator facilitates communication between the parties
- 2014-15, the Supreme Court of Victoria estimated that **985 court sitting days** were saved through the use of mediation
- **Overview:**
 - o Two disputing parties, with possible representatives
 - o Third party = mediator whose role is to facilitate communication between the parties
 - o Resolution is made by the parties, voluntarily
 - o Resolution may be enforceable if terms of settlement entered into
 - o Used extensively in Victorian courts and VCAT

Use of mediation in resolving disputes

- Courts:
 - o Courts can refer civil disputes to mediation. Parties may be ordered to attend mediation at a fixed point before the cases are set down for trial or hearing, or earlier if possible
 - o Parties may externally arrange a private mediator, or the court may refer the dispute to judicial mediation
- VCAT:
 - o VCAT often refers a claim to mediation before a final hearing
 - o Small civil disputes relating to goods and services, VCAT uses the SMAH dispute resolution method, in which parties attend a brief mediation conducted by a VCAT mediator. If the matter does not settle, the final hearing is scheduled for the same day
- CAV:
 - o Primary method to resolve disputes is conciliation
- Private use:
 - o Individuals may attempt mediation at any time either before or after they initiate a claim
 - o Can contact the Dispute Settlement Centre of Victoria or private mediators

Conciliation

- Two disputing parties, with possible representatives
- Third party = conciliator whose role is to facilitate communication between parties, and offer suggestions and solutions
- Resolution is made by the parties, voluntarily – it may be on the advice of the conciliator
- Resolution may be enforceable if terms of settlement entered into
- Use by CAV and VCAT. Courts do have power to refer disputes to conciliation

Use of conciliation in resolving disputes

- Courts
 - o County Court and Supreme Court do not generally use conciliation as a method of dispute resolution, preferring to refer parties to mediation. However, all courts have the power under the *Civil Procedure Act* to order any civil proceeding to conciliation, so it is possible for parties to be ordered to conciliate the dispute prior to hearing or trial
 - o Conciliation is widely used in the Family Court of Australia to help resolve family disputes
- VCAT
 - o The parties may be ordered to take part in a **compulsory conference** to identify and clarify the nature of the issues in dispute in the proceedings, and to promote a settlement before a matter is heard in the tribunal. This conference is conducted using a conciliation process.
- CAV
 - o CAV's primary method of resolving disputes is through conciliation
- Private use
 - o Individuals may attempt conciliation at any time either before or after they initiate a claim

Appropriateness of mediation and conciliation

Disputes suitable for mediation and conciliation

- Disputes in which **a relationship between the parties will continue**
- Disputes in which both parties are prepared to meet in **a spirit of compromise and are willing to stick to any agreement reached**
- Disputes in which a defendant **admits liability** and the only issue to determine is the amount to be paid
- Disputes in which the parties want **privacy and confidentiality** when resolving the matter
- Disputes which call for a combination of remedies to achieve the plaintiff's outcome
- Disputes in which a **proceeding has been issued in a court**, and the court has referred the parties to mediation or conciliation
- Disputes in which the parties **expect the legal costs will be significant** and the matter can be resolved at an early stage

Disputes unsuitable for mediation and conciliation

- Disputes in which **overwhelming emotions might interfere** with the negotiating process
- Disputes in which there is a **history of broken promises**
- Disputes in which there is a **history of violent and threatening behaviour**
- Disputes in which one or both of the parties are **unwilling to try to reach a mutual agreement**
- Disputes in which there is a **gross imbalance of power** between the parties
- Disputes in which the **mental health of a party** suggests that the process unlikely to be effective
- Disputes in which a **debt is clearly owing by one party**
- Where the matter is urgent

Strengths and weaknesses of mediation and conciliation

Strengths

- They are **much less formal** than courts and VCAT – it is likely to be less intimidating
- They may **address the parties' needs better**
- They are conducted in a **safe and supportive environment**, in a venue that is suitable for both parties
- They make use of **an experienced third party** who has expertise in resolving disputes or in the subject matter
- They **save time** rather than waiting for a final trial or hearing
- They are **generally cheaper** than having the matter litigated – pre-trial procedures can be avoided
- They are **private and confidential**
- They are **voluntary** – parties are not forced into doing or saying anything
- There is **flexibility in the steps** – there are generally few rules as to how mediation is conducted
- They offer savings for the justice civil system

Weaknesses

- The decision **may not be enforceable**, depending on the terms of settlement
- One party may compromise too much
- One party may be **more manipulative or stronger**, so the other party may feel intimidated
- The matter may not resolve and so **may need to be litigated anyway**, thus wasting time and money
- Some parties may **make claims on principle and want a hearing**
- The decision will not form any precedent
- One party may feel compelled to reach a resolution and therefore may feel dissatisfied
- The mediation or conciliation may be conducted too early or too late in the proceeding to be effective

7.11 Methods used to Resolve Civil Dispute – Arbitration

- Method of dispute resolution without the court. An arbitrator will listen to both sides and **make a decision** that is binding on the parties
- Unlike mediation and conciliation, since the third party makes a final and binding decision
- Known as an **arbitral award**, which is a legally binding decision made in arbitration
- Conducted in **private**
- **Less formal** and **more cost-effective** than attending court
- Parties have more control over the process and are free to agree on the procedure
- **Agree on how evidence is submitted**, or the time by which steps are to be completed
- Generally, the arbitrator:
 - o Is **not bound** by **rules of evidence**
 - o Must ensure that the parties are **treated equally**, and each party is given a reasonable opportunity of presenting their case
 - o Is **not required** to conduct the proceedings in a **formal manner**
- Available when:
 - o The parties have **agreed to settle their dispute by arbitration**
 - o The **court orders** the parties to arbitration
 - o Filed in the **Magistrates' Court** and the plaintiff is seeking **\$10,000 or less**
- Summary of arbitration
 - o Two disputing parties, with possible representatives
 - o Third party is an **arbitrator**. Role is to listen to the evidence and arguments of the disputing parties, then make a decision
 - o Resolution is **decided by the arbitrator**
 - o **Arbitral award is legal binding**
 - o Use in the Magistrates' Court for **claims of less than \$10 000**, and in private and commercial disputes

Use of arbitration in resolving disputes

- **Courts**
 - o Courts have power under the *Civil Procedure Act* to refer all disputes to arbitration prior to a final hearing or trial, as long as consent is given
 - o For small claims in the Magistrates' Court (less than \$10 000), the Magistrates' Court can refer a dispute to arbitration by a magistrate
- **VCAT**
 - o VCAT hearings are not arbitrations
 - o But under section 77 of the *Victorian Administrative Tribunal Act*, they **can refer** a matter to arbitration on the basis that it is a **more appropriate forum**
- **CAV**
 - o **CAV does not use arbitration**
- **Private use**
 - o Parties can arrange their own private arbitration
 - o Arbitrators can be found using institutions such as the **Resolution Institute** or the **Victorian Bar**
 - o The Supreme Courts' Arbitration List also offers support for parties in arbitration, such as determining discrete questions of law which an arbitrator has referred to the Court.

Appropriateness of dispute arbitration

- **Disputes suitable**
 - Disputes in which the parties have **agreed to arbitrate** the dispute, or the claim is **less than \$10 000** and has been issued in the Magistrates' Court
 - Disputes in which the parties want **the benefits of a binding and enforceable award** made by an independent third party
 - Disputes in which the parties want **evidence to be presented to a third party**, and some rules of evidence applies
 - Disputes in which the parties want to **avoid the publicity of a courtroom** and wish to have their matter resolved confidentially and in private
- **Disputes unsuitable**
 - Disputes where the parties **have not agreed to arbitrate the dispute**, and do not want arbitration as a dispute resolution method
 - Disputes where the parties **want greater control over the dispute resolution process**
 - Disputes where the parties wish to **have their day in court** and would rather not have the matter conducted in private
 - Disputes where the parties are **more comfortable with formal rules of evidence** and procedure, and would rather a court conduct the process

Strengths and weaknesses

- **Strengths**
 - The **decision is binding**, and is fully enforceable through the courts
 - **Held in private and will be confidential**, which can be beneficial for parties wishing to avoid the publicity of a trial
 - The parties have **control over how the arbitration is to be conducted**, by determining how evidence is to be presented and when steps are to be undertaken
 - The arbitrator is **generally an expert** on the subject matter
 - There can be a **timelier resolution** of the dispute and cost effective
- **Weaknesses**
 - Arbitrations can **be formal if the parties have agreed on a formal method** of arbitration, adding to the stress, time and costs
 - Parties have **no control over the outcome**, which will be imposed on them by the arbitrator
 - They can be **costly and take a long time** depending on the nature of the dispute and the way the parties have decided to resolve it
 - The right to appeal is limited

Comparison of the three methods of dispute resolution

	MEDIATION	CONCILIATION	ARBITRATION
THE THIRD PARTY			
Name of third party	Mediator	Conciliator	Arbitrator
Is the third party independent?	Yes	Yes	Yes
Role of the third party	Facilitates discussion between the parties and ensures all parties are being heard. Does not need to be an expert in the field.	Facilitates discussion and suggests options and possible solutions. Usually someone with specialist knowledge in the field	Listens to both sides and makes a binding decision on the parties. Usually someone with specialist knowledge in the field.
HOW IT IS CONDUCTED			
Is it conducted in private?	Yes	Yes	Normally, yes
Are parties required to be present personally	Yes	Yes	Yes, but they may be represented by someone else
Are there rules of evidence and procedure?	No	No	Parties may agree how it is to be conducted
FINAL DECISION			
Who makes the decision?	The parties	The parties	The arbitrator
Is a final order made?	No, unless the terms of settlement are formulated into orders that are then made by the court or VCAT which give effect to the settlement	No, unless the terms of settlement are formulated into orders that are then made by the court or VCAT which give effect to the settlement. CAV does not have the power to make a final order	Yes, called an arbitral award
Is the decision binding?	If the terms of settlement are formulated into orders, yes. If the parties settle the case, the terms of settlement can be enforced (but will require the party to institute proceedings to enforce them).	If the terms settlement is formulated into orders, yes. If the parties settle the case, the terms of settlement can be enforced (but will require the party to institute proceedings to enforce them).	Yes.

7.12 Remedies

- A remedy provides a legal solution for the plaintiff by restoring them to their original position prior to the breach of their right (as much as possible)

Damages

- An amount of money awarded to the plaintiff, to be paid by the defendant
- Purpose is to compensate the plaintiff for losses suffered
- **General damages** are damages that cannot be assigned a specific monetary value to, such as pain and suffering, psychological harm
- **Specific damages** can be assigned a specific monetary value to, such as medical bills, loss of wages
- **Compensatory damages**
 - o *Think compensate from “compensatory”*
 - o Aim to **restore the party whose rights have been infringed as much as possible to the position they were in before the infringement**
 - o Compensating them for losses suffered
- **Nominal damages**
 - o *Small amount*
 - o A **small amount** of money paid by way of damages
 - o Plaintiff seeks nominal damages to **show that their rights were infringed**, rather than seeking a large sum of money in compensation
 - o Purpose of nominal damages is to **uphold the plaintiff’s rights** without awarding any substantial amount of damages
 - o For example, in a **defamation case**, nominal damages may be awarded when the plaintiff’s character has been tainted, but little damage has been done to the plaintiff’s reputation
- **Contemptuous damages**
 - o *Contempt from “contemptuous”*
 - o Small damages awarded to **show contempt for the claim that is made**, while admitting the plaintiff’s right to make the claim.
- **Exemplary damages**
 - o *To punish*
 - o Seeks to punish the defendant for an extreme infringement of rights, and deter others from undertaking the same type of actions
- **Restrictions on damages**
 - o Certain types of claims and certain types of loss have restrictions imposed on damages
 - o For example, in defamation claims, damages for non-economic loss are also limited to \$250 000

Injunctions

- A court order directing someone to stop doing a certain act, or compelling someone to do a certain act
- Purpose is **to rectify a situation caused by the person who was found to be in the wrong**
- **Restrictive/prohibitive:**
 - o Ordering a person to refrain from undertaking an action
- **Mandatory**
 - o Ordering a person to do a particular act
- Can be **interlocutory** or **final**:
 - o **Interlocutory injunction** is a **temporary injunction** that is awarded quickly and in circumstances where there is an urgent situation and an injunction is needed as soon as possible
 - o **At the final hearing**, the interlocutory injunction can become **final** or **dismissed** (overturned)

Summary of remedies

- Most remedies:
 - o **TO restore the plaintiff to the position he or she was in before the harm occurred**
- Damages:
 - o **To compensate the plaintiff for losses** they have suffered such as payment of medical expenses (**compensatory damages**)
 - o For the plaintiff to **make a point about being legally right** and show their rights have been infringed (**nominal damages**)
 - o **To show contempt for the claim that is made**, while admitting the plaintiff's right to make the claim (**contemptuous damages**)
 - o **To punish** the defendant for an extreme infringement of rights (**exemplary damages**)
- Injunctions
 - o **To rectify a situation caused by the person found to be in the wrong**
 - o **To stop a person from undertaking an action** (**restrictive** injunction) that is or will cause a wrongdoing
 - o **To order someone to undertake a particular act** (**mandatory** injunction) to stop the breach or potential breach of a right
 - o **To preserve the position of the parties** until the final determination of the matter (**interlocutory injunction**)

Remedies and their purposes

- Damages:
 - **What sort of loss** has the plaintiff suffered – economic, physical, emotional, mental, reputational?
 - **What is the appropriate measure for unquantifiable losses** such as pain and suffering, humiliation, reputation and loss of life?
 - **Can money return the plaintiff to the position** they were in before the harm occurred?
 - **Can damages compensate for time** in having the case heard, and for stress and inconvenience?
 - Does the defendant have the **capacity to make payment**?
 - What is the **measure of future earning** capacity?
 - Are there any **restrictions in place** which limit the amount to be compensated?
 - Is there any other reason for which the plaintiff may not be returned to their original position?
 - **Is there some other remedy**, such as an injunction, that would be better compensate the plaintiff?
- Injunctions
 - Has the defendant **already done something damaging** and the plaintiff is stopping the defendant from causing any further damage?
 - Will an injunction **stop the defendant** from doing other things?
 - Will the defendant **comply with the injunction**?
 - Even if the defendant does comply with the injunction, **does it mean the plaintiff is fully returned to their original position**?
 - **Is there some other remedy**, such as damages, that would better compensate the plaintiff?

Chapter 8 – Reforming the Civil Justice System

8.1 Costs Factors

Introduction to costs factors

- Aspects such as mediation and conciliation are designed to help reduce legal costs for parties
- Still does not entirely rectify the high costs required to be paid for their disputes to be settled
- High costs can discourage people from pursuing civil claims or defences

Legal costs

- **Cost of legal representation**
 - o Everyone has a right to legal representation, but in reality, not everyone can afford this right
 - o Nature of the court relies on good legal representation
- **2014 Productivity Commission Review** estimated that the amount spent in legal costs by an average plaintiff on a Supreme Court matter was **around \$60 000**.
 - o These costs include discovery, a pre-trial procedure
 - o Especially high for large commercial and complex cases
- Civil parties have difficulties accessing legal aid, because most of legal aid funding is spent on aid for criminal and family law cases, rather than civil disputes
- Other costs:
 - o Engaging expert witnesses and mediators
 - o Filing and heading fees
 - o Using a jury
- As a result, it encourages self-represented parties, which VCAT does encourage, but is not suitable for everyone
 - o Assistance is given by courts
 - o Does not completely overcome the issues faced
- **Principles of justice:**
 - o **Fairness:**
 - If not enough money to pay for legal costs, they are forced to withdraw their claim, or self-represent, which can lead to unfair outcomes
 - Court can assist self-represented parties to help ensure fairness, but they still struggle to understand legal issues or procedures
 - Self-represented parties do not have the same objectivity as those who are represented by experienced lawyers, therefore not making correct decisions
 - o **Equality:**
 - Self-represented parties or parties with less skilled representation can often feel unequal in the court room.
 - Larger impact on vulnerable people
 - o **Access**
 - Costs can prohibit a person's access to the legal system, particularly courts, as they often are deterred from making or defending a claim, or will have to settle the claim to avoid trial

VCAT Costs

- Intended to be low-cost, informal and quick resolving disputes
- Lower fees, ensured by requiring parties to be self-represented in most cases
- Avoid the costs of pre-trial procedures and formalities of a hearing
- But since 2013, VCAT costs have been rising due to the rising costs of operating VCAT
- Further increases introduced in *Victorian Civil and Administrative Tribunal (Fees) Regulations 2016* (Vic)
 - o **Hearing fees for some hearings** – previously, no hearing fee was payable for most matters for the first day
 - o **Three tiers of fees** – corporate (businesses with turnover of more than \$200 000), health care card holders and standard
 - o **Increase in fees** for corporate users
 - o **Reduction in fees** for health care card users
- Fee for \$20 000 claim – Based on Standard Fee
 - o Application fee
 - 2012-13 - \$38.80
 - 2017-18 - \$467.80
 - o No hearing fee on day 1
- Fee to challenge development worth less than \$1M
 - o Application fee
 - 2012-13 - \$38.80
 - 2017-18 - \$935.70
 - o Hearing fee – day 1
 - 2012-13 – No fee
 - 2017-18 – \$348.80
- Fees are still quite low in comparison to court fees
 - o Example: Residential Tenancies Division at VCAT, standard fees for claims up to \$15 000 in 2017-18 was \$62.70
 - o Introduction of a health care card holder fee also assists people accessing VCAT. Fee is capped at \$156.40
- Increase may be influenced by the decline in the number of civil claim matters lodged with VCAT
- **The Principles of Justice**
 - o **Fairness**
 - Many people may not be able to afford to pay VCAT fees, which may be at risk of having to abandon their claim which leads to an unfair outcome
 - VCAT costs remain low for most claims, and health care card holders pay even lower fees.
 - Tries to ensure fairness by having a three-tier system where people who have a greater ability to pay are charged more
 - o **Equality**
 - Three tier system tries to create equal outcomes by charging higher fees to large businesses and lower fees to health care card holders
 - Fees can lead to inequality if the lower fees remain unaffordable for parties to a civil dispute

- **Access**
 - Low costs greater ensures access by people to VCAT than to other bodies such as courts
 - People criticise VCAT's user-pays system, claiming it restricts access to justice. Relevant for cases that VCAT has exclusive jurisdiction, and the person with a claim cannot pay the fees.

Increased use of dispute resolution methods

- Use of alternative dispute resolution methods such as mediation and conciliation are now well established.
 - Can avoid a final hearing or trial in courts or at VCAT
- Dispute Settlement Centre of Victoria offer parties an opportunity to work together to resolve disputes outside of the courtroom.
- Helped with costs in two ways:
 - **Earlier a dispute is resolved, the more money is saved.** Parties avoid the significant costs involved with pre-trial procedures and trial procedures. The settlement of a dispute before trial also saves a party having to pay the winning side's costs, which may be substantial
 - **Saving for the court or VCAT**, and therefore a saving for the entire civil justice system. The more that is spent on trials and hearings, the more funding is required for our dispute resolution bodies.
- However, not all alternative dispute resolution methods are appropriate, such as for vulnerable parties.
- Also, must be used at the appropriate time
- **Principles of Justice**
 - **Fairness**
 - Dispute resolution methods that use a skilled third party who can monitor processes can ensure equal opportunity for the parties to present their case and have a say
 - Informality allows parties unfamiliar with the courtroom to actively engage with the processes and have an opportunity to speak
 - The parties take ownership of the processes and the outcome, thus avoiding an unwanted outcome being imposed on them
 - **Equality**
 - Third party operates as an impartial and unbiased referee who does not advocate for either side
 - Methods such as mediation avoid a third party who may have biases, such as a judge or jury member
 - Whether there is equality in an actual mediation or other alternative dispute resolution method will, however, depend on the skills of the parties and their legal representation
 - **Access**
 - The cost savings can enable a party to access a wider range of methods to resolve the dispute
 - Parties can hire private mediators or conciliators, avoiding the costs of issuing a claim
 - However, alternative dispute resolution methods should be used at the appropriate time. Organising a mediation too early or too late can incur significant wasted costs

8.2 Time Factors

Court delays

- In 2014 Productivity Commission Review found that most disputes heard in lower courts were resolved within 6 months, while a third of cases heard in the superior courts took more than 12 months
- Causes of court delays:
 - o **Court backlogs** – While delays in having cases listed for trial have improved in recent years, it largely depends on the court
 - o **Pre-trial procedures** – Pre-trial steps can be complex and lengthy. Most criticised is the process of discovery, which can take months. Courts that use case management processes often make orders about discovery and other pre-trial steps to streamline the process
 - o **Evidence gathering and preparation** – The time it takes for the parties to get a case ready for trial.
- **Principles of justice:**
- **Fairness**
 - o The delay can impact on the reliability of evidence, jeopardising a fair outcome
 - o Delays deny the parties fair and due process
- **Equality**
 - o Delays can have a serious impact on some parties
 - o Delays can also impact on more vulnerable parties, who are generally not familiar with litigation and can be stressed by the inconvenience of court processes
- **Access**
 - o Delays may force parties to settle or withdraw their claim, frustrated by the loss of time or unable to continue without settlement. This can reduce genuine access to the civil justice system
 - o The reality of possible delays may also deter parties from pursuing their claim in the first place

VCAT waiting times

- Intended to be a speedier and more efficient way of resolving disputes
- Average waiting time according to VCAT annual report 2015-16:
 - o Residential Tenancies: 2 weeks
 - o Owners Corporation: 6 weeks
- For tenants and landlords who wish to have a speedy resolution of rent matters, rental arrears, repairs and vacating premises, speed is helpful in ensuring these disputes do not drag
- However, waiting time for some lists are significant
 - o Planning and environment: 25 weeks
 - o Review and regulation 22 weeks
 - o Civil Claims: 10 weeks
- **Principles of justice**

- **Fairness**
 - Short waiting time for some disputes in VCAT can result in a fairer outcome, with parties being able to recall the facts in dispute and not have to wait a significant amount of time for a resolution
 - The long waiting time for some lists, however, can produce unfair results, particularly for large developments and businesses that risk losing costs and time with waiting for a resolution
- **Equality**
 - Short waiting times can reduce any risk that a person needing a quick resolution has to wait – for example, a tenant or a landlord who needs a speedy determination
 - Long waiting times, however, can impact on more vulnerable people who are stressed or inconvenienced as a result of delays
- **Access**
 - Short waiting times improve access to justice. People are not deterred from issuing claims because of the long time it will take to have the matter heard, and disputes do not fester in the community.
 - Long waiting times, however, can reduce access to justice, as some people may be deterred from pursuing their case, or may withdraw or settle their claim or defence because of the time taken to get an outcome

Appeal processes

- Reforms include:
 - **Changes to the way appeals are heard and determined in the Court of Appeal**
 - In 2014 the *Supreme Court Act 1986* was amended so that **leave to appeal is required for almost all civil appeals**
 - Court of Appeal can only grant leave to appeal if it is satisfied that the appeal has a **real prospect of success**
 - Amendments made to the appeal process. For example, there are **standard timeframes for certain steps to be taken**, and applications may be decided on the papers.
 - Purposes of amendments were to make **appeal process more efficient**, faster and targeted.
 - **Changes to the process used by the High Court to hear special leave application**
 - Usually, special leave applications are heard and determined in an oral hearing after the parties submit the relevant court documents for the purposes of the hearing.
 - However, in 2016, the High Court announced that in represented applications, a Panel of Justices would determine in the first place whether an oral hearing was required, and if the Panel decided that no hearing was necessary, the application would be determined on the papers and without a hearing.
 - Changes expected to reduce the time between the filing of an application and the hearing
- **Principles of justice**

- **Fairness**
 - Appeal must have real grounds for it to be granted leave to be heard in the Court of Appeal. This means that parties do not put time and money into weak appeals
 - Both parties remain entitled to present their arguments to the courts in written submissions and documents, ensuring they have an opportunity to be considered
 - The appeal will be determined on its merits by experienced judges
 - The changes are designed to allow appeals to be heard more quickly and with greater cost savings to the parties
- **Equality**
 - A reduction in delays can reduce the impact on the parties, particularly those who are significantly disadvantaged because of delays
- **Access**
 - The parties have greater access to appeal processes without concerning themselves about oral hearings in the Court of Appeal or the High Court, or about long delays before their appeal is heard. Parties may feel more inclined to appeal if they know they have good prospects and know that the appeal will be heard swiftly.

Use of case management powers

- Powers to order the parties to mediate the dispute, and the power to give directions to the parties
- Involves the transfer of some of the control and initiative of case preparation from the parties to the court
- Tribunals such as VCAT have powers of case management to ensure disputes are resolved efficiently
- Can result in a significant change of procedure rules, as well as modification of rules relating to pleadings, discovery and evidence preparation
- The courts can:
 - Order that the parties attend mediation or some other form of dispute resolution method
 - Limit the scope of discovery to ensure that it does not take too long
 - Order that no pleadings are required
 - Restrict the time for final hearings, including limiting the number of witnesses and the time to make submissions or cross-examine witnesses
- January 2017, the Supreme Court of Victoria's Commercial Court released a practice note which deals with case management
 - Emphasis on the overarching purpose to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute
- **Principles of justice**
- **Fairness**
 - Courts and tribunals can adapt processes to adapt to the needs of the parties. This can ensure that the parties are focused on resolving the issues in dispute, and the court can focus on what is required to resolve the dispute
- **Equality**
 - Courts and tribunals can ensure there is flexibility without any favour or discrimination
 - Orders or directions can apply equally to both parties

- **Access**
 - Case management enables greater access to the courts and tribunals, as there can be flexibility in formalities, in what rules the judge orders in relation to procedure, in the way that documents are filed, and the time required to undertake tasks
 - The Supreme Court’s approach to case management can also help parties access the system without being burdened by the time and costs involved in undertaking pre-trial procedures.

8.3 Accessibility Factors

Barriers to communication

- Includes anything that prevents a person from receiving and understanding information
 - Prevent a person from understanding their legal rights
 - Reduce a person’s understanding of the methods and bodies used to resolve disputes
 - Reduce a person’s understanding of the processes involved in pursuing their rights
- Most common is language based.
 - While 80% of Aboriginal and Torres Strait Islander peoples speak English at home as a first or only language, in some remote communities English is a second, third or fourth language.
- Productivity Commission Review found that Indigenous interpreter services help some Indigenous people understand civil rights and communicate what they need, though it takes a long-term commitment to ensure those services are ongoing.
- **Principles of Justice**
 - **Fairness**
 - People who are unable to communicate well in English may not understand their legal rights or the dispute resolution methods or bodies that can help them resolve a dispute. This reduces their ability to access procedures and engage in a trial or hearing, therefore reducing their ability to present their case in the best light possible
 - **Equality**
 - Struggle to tell their side of their story. Make them unequal before the law or deny them an equal opportunity to present their case
 - **Access**
 - Person with little understanding of their rights or the mechanisms used to resolve disputes may abandon their claim or defence, may not know they have a claim or defence in the first place, or may compromise or withdraw their claim or defence just because they feel uncertain about what needs to happen to pursue their case.

Services in rural and remote areas

- Find it more difficult to access legal and dispute resolution services who live in those areas compared to larger cities and towns
- Victorian Access to Justice Review Report reported on legal services in rural and regional. It stated that there were issues with access to services to Victorians living there.
- VCAT has tried to ensure to be in locations available to most Australians.
- Courts do not usually sit every day in each of those places, but rather use the '**circuit court system**', where a calendar is used to determine when the court will sit at a location.
- Ballarat, Bendigo, Geelong, Horsham, Mildura, Morwell, Sale, Shepparton, Wangaratta, Warrnambool and Woodongga all have access to courts at every level as well as VCAT
- Circuit court sittings are held across Victoria to ensure people have local access

Court	Number of Locations in Victoria
VCAT	37 (including two Melbourne venues)
Magistrates' Court	51 (including 10 metropolitan courts)
County Court	13 (including Melbourne)
Supreme Court	13 (including Melbourne)

- **Principles of Justice**
 - o **Fairness**
 - Decline or lack of legal services in some rural and remote areas of Victoria impacts on people's ability to seek legal advice and assistance, and access resources and information about their case. It can inhibit a person's ability to use legal processes to ensure they put their case forward properly
 - o **Equality**
 - Rural and remote Victorians may not be equal before the law if they have unequal access to legal service and resources, as well as unequal access to the courts and tribunals
 - o **Access**
 - An inability to access legal services, courts and tribunals can impact on the ability of a person to pursue their legal rights and seek compensation for any wrong that they have suffered

The use of representative proceedings

- Representative proceedings are proceedings commenced by a lead plaintiff on behalf of seven or more persons who have a claim arising out of the same, similar or related circumstances.
- First introduced in Australia in 1992
- Class actions increase people's access to dispute resolution
 - o A person who used to have a legitimate claim against a big business may not otherwise have the desire or ability to pursue that claim, and therefore may abandon that claim
 - o Class actions enables that person to seek recovery for loss suffered by joining with several other people who have a similar claim, even if each individual claim is small

- There is criticism
 - Unmeritorious claims (baseless claims) are more easily pursued
 - The use of a litigation funder can erode the ultimate payment that is made to legitimate claimants
 - The risk of class actions can be detrimental to companies and businesses.
- 2017, Victorian Attorney-General Martin Pakula asked the Victorian Law Reform Commission to undertake a review of the use of litigation funders in representative proceedings to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens.
- **Principles of Justice**
 - **Fairness**
 - People with claims are able to join a class and not be subjected to personally having to pay costs, or be subjected to adverse costs orders
 - The way in which class actions are conducted removes a party from court processes and having to give instructions, which can be difficult for someone without experience in legal processes
 - The fairness of the outcome depends on the settlement reached and the payment to be made by any litigation funder or legal practitioners
 - **Equality**
 - Class actions are often conducted by experienced legal practitioners and law firms who can present the case in the best light possible and as equally as the defendant's law firm
 - **Access**
 - People who cannot afford to initiate their own claim are able to access justice by joining a representative proceeding
 - However, the costs of litigation funding and legal fees can restrict the size of the final payment, which reduces the value of having access to justice through a class action

8.4 Recent Reforms

- There are number of reforms to the civil justice system that have been introduced in the last four years. Consider how these reforms are able to improve the civil justice.

Recent reforms addressing costs factors

- **Introduction of three-tier fee system in VCAT**
 - **From July 1st, 2016**, VCAT has three tiers of fees: corporate, standard and health care card holders
 - For health care card holders, fees are capped over \$150 regardless of the type of fee or the nature of the dispute
 - Fees higher for companies, government agencies and businesses with annual turnover of \$200,000 or more
- **Use of Technology Assisted Review in the Supreme Court**
 - In 2016, Supreme Court approved predictive coding or TAR to assist in the discover process
 - Technology expected to be just as accurate as a person, and will be more efficient, cost-effective and timely than a lawyer doing the same task

Recent reforms addressing time factors

- **Introduction of the Judicial Commission of Victoria**
 - In 2016, Vic Parliament passed the *Judicial Commission of Victoria Act* which establishes the JCV
 - A person can make a complain to the JCV about the conduct or capacity of a judicial officer or a member of VCAT
 - Types of complaints include, excessive delays in handing down judgements
 - It is expected that JCV will establish higher standards when it comes to matters such as time delays, and may therefore address delay issues, particularly those involving long wait times for court decisions to be handed down
- **Changes to High Court appeal processes**
 - In 2016, rather than allowing every special leave application to have an oral hearing, the High Court first determines, through a Panel of Justices, whether an oral hearing is necessary.
 - If not necessary, the application is heard on the papers. Most are now this.
 - Reduces costs and time involved in appearing before the High Court as it determines whether leave should be granted.

Recent reforms addressing accessibility factors

- **VLA online tool**
 - February 2017, Code for Australia and Victoria Legal Aid released a prototype online tool which people with legal problems
 - Can tell if people are eligible for legal aid
 - Advise people where they can go for help and which can answer simple questions for people
- **Use of technology**
 - In January 2017, Supreme Court issued a practice note titled “Technology in Civil Litigation”.
 - Purpose is to promote the use of technology in the conduct of civil litigation to reduce time and costs, as well as assist parties in accessing documents and information for the purpose of trial.
 - For example:
 - Specifies emails are preferred communication
 - Documents to be filed electronically
 - Discovery can be conducted using technology
 - Court Services Victoria in its 2015-16 Annual Report also noted the changes to submitting documents electronically in some courts and lists
- **Removal of wigs**
 - May 2016, Supreme Court announced that judges will stop wearing wigs in all civil matters.
 - Chief Justice Warren noted that wigs represented the past and di not assist in the administration of justice
 - Removal of wigs allows the courtroom to feel more accessible to modern-day Australians, who may find the formality of wigs intimidating

The ability of recent reforms to achieve the principles of justice

- What problem, difficulty or issue is it trying to overcome?
 - o Links to principles of justice
- Is it a short- or long-term solution?
- What principles of justice is the reform achieving?
- Are there any statistics, data or evidence to show that the reform has improved the civil justice system?
- What else needs to be done in addition to the reform, or is it a total solution to the problem, difficulty or issue it is trying to overcome?
- **Introduction of three-tier fee system in VCAT**
 - o Assists some people, in particular health care card holders
 - o Aims to **ensure fairness and equality** by charging larger businesses higher fees
 - o **High fees remain for many lists**, and certain fees, such as hearing fees, make VCAT unaffordable for many people
 - o Health care card holders are **still subject to an application fee**, which can be out of reach for some
- **Approval of use of TAR in the Supreme Court**
 - o Provides an **accurate** way of discovering documents
 - o Intended to be **quicker, cost-effective** and more efficient
 - o **Not all parties will have access to the technology** to help them with discovery
 - o **Costs and time** will still need to be spent on building up the technology and training the technology to identify relevant documents
- **Introduction of JCV**
 - o Allows **greater scrutiny of judicial officers** and members of VCAT
 - o May ensure **greater transparency** and focus on the time it takes for there to be an outcome
 - o The JCV will not enquire into general delay issues as those involving discovery or other pre-trial stages, therefore its ability to speed up justice is limited
- **Changes to High Court appeal processes**
 - o Allows a more **efficient and cost-effective** way of seeking leave
 - o **Avoids and stress and inconvenience of an oral hearing**, and parties can be on an equal footing without having to rely on advocacy skills
 - o Some people may believe that it is fairer to allow oral submissions to the judges
 - o This is not an entire system solution as few claims will make their way to the High Court
- **VLA online tool**
 - o Provides people with **access to information about their rights** and where to go for help
 - o Can be useful first port of call for people who are not aware of legal assistance or rights
 - o **Is currently only a prototype**, and offers assistance in a limited range of disputes
 - o Will not replace the need for legal representation
- **Use of technology**
 - o Provides greater access for people, including those in rural and remote areas or those who cannot reach the courts to file documents manually
 - o Can deal with litigation more efficiently by giving all parties and the courts access
 - o The uptake of technology is still relatively slow and improvements are still required

- **Removal of wigs**
 - Modernises the courts and makes them more accessible by avoiding formalities
 - Currently only applies to the Supreme Court and not the County Court in some matters
 - Does not address other formalities and stresses involved with the courtroom.

8.5 Recommended Reforms

- Reforms that have not been made but have been suggested by official legal bodies.
- *Learn two recommended reforms for each factor*

Recommended reforms addressing costs factors

- **Increased use of alternative dispute resolution methods**
 - *Access and equality*
 - Victorian Access to Justice Review recommended expanding and increasing the use of dispute resolution methods
 - Final report recommended that VCAT expand its Short Mediation Hearing program into regional areas
 - Improved access for those living in rural areas, however, the costs will be very high for the government, hiring facilities, mediators etc.
- **Greater legal aid funding**
 - *Access*
 - Inquiries have recommended that there be transparent and formal funding models
 - Funding to be increased
 - Funding take into account the demands of legal aid
- **Online system for the resolution of small civil claims**
 - *Access*
 - Victorian Access to Justice Review recommended that Vic Government establish a panel to oversee the introduction of an online dispute resolution system for small civil claims in Victoria
 - Victorian Government agreed with this recommendation
- **Assistance to self-represented parties**
 - *Equality, access*
 - Productivity Commission recommended all court and tribunal forms be drafted in plain language
 - Victorian Access to Justice Review Report also recommended that there be better use of support people to assist-represented litigants
 - Forms and information be reviewed to make them more accessible and that there be education and training of staff to help them to assist self-represented parties

Recommended reforms addressing time factors

- **Improvements and increase in case management**
 - Productivity Commission recommends replacing formal pleadings with less-formal alternatives, requiring strict observance of time limits, and limiting traditional discovery
 - Discovery limited to documents that are directly relevant
 - Courts need to ensure that information technology is used to manage the process more efficiently
- **Making enforcement of VCAT orders easier**
 - Victorian Access to Justice Review recommended that the enforcement of VCAT orders be made simpler
 - Recommends that monetary order of VCAT should be automatically enforceable without having to be certified
 - Non-monetary orders be enforceable without having to proceed to the Supreme Court
 - Vic Government accepts these reforms

Recommended reforms addressing accessibility factors

- **Expansion of information from VLA**
 - Victorian Access to Justice Review recommended that VLA expand its website to include a web-chat service and information in a wide range of languages and in accessible formats
 - Expand telephone line services
- **Greater coordination between legal service providers**
 - Productivity Commission in 2014 and Vic Government in 2016, have suggested that coordination should occur between legal aid bodies and other service providers such as courts and legal centres
 - Building on their existing telephone hotlines and websites, and referrals should occur where appropriate
 - Vic Government also recommended an integrated delivery model and strengthened relationships between service providers to ensure that users of the system understand the options available to them
- **Publication of plain language guides and information**
 - Productivity Commission in 2014 recommended all government agencies in Australia publish plain language guides that summarise legislation in areas of law regularly encountered
 - Vic Government also recommended that Vic courts and tribunals consider making their websites and legal information materials more accessible and ensure that information is provided in languages other than English
- **Improving access to interpreters**
 - Productivity Commission has recommended a National Indigenous Interpreter Service to ensure that there is an interpreter service across the country for Aboriginal and Torres Strait Islander peoples.
 - Vic Access to Justice Review also recommended adequate availability of interpreters in all courts and VCAT