6.1: INTRODUCTION TO THE CIVIL JUSTICE SYSTEM

0. Definitions

1. A Civil Justice System

Definition of a civil justice system

- The civil justice system is a set of methods, processes and institutions used to resolve civil disputes.

Definition of a civil dispute

- A disagreement between two or more individuals or groups of individuals in which one party makes a legal claim against the other.

Purposes of a civil justice system

- Enables a person to enforce their legal rights or take action over legal wrongs.
- Determines whether the defendant is liable to that person.
- Award a remedy where the defendant has been found liable.

'Timeline' of the key stages of a civil trial

Victoria's civil justice system

- The law-making power in civil law is generally held by the six states and two territories of the Commonwealth of Australia — managing courts and dispute resolution bodies and having its own civil laws.

- The Commonwealth does have law-making powers in some areas of civil law, and there are some Commonwealth laws that can give rise to civil disputes.

    - The Commonwealth Parliament also has some law-making powers in relation to industrial disputes (employee disputes) that are beyond the limits of any state.

2. Parties to a Civil Dispute

The parties

- Plaintiff and defendant.
- Parties to a civil dispute can be:
    - An individual suing or being sued in their own name, or a group of individuals suing or being sued together
    - A corporation, otherwise known as a company – a separate legal entity from the individuals who run the company, which can sue and be sued
    - A government body, such as the state of Victoria, or a statutory body such as Victoria Police

The plaintiff

- The party who commences a civil action, also known as the aggrieved party.
- Sometimes there can be multiple plaintiffs, and multiple defendants, in a civil action.
    - For example, if two people both own a property that has been damaged, they both may be plaintiffs. Similarly, if two people have damaged another person's property, they both may be defendants.

The defendant

- The party who is alleged to have infringed the rights or caused wrongdoing.

The act of suing

- Suing or litigating means to take civil action against another person, claiming that they infringed some legal right of the plaintiff, or did some legal wrong that negatively affected the plaintiff.
- The aim of a civil action (suing) is to obtain a remedy that will compensate the plaintiff they are successful, by restoring them to the position they were in before the breach occurred, to the furthest extent possible.

Children as parties in a civil case

- A child under the age of 18 can sue another person or group through a litigation guardian, often known as a 'next friend', who is usually a parent or guardian.
- Children can also be sued — but the extent of their legal liability depends on the child's level of maturity and the behaviour expected of a child of that age.

The principle of vicarious liability

- Vicarious liability is the legal responsibility of a third party for the wrongful acts of another, which may include an employer's liability for what their employees do.
- Therefore, if an employee infringes a person's rights while acting in the course of his or her employment, the injured person may be able to sue the employer.
    - The reason for making the employer liable is that employers have a right, ability and duty to control the activities of their employees.

3. Types of Civil Disputes

Examples of types of civil disputes

- Family law, breach of contract, defamation, nuisance, trespass, negligence

Defamation

- Defamation relates to saying or publishing material which causes damage to another person's reputation.
    - For example, a newspaper article might falsely report that a business owner has committed fraud, which drives customers away.

6.2: THE PRINCIPLES OF JUSTICE

1. Fairness

Definition

- Fairness requires requires a level of impartiality and a lack of bias in legal processes, systems and institutions.
- It also requires that all parties to a case receive an unbiased hearing, meaning that the person exercising administrative power, such as the judge, is objective and impartial.

Factors that can affect the upholding of fairness

- The time it takes for a civil dispute to be resolved, and whether any delays have occurred
- The availability of legal representation for the parties
- Whether procedures are in place to ensure the parties have the opportunity to be fully informed of the case put against them, and have the opportunity to present their case

Examples of how fairness is upheld in the civil justice system

2. Equality

Definition

- Equality requires that the legal system should strive to achieve non-discriminatory outcomes, including equal protection for all who come before it.
- However, the system acknowledges, that, invariably, there are differences, and so there should be resources that exist to provide balance.
- This seeks equal rights and responsibilities, and ensuring that no individual is disadvantaged.

Factors that can affect the upholding of equality

- The impartiality of a judge and jury when resolving civil disputes
- The disadvantage that particular groups in society may suffer because of features of the civil justice system, such as Aboriginal and Torres Strait Islander peoples or people with disabilities
    - The extent to which the availability and skill of legal representation impacts on people being treated equally before the law

Examples of how equality is upheld in the civil justice system

3. Access

Definition

- Access (to the legal system) requires that all people should be able to understand their legal rights and pursue their cases.
- This is more than just being able to access the institutions that hear civil cases, but also for people to be able to approach bodies that provide legal advice, education, information and assistance about the various proceedings that occur.

Factors that can affect the upholding of access

- The availability of a range of methods and bodies that can be used to resolve civil disputes, such as complaints bodies, tribunals and courts
- The costs and delays associated with having a dispute resolved
- The complex nature of procedures involved in having a dispute resolved

Examples of how access is upheld in the civil justice system

6.3: KEY CONCEPTS IN THE VICTORIAN CIVIL JUSTICE SYSTEM

1. Burden of Proof

The burden

- The burden of proof refers to the onus or responsibility that one party has to prove the facts of the case.
- Since the burden of proof lies with the person or party who is bringing the case, in a civil dispute, the burden of proof is on the plaintiff.
    - When a plaintiff sues a defendant, it is the plaintiff who has to show that the defendant was in the wrong.
    - This follows the principle that the party who brings the case has to satisfy the court, or tribunal, that their claim is supported by the facts they can prove.

Reversal of the burden

- If a defendant makes a counterclaim against the plaintiff, then the burden of proof is on the defendant, because they are the ones make a direct claim against the plaintiff.
- Further, if a defendant raises a particular defense, such as the defense of contributory negligence in a negligence claim, then the defendant will also be responsible for proving that defense.

2. Standard of Proof

The standard

- The standard of proof refers to the strength of evidence needed to prove the case.
- In a civil dispute, the plaintiff must prove the case, or the defendant must prove the counterclaim or a certain defense, on the balance of probabilities.
- This means that the party must prove that they are most probably or most likely in the right, and the other party is most probably in the wrong.
    - This is a less strict standard of proof than 'beyond reasonable doubt' in criminal cases.

3. Representative Proceedings

Definition of a representative proceeding

- Legal proceedings in which a group of people who have a civil claim based on similar or related facts bring that claim to court in the name of one person. They are also known as class actions.

Conditions for the commencement of a class action

- Class actions can be commenced if:
    - Seven or more people have claims against the same person
    - Those claims relate to the same, or similar or related circumstances
    - The same issues need to be decided, such as whether the defendant owed a duty of care to those plaintiffs. the same claim???

The commencement of a class action

- If the three conditions of a class action are met, a representative proceeding may be commenced by a person who is part of the group.
    - They will 'represent' the group in the proceeding — and will be known as the lead plaintiff.
    - Other people who are part of the group are known as group members.

Group members of a class action

- One person in a group is named as the plaintiff on behalf of the group, the lead plaintiff does not need the consent of the group members and does not even need to know who they are.
- Once the group is described, every person in that group is assumed to be part of the representative proceeding unless they decide to 'opt out' of it by filing a notice with the court in a specified form.
    - If a person 'opts out', then they will not be bound by the decision or settlement, and they may be able to pursue the defendants in separate legal proceedings.

Example of a class action lawsuit

- An example of a representative proceeding is the 'Bonsoy class action', Downie vs. Spiral Foods Pty Ltd (2015).
- The lead plaintiff Erin Downie, sued the manufacturer of Bonsoy soy milk, on behalf of all people around Australia who have suffered an injury from consuming Bonsoy soy milk.
    - The manufacturer, exporter and distributor of Bonsoy soy milk agreed to compensate victims with $25 million, which is the highest settlement of a food safety class action in Australia.

4. Types of Representative Proceedings

Shareholder class actions

- Shareholders of a company may make a claim about being misrepresented about the state of the company's affairs.

Product liability class actions

- Consumers who have purchased a good or service have all suffered the same loss or damage.

Natural disaster class actions

- The group members have suffered loss or damage as a result of a natural disaster. then who would they sue

5. Benefits of Representative Proceedings

Benefits of representative proceedings

- More efficient, and saves the resources of the court
- In certain circumstances, a litigation funder, which is a third party that agrees to pay the legal costs associated with the action, 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.
- People can pursue civil actions that they might not be able to afford in an individual case, and this gives them access to the courts to resolve their disputes

6.4: NEGOTIATION AND COSTS OF A CIVIL CLAIM

1. Reasons for the Limitation of a Civil Claim

Reasons

- The main reason is that the party wishes to be compensated for the wrong they have suffered.
- Another reason is for one's desire to stop the defendant from engaging in certain conduct.
    - e.g. a person wishes to stop another person from trespassing on his or her land
- Another reason is if the plaintiff wants to force another party to act in a certain way
    - e.g. perform their obligations under a contract

Relevant factors when initiating a civil claim

- Someone deciding whether to initiate a civil claim may consider the following five factors before doing so:
    - negotiation options
    - costs
    - limitation of actions
    - the scope of liability
    - enforcement issues

2. Negotiation

Negotiation

- One of the considerations for a plaintiff is whether the dispute can be resolved out of court or tribunal.
- In some circumstances, it may be available to the plaintiff to try and negotiate a resolution of the dispute directly with the defendant without initiating a claim, or the parties may be able to agree on what the issues are during negotiation.

Negotiation options for dispute resolution

- Direct negotiation
    - Negotiation normally involves the parties interacting directly with each other to try and resolve the dispute.
    - This may be with or without legal representation, and normally involves informal discussions between themselves about the issues in dispute.
- Mediation or conciliation, known as facilitated negotiation
    - Negotiation may involve parties arranging between themselves, with or without legal representation, an independent third party, such as a mediator, to help resolve the dispute.
- Dispute resolution bodies
    - Parties can arrange a negotiation or other dispute resolution service through a body such as the Dispute Settlement Centre of Victoria (general disputes), or FMC Mediation and Counselling Victoria (family disputes).

When negotiation may not be an option

- There have already been attempts to negotiate, but these attempts have not been fruitful
- It is unlikely that the negotiation will yield any outcome, such as if the plaintiff's claim is too unreasonable

- If there is a significant power imbalance between the parties, and so the parties are not on an equal footing to be able to negotiate
    - e.g. if a young employee sues his or her employer who has significant legal representation

Benefits of negotiation

- The costs, time and the stress involved in commencing a formal civil action may be avoided
- The parties have control over the outcome, as opposed to it being decided for them by a third party.
    - For example, parties can choose how to negotiate, in what setting, and what they are prepared to accept as an outcome
    - In this sense, they also have certainty of outcome
- 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

3. Costs

Costs

- A party involved in a civil dispute may incur costs in resolving a civil dispute. The costs include fees for:
    - legal representation
    - court costs
    - other disbursements (such as fees paid to expert witnesses), and possible costs to be paid to the other party if he or she is not successful

Fees for legal representation

- Engaging a solicitor and a barrister is costly, and often in court cases, a party will engage both. The client is paying for a high level of experience and training. The cost of legal representation may depend on:
    - the complexity of the case
    - the length of legal proceedings
    - the expertise of the lawyers — lawyers with greater seniority or expertise usually charge higher fees
- The high cost of legal representation is a factor to be taken into account before initiating a civil claim — the plaintiff must consider if the costs be more than the amount they are seeking.

Disbursements

- Disbursements are out of pocket expenses or fees, other than legal fees, incurred as part of a legal case. Issuing a claim in a court or tribunal will incur a number of disbursements
    - e.g. fees paid to expert witnesses, court fees, and other third party costs such as photocopying costs
- Court fees
    - If a plaintiff issues a claim in court, the court will charge certain fees, such as filing fees, hearing fees or jury costs.
    - The filing fee is from $1000 to more than $4000 in the Supreme Court, depending on the nature of the claim.
- Mediation fees
    - If the court orders the parties to attend mediation to try and resolve the case before trial. They are likely to share the costs of the mediator, which can be between $500-$1000 per day.
- Expert witness fees
    - The plaintiff's claim may require an expert to give an opinion, depending on the nature of the claim.
    - For example, if the plaintiff claims that she has suffered a severe spinal injury, she may need to engage a medical expert to prove this injury.

Adverse costs orders

- An adverse costs order is a court order, which is legally binding, that a party pay the other party's costs.
    - Often the fear of having an adverse costs order made against them will deter a plaintiff from initiating a civil claim, because 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 costs.
- The general rule in civil disputes is that a successful party should receive an order from the court that his or her costs are paid by the losing party.

The availability of legal aid

- Victoria Legal Aid (VLA) provides some assistance to people seeking legal advice and representation for some civil disputes.
    - It does, however, focus on people who need it most, and it has limits on the amount of legal aid that can be provided to particular cases. For example, legal aid is not available for business and commercial disputes and employment disputes.
    - In addition, legal aid provided by VLA largely goes to criminal and family matters, with very little left for those who are defending a civil claim, or want to initiate a civil claim.
    - Further, the strict tests applied by VLA means that many 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.

Factors to consider when initiating a civil claim, relating to cost

- How much it will cost to have the dispute resolved, and whether the plaintiff will have the money to pay
- Whether they are eligible for legal aid or free legal assistance through some means
- What the risks are if they are ordered to pay the other side's costs and cannot afford to do so — such as having to sell their assets

6.5: LIMITATIONS, LIABILITY AND ENFORCEMENT

1. Limitation of Actions

Definition of limitation of actions

- Limitation of actions are the restriction on bringing a civil claim after the allowed time.
- That is to say, that once a period of a certain number of months or years has passed, if a plaintiff commences the proceeding the defendant may be able to raise a defence that the plaintiff is out of time and can no longer bring the claim.

Rationale/purpose of the limitation of actions

- The defendant does not have to face an action after a significant amount of time
- So that evidence is not lost and people can still remember what happened
- disputes can be resolved as quickly as possible, so as to promote social cohesion
    - Social cohesion: willingness of members of a society to cooperate with each other in order to survive and prosper

Examples of limitation of actions

- For example, the limitation of actions for defamation is 1 year, and an action to recover land is 15 years.

Extension of limitation of actions

- In some situations, the limitation period can be extended.
- For example, in 2015, Victoria became the first state to remove limitation periods for persons who suffered physical or sexual abuse as a minor, or psychological abuse that arose out of that abuse.

2. Scope of Liability

The scope of liability

- Liability means legal responsibility for one's acts or omissions.
- To determine the scope of liability, the plaintiff must ascertain:
    - who the possible defendants are
    - to what extent they may be liable

2.1 Possible Defendants

Possible defendants

- Normally, the defendant is the person who is alleged to have infringed the plaintiff's rights or who has directly caused harm to the plaintiff.
    - For example, in a negligence claim, the defendant will be the person who breached his or her duty of care to the plaintiff.
- However, there may be a party other than the person who directly infringed the plaintiff's rights who the plaintiff may sue, and may be liable to compensate the plaintiff. Those parties may include:
    - An employer, which is upheld by the principle of vicarious liability
    - An insurer
    - A person who was involved, but did not partake in the wrongdoing, under the principle of accessorial liability

Employers (possible defendants)

- The principle of vicarious liability means that an employer may become liable for the actions of its employee.

- For an employer to be liable, the plaintiff needs to establish that:

    - the employee was in fact an employee

    - that they were acting in the course of employment when the events leading to the claim occurred — a connection between the act and employment must be present

Insurers (possible defendants)

- 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.

    - Types of insurance may include public liability insurance, which provides insurance for injury to a third party or their property

- When a plaintiff sues a defendant, that defendant is often insured — while the plaintiff can't make a direct claim against the defendant's insurer, if the plaintiff is successful, the defendant will then claim on the insurer for the loss.

    - Insurers therefore often run cases in the name of the defendant because they will be making the payment in the end.

Accessorial liability

- Accessorial liability is a way in which a person can be found to be responsible or liable for the loss or harm suffered to another because they were directly or indirectly involved in causing the loss or harm

- A person may be involved in wrongdoing if they:

    - 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

2.2 Extent of Liability

Extent of liability

- One of the other issues that may arise for a plaintiff is the extent to which the defendant is liable.

- That is, the defendant may argue that if they are found liable, then they are only liable for a part or a portion of the plaintiff's loss or damage.

Extent of liability with contributory negligence

- The extent of the defendant's liability is often considered in negligence claims, when the defendant may claim contributory negligence.

- This is when the defendant may try to prove that the plaintiff is in part to blame for the harm done. If the defendant is successful, then the defendant's liability for the loss or damage is likely to be reduced, often significantly.

Other defenses using extent of liability

- The defendant may also argue that someone other than the plaintiff was liable, and therefore try to reduce his or her liability.

- For example, the defendant may argue that somebody else caused the loss suffered by the plaintiff. what's the difference between this and accessorial liability

3. Enforcement Issues

Ways to obtain settlement or a 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

Enforcement issues

- If a court orders an amount of money to be paid to a plaintiff, or the defendant agrees to pay a sum of money, there is a chance that the defendant will not be able to pay, or even if they are able, will not pay anyway regardless.

- Some of the issues that the plaintiff will need to consider are:

    - If the defendant may be bankrupt, which means that he or she will not have any assets or money to pay anything to the plaintiff

    - Even if the defendant is not bankrupt, he or she may still be unable to pay

    - The defendant may be in jail, particularly if the civil dispute arose out of a criminal action, and the defendant has been found guilty and imprisoned. It will therefore be more difficult to enforce the remedy

Enforcement proceedings

- Even if the defendant is able to pay, the plaintiff may have to issue enforcement proceedings to force a defendant to comply with a remedy.
    - An example of an enforcement mechanism is obtaining from the court a warrant to direct the court sheriff to seize the defendant's goods and sell them.

Summary of factors to consider when initiating a civil claim

- Negotiation options
    - What are the options to negotiate a resolution to the dispute?
- Costs
    - What are the costs involved?
- Limitation of actions
    - Do the restrictions prevent a claim from being issued?
- Scope of liability
    - Who are the possible defendants, and to what extent are they liable?
- Enforcement issues
    - Are there any issues with enforcing the remedy?

7.1: CONSUMER AFFAIRS VICTORIA

1. Introduction to CAV

Complaints bodies

- Complaints bodes are organisations established by parliament to resolve formal grievances made by an individual about the conduct of another party.

Consumer Affairs Victoria

- Consumer Affairs Victoria (CAV) is a complaint body, and a business unit of the Victorian Government's Department of Justice and Regulation.
    - It is Victoria's consumer affairs regulator.
- CAV primarily offers dispute resolution services over the phone to try and resolve the dispute.
    - In some cases, more tailored services can be provided such as an in-person conciliation.

Purposes of CAV

- Provides information and guidance to educate people about consumer laws, and enforces compliance with consumer laws.

- It provides consumers and traders, and landlords and tenants, with a dispute resolution process — people can use CAV to exercise their consumer rights when they may have been infringed.

- CAV will help people settle their disputes efficiently and constructively, without any cost.

    - This ensures that any inappropriate conduct is stopped, and to help any party that has been wronged seek compensation for any loss they have suffered.

Dispute resolution methods used by CAV

- The main method used by CAV to help parties resolve disputes is conciliation.

    - Conciliation involves the assistance of an independent or neutral third party who helps the parties reach a mutually acceptable decision between them.

- The conciliator is usually someone with specialist knowledge of the nature of the dispute.

    - This is why CAV has teams devoted to the particular types of disputes they can help with.

Terms of settlement via conciliation

- A terms of settlement is a document that sets out the terms on which the parties agree to resolve their dispute.

- If the parties come to a decision, they may sign terms (also known as deeds …) of settlement, which reflects their agreement about the way they will resolve their dispute.

- The terms of settlement may then be enforceable through a court if one of the parties does not follow through with the promises they made.

2. Appropriateness of CAV

Appropriateness

- CAV uses certain criteria to determine whether it is an appropriate dispute resolution body for a particular dispute. Three of those criteria are as follows:

    - Whether the dispute is within CAV's jurisdiction
    - Whether the dispute is likely to settle
    - Whether there are better alternatives to resolve the dispute

Other factors that affect the appropriateness of CAV

- CAV will not conciliate disputes that the courts or the VCAT have already made a decision on, or disputes where there is a case pending in the courts or VCAT.

- It will only accept complaints if the person complaining has first tried to resolve the dispute themselves.

- The complaint should warrant CAV's involvement — i.e. should not be a trivial complaint.

Point 1: Jurisdiction of CAV

- CAV is limited to assisting in the settlement of disputes that are within its jurisdiction. It obtains its power through Victorian statutes, and it can assist with disputes about:

    - The supply of goods and services

        - This includes disputes between purchasers/consumers and suppliers, or consumers and suppliers, where the amount paid for the goods or services is $40 000 or less.

    - Residential tenancies
    - Retirement villages
    - Owners' corporations

Point 2: Whether a dispute is likely to settle

- CAV will help resolve a dispute if there is a reasonable likelihood that the dispute will settle. The following factors may indicate that the parties are likely to settle:

    - There has been no delay in the person complaining to CAV, after the action has occurred look at the textbook

    - 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

Point 3: Other or better ways (alternatives) to solve the dispute

- The parties will need to consider whether there are other or better ways to resolve the dispute. They will need to consider:

    - Whether they will be able to, or have tried to, resolve the dispute themselves, such as through a negotiation process

    - Whether the matter is too big or complex to be appropriate for CAV

    - Whether the dispute is best resolved by a court or tribunal making a binding order on the parties, rather than reaching a resolution themselves

3. Evaluation of CAV

Strengths of CAV

- Its conciliation service is free, meaning that it remains accessible to all Victorians, regardless of their ability to pay

- The conciliation process is informal, and can be conducted over the telephone, which removes many anxieties people have with the formalities of a courtroom

- CAV aims to conciliate disputes in a timely manner, so parties do not have to wait months or years for resolution through a more formal body such as a court

Weaknesses of CAV

- CAV's role is limited mainly to consumer and landlord disputes — it has essentially no power to assist with the many other types of civil disputes.
    - Therefore its jurisdiction and ability to deal with a wide range of cases is severely restricted.

- CAV has no power to compel parties to undergo conciliation.
    - A willing party to a dispute may not be able to use CAV's dispute resolution services if the other party is not also willing.
    - Further, a party who is not taking the dispute seriously may not even show up, which wastes the time and resources the parties and the complaint body.

- CAV also has no powers to enforce any decisions reached by the parties in conciliation, since they are non-binding.
    - Unless the parties have entered into a binding agreement at conciliation, then one of the parties may just ignore the outcome — which leaves them no better off than they were before the conciliation, and wastes a lot of time.

7.2: THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT)

1. Introduction and Structure of VCAT

The Victorian Civil and Administrative Tribunal (VCAT)

- The Victorian Civil and Administrative Tribunal is a tribunal, as opposed to a court, that hears and determines civil and administrative legal cases in Victoria. Established in 1998, VCAT is the busiest tribunal in Australia — finalising more than 85,000 cases a year – mostly disputes – at over 46 venues across Victoria.
    - Tribunals are are dispute resolution bodies which deal with a limited area of law, and build up expertise in that area.
- The process of dispute resolution is less formal than the courts, and is intended to be a cheaper and more efficient way of resolving disputes.

Ombudsman

- An officeholder with power to investigate and report on complaints relating to administrative action taken by government departments and other authorities.

Structure of the governing body

- The governing body of VCAT consists of:
    - the President
    - a number of vice-presidents
    - deputy presidents
    - senior members
    - ordinary members
        - A VCAT member is the person who presides over final hearings and compulsory conferences at VCAT. All the above are members.
- The President is a judge of the Supreme Court, and vice presidents are judges of the County Court. They are responsible for the management and administration of VCAT.

Divisions of VCAT

- VCAT is divided into four divisions. Each contains one or more lists, which hears certain types of disputes.
- The four divisions are: administrative, civil, human rights and residential tenancies.
- For example, the residential tenancies division only has one list (residential tenancies itself).
    - This division deals with tenancy disputes, such as disputes between residential tenants and landlords and rooming house owners and residents.
    - Residential tenancies disputes made up more than 65 per cent of claims filed with VCAT in 2015-16.

2. Purposes of the VCAT

Purposes

- VCAT's purpose is to provide Victorians with a:
    - low-cost
    - accessible
    - efficient
    - independent tribunal delivering high-quality dispute resolution processes.

Low cost methods of resolving disputes through VCAT

- Generally, the parties need only pay a small amount for filing their claim — until 1 July 2018, the standard fee was $62.70 for smaller claims which are under $15,000, in lists such as residential tenancies.
    - The filing fee is also waived for those with a pension or health care card.
    - The filing fee for the same claim in the Magistrates' Court can be up to $460.
- Additionally, there are no hearing fees for some smaller claims, under $15,000 — the Magistrates' Court, by comparison, charges a $593 hearing fee for the same claim.
- Costs are further reduced because the parties can represent themselves, rather than paying lawyers. More than 80 per cent of people represent themselves at VCAT.

Accessibility of the VCAT

- VCAT conducts hearings in various locations in Victoria — its main centre is in Melbourne, but it has a number of venues across the state, with over 46 venues across Australia.
    - It is actively aiming to improve its accessibility, using processes such as telephone and video conferences in place of attending the tribunal, and allowing people to lodge certain documents online.
    - To encourage Koori participation at VCAT, from 2017 there is now a Koori Engagement Project Officer who raises awareness about VCAT among Victoria's Koori community.

Efficiency (timeliness) of the VCAT

- VCAT constantly aims to reduce waiting times — reducing the waiting time for parties to have their disputes resolved makes the process more efficient.
    - In 2015–16, the Civil Claims List had a median wait time of 10 weeks, while the Residential Tenancies List had a median wait time of 2 weeks.

Independence of the VCAT

- VCAT's members are independent, and will act as unbiased decision makers.
- VCAT is also supported by Court Services Victoria (CSV), established in 2014. CSV is independent of parliament and government.

3. Dispute Resolution Methods used in the VCAT

Mediation

- Most disputes at VCAT will go to mediation before a final hearing. If the matter settles at mediation, then there is no need for a hearing.
- Mediation is a cooperative method of resolving disputes.
- The parties attempt to reach an agreement with the help of a mediator.
    - A mediator does not interfere, but allows the parties to have control of their dispute, explore the options and attempt to reach an agreement that satisfies the needs of both parties.

Short mediation and hearing (SMAH)

- Disputes about goods and services in the Civil Claims List valued at less than $3000 may be listed for a short mediation and hearing.
- Parties attend a brief mediation conducted by a qualified VCAT staff mediator. If the matter does not settle, the final hearing is scheduled for the same day.
    - In the financial year 2015–16, about half of the cases that went to mediation as part of the SMAH process settled.

Compulsory conferences

- Compulsory conferences are confidential meetings during which the parties discuss ways to resolve their dispute in the presence of a VCAT member.
- Compulsory conferences use a conciliation process — the VCAT member who assists in the process may suggest forms of settlement, and may explore the possible and likely outcomes that may be reached at hearing.
    - The VCAT member who assists in the compulsory conference generally will not hear the case at the final hearing, and will not tell the member presiding over the hearing what happened at the compulsory conference.

Final hearing

- If the matter has not settled at mediation, compulsory conference or in any other way, then it will be listed for a final hearing before a VCAT member.
- At the hearing, the parties will be given an opportunity to present their case, which will include giving and hearing evidence, asking questions of witnesses and providing documents which support their case.
    - A VCAT member will oversee the hearing and make a binding decision on the parties.
- Hearings are intended to be less formal than court hearings or trials.
    - In fact, VCAT has an obligation to conduct each proceeding with as little formality and technicality as possible, though it can adopt rules of evidence or procedures if necessary.

Orders made by VCAT

- The types of orders that VCAT can make in a hearing vary from list to list, as appropriate.
- Decisions of VCAT are binding on the parties, and can be enforced if a party does not comply with the decision.
- Examples include:
    - requiring a party to pay a sum of money
    - require a party to do something, such as carry out repairs or vacate premises
    - require a party to refrain from doing something

Appeals from a VCAT case

- Appeals from a decision made by VCAT may only be made on a question/point of law.
- For example, a party may argue that the law has not been properly interpreted in the case. Leave is required to appeal a VCAT decision.
- If the tribunal was presided over by the President or a vice-president, the appeal will be heard in the Court of Appeal. All other appeals will be heard in the Trial Division of the Supreme Court.

7.3: EVALUATION OF VCAT

1. Appropriateness of VCAT

Appropriateness

- Two factors should be considered in determining whether VCAT is the most appropriate body to resolve a civil dispute:
    - whether the dispute is within VCAT's jurisdiction
    - whether there are other or better ways to resolve the dispute

VCAT's jurisdiction

- Often the parties will have no choice but to bring their disputes to VCAT, because it has exclusive jurisdiction to hear certain types of claims.
    - Exclusive jurisdiction means that only VCAT has the power to hear and determine that type of dispute, and not a court.
- The types of claims that can be heard by VCAT include claims about:
    - purchases or sales of goods and services
        - this is unlike CAV — VCAT accepts claims made by sellers and businesses as well as purchasers
    - discrimination and sexual harassment
    - disputes between tenants and landlords relating to renting a house
- VCAT also has a review jurisdiction to revisit decisions made by certain authorities. This means it can affirm, vary or set aside the decision made.

Specific cases excluded from VCAT's jurisdiction

- Representative proceedings
- Disputes between employers and employees
- Disputes between neighbours

Exclusive and review jurisdiction

- Exclusion jurisdiction is the lawful authority or power of a court, tribunal or other dispute resolution body to decide legal cases to the exclusion of all others — that is, that no other body can hear those cases.
- Review jurisdiction, on the other hand, is the power of a body to consider a decision made by an agency or authority in order to either confirm, change or overturn that decision.

Other or better ways to resolve disputes

- The parties will need to consider whether there are other or better ways to resolve the dispute, and consider:
    - Whether the parties are able to resolve the dispute themselves through negotiation or mediation
    - The nature of the fees — for most lists, the fees are much more cost-efficient than court fees
    - Whether the parties wish to have greater avenues of appeal — appeals from VCAT decisions are limited to appeals on a question of law, and this may be a deterring factor if the claim is significant since there is no appeal on damages

2. Evaluation of VCAT

Strengths of VCAT

- VCAT is normally cheaper
- Generally offers speedy resolution of disputes
- There is a more informal atmosphere than the courts
- Each list operates in its own specialised jurisdiction

Strength 1: Cost

- (*copied from purposes)* Generally, the parties need only pay a small amount for filing their claim — until 1 July 2018, the standard fee was $62.70 for smaller claims which are under $15,000, in lists such as residential tenancies.
    - The filing fee is also waived for those with a pension or health care card.
    - The filing fee for the same claim in the Magistrates' Court can be up to $460.
- Additionally, there are no hearing fees for some smaller claims, under $15,000 — the Magistrates' Court, by comparison, charges a $593 hearing fee for the same claim.
- Costs are further reduced because the parties can represent themselves, rather than paying lawyers. More than 80 per cent of people represent themselves at VCAT.

Strength 2: Timeliness

- VCAT constantly aims to reduce waiting times — reducing the waiting time for parties to have their disputes resolved makes the process more efficient.
    - In 2015–16, the Civil Claims List had a median wait time of 10 weeks, while the Residential Tenancies List had a median wait time of 2 weeks.

Strength 3: Informality

- An informal atmosphere ensures that parties can put their case forward in their own way, which can make people feel more comfortable with the process.
    - Hearings are intended to be less formal than court hearings or trials. In fact, VCAT has an obligation to conduct each proceeding with as little formality and technicality as possible, though it can adopt rules of evidence or procedures if necessary.

Strength 4: Specialisation via lists

- Each list operates in its own specialised jurisdiction, resulting in tribunal personnel developing expertise in resolving disputes in that area of law.

Weaknesses of VCAT

- VCAT's jurisdiction is quite limited
- Limited right to appeal
- Cases heard by non-judicial officers
- Not bound by precedent

Weakness 1: Limited jurisdiction

- For large and complex civil claims, including class actions, VCAT is not an appropriate forum to resolve the dispute.
    - For example, VCAT cannot hear representative proceedings.
- VCAT's jurisdiction is also limited in the sense that it cannot hear certain cases.
    - e.g. disputes between employers and employees, or disputes between neighbours.

Weakness 2: Limited right to appeal

- There is a limited right to appeal VCAT decisions. Decisions can only be appealed on a point of law, and to the Supreme Court, making it complex and expensive to appeal a case.
    - This also is a considerable deterrent for large claims to be pursued in the VCAT, because a party runs the risk of not being able to appeal on damages if the resulting amount is too low.
    - Not being able to appeal on question of fact also derogates fairness.

Weakness 3: Non-judicial officers

- VCAT members are normally not judicial officers, meaning they may be casual, sessional members without as much experience in hearing matters as judges.
- While they may be trained in analysing the law of one legislation, they are not experienced in applying the letter of the law, and therefore are not completely appropriate to construct legally binding decisions, as they are not trained to do so.

Weakness 4: Lack of precedent

- Because VCAT is not part of the court hierarchy, it is not bound by precedent, and its members are not bound by previous VCAT decisions.

- Over time, inconsistency may develop in the decisions made in similar cases.

7.4: PURPOSES OF CIVIL PRE-TRIAL PROCEDURES

1. Pleadings

Mandatory and non-mandatory pre-trial procedures

- If a plaintiff decides to issue a proceeding in the County Court or the Supreme Court, the parties must complete various pre-trial procedures before the proceeding is ready for trial.
    - Many of the pre-trial procedures are mandatory, and must be undertaken before the dispute is ready for trial.
    - In other instances, the judge may order that one or both parties undertake a certain pre-trial step.

Pleadings

- Pleadings are a series of documents filed and exchanged between the parties to a court proceeding.
- They set out and clarify the claims and the defenses of the parties and help to define the issues that are in dispute.
- The two main documents exchanged during the pleadings stage are:
    - A statement of claim: a document filed with the court by the plaintiff, served to the defendant to notify them of:
        - the nature of the claim
        - the cause of the claim
        - the remedy sought
    - A defense: a document filed by the defendant which sets out a response to each of the claims contained in the plaintiff's statement of claim

Purposes of pleadings

- Pleadings require the parties to state the main claims and defenses of their case.
    - This aims to achieve procedural fairness and equality by ensuring each side knows what the opposing side's defense or claim is about

- Pleadings compel each party to state the material facts and particulars they are relying on to prove their claims and defenses.
    - This avoids taking the opposing side by surprise with facts that a party is relying on to support their claim or defense, as they do not have sufficient time to prepare for an appropriate response.
- Pleadings assist in reaching an out-of-court settlement where appropriate.
    - This may be the case when a claim or defense is so compelling that it might convince the other party to pursue a strategy to settle the claim before trial.

2. Discovery (of Documents)

Discovery

- The discovery stage refers to parties to receiving copies of documents that are relevant to the issues in dispute. Documents which are relevant to the claims and defenses are listed in a formal document and the other side is entitled to inspect those documents.
    - For example, if the plaintiff claims that there has been a breach of a written contract, the plaintiff would be expected to have a copy of that contract
- Because of this procedure, there is an obligation on the parties to disclose the existence of critical documents at the earliest reasonable time.

Purposes of discovery

- Discovery requires the parties to disclose or reveal all relevant documents to the other side so that all parties have access to the documents, ensuring procedural fairness
- Discovery reduces the element of surprise at trial and avoid a 'trial by ambush'.
    - Since the parties have seen the relevant documents well in advance at trial and have had time to prepare their arguments, which results in fairness.
- Discovery assists in reaching an out-of-court settlement where appropriate.
    - This may be the case when particular documents are so compelling that they might force one party to reconsider their claim or defense, and offer a settlement without going to trial.

3. Exchange of Evidence

Lay evidence

- Lay evidence is evidence given by a layperson — an ordinary person, about the facts in dispute
- They do not give evidence about their opinion or expertise about a matter, but rather about what they know about the factual circumstances.
- Depending on what the court has ordered, laypersons might give evidence as follows:
    - As a brief outline: An outline is a brief description of the topics the witness will give evidence on when they attend trial.
    - Filing a witness statement: A witness statement is the written form of evidence that the witness would have given orally. They may have 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.

Ways to examine witnesses

- The three types of examination of witnesses are:
    - Examination in chief: A series of questions put to the witness by the party that has called the witness
    - Cross-examination: The other party questions the witness, and points out flaws in evidence
    - Re-examination: The party that called the witness will clarify anything raised in cross-examination

Expert evidence

- Experts are often called by parties in a civil claim to give an opinion about an issue in the case.
- Expert evidence is often submitted through a written report by an independent expert.
    - Experts must only give an opinion within their area of expertise.
        - Depending on the nature of the case, the person may have expertise in a particular field such as medicine, finance or law.
- Even though experts are engaged by a party, they are independent and have a primary duty of the court — they cannot argue the case for one party, even if the evidence they give is harmful to that party's case.
- Expert evidence is often given in cases involving:
    - personal or mental harm (the witness would assess extent of injury suffered)
    - loss or damage (the witness would assess extent of damage suffered)

7.5: THE REASONS FOR A VICTORIAN COURT HIERARCHY

1. Victorian Hierarchy of Courts

Court hierarchy

- Victorian courts are arranged in a court hierarchy. This means they are graded or ranked in order of the complexity and severity of cases that they hear.
- The High Court is the highest court with state jurisdiction, but is not a state court — it is a federal court.
- The four main reasons for a civil court hierarchy are:
    - administrative convenience
    - appeals
    - specialisation
    - doctrine of precedent

2. Reasons for a Court Hierarchy

Reason 1: Administrative convenience

- Using a hierarchy for courts means that cases can be distributed according to their seriousness and complexity, in order to better allocate their resources and achieve efficient resolution.
- Each court only needs the paperwork and physical facilities that suit its types of disputes — this means that parties do not have to pay fees or participate in procedures that are not appropriate to them and the needs of their case.
    - For example, the County Court and Supreme Court are fitted with jury boxes and have procedures for the empanelment of a jury, while the Magistrates' Court has neither.
    - Also, different filings are required for a filing a request for leave to appeal in the Court of Appeal than for filing a claim with the County Court.

Reason 2: System of appeals

- Someone who is dissatisfied with a decision in a civil trial can, if there are grounds for appeal, take the matter to a higher court to query an error they believed has been made, on the basis of:
    - point of law (when some law has not been followed)
    - question of fact (whether the facts of the case had been applied correctly to reach a just outcome)
    - the remedy awarded

- This gives the opportunity for mistakes to be corrected, and for the legal reasoning and administration of justice by less experienced officers to be scrutinised by more experienced officers in higher courts.

Reason 3: Specialisation

- Each court has its own jurisdiction to hear particular types of case.
- Because each court hears similar types of cases on a daily basis, the presiding officers and other personnel can develop specialisation — expertise in the relevant law and in the procedure for hearing those kinds of matters.
    - e.g. the Magistrates' Court has greater expertise in hearing civil fencing disputes between neighbours.

Reason 4: Doctrine of precedent

- The court hierarchy supports the operation of precedent, because it enables presiding members to determine which precedents are binding and which are persuasive.
- By using precedent, the court system develops consistency and predictability.
    - Additionally, by looking at past cases, a party that takes a case to court can anticipate how the law may apply to their situation and have some certainty of outcome because similar cases are decided in a similar manner.

Appealing 'with leave'

- 'Leave' means to request the court's permission/consent to do something.
- Most civil disputes now require leave to appeal.
    - This includes almost all appeals to the Court of Appeal, and all appeals to the High Court.
    - These courts can determine special leave applications 'on the papers', which means that no formal hearing may be required.
- Getting the court's consent to hear an appeal in a civil case will usually require the party to satisfy the court that there is a reasonable chance of success.

7.6: THE RESPONSIBILITIES OF THE JUDGE AND THE JURY IN A CIVIL TRIAL

1. Responsibilities of the Judge

The judge

- A judge is a public officer who decides matters in a court of law. Some of their main responsibilities are:
    - to manage the trial
    - to decide on the admissibility of evidence
    - to determine liability and the remedy

Responsibility 1: Manage the trial

- The judge has significant powers of case management to ensure the trial is conducted in a just, timely and efficient manner.
- Generally, a trial will be conducted according to a set procedure — and the judge will make sure that the set procedure is adhered to. The judge also has the power to change this procedure.
    - The judge also has power to give directions and orders in the trial, ask a witness questions to clarify his or her evidence, and hand down rulings throughout the trial where necessary.

Responsibility 2: Decide on admissibility of evidence

- Like a judge in a criminal trial, the judge in a civil trial is responsible for deciding which evidence is to be permitted under the rules.
- Evidence such as hearsay evidence can be excluded from the trial, ensuring fairness in the way evidence is allowed.

Responsibility 3: Determine liability and the remedy

- If there is no jury in the civil trial, the judge must decide whether the plaintiff has proven their claim against the defendant, and if so, what remedy, if any, should be awarded.
    - This means that the judge, not a jury, is the decider of facts.
- Judgements, which is a statement by the judge at the end of case that outlines the decision and the legal reasoning behind the decision, should be delivered in a timely manner and in a way that is accessible and readable.
    - What is timely will depend on the complexity of the case, but parties should not have to wait significant months or years for judgment.

2. Responsibilities of a Civil Jury

Difference between civil and criminal jury

- Number of jurors: typically 12 in criminal, 6 in civil, if any
- Frequency: very often (indictable where accused pleads not guilty) for criminal, quite uncommon for civil
- Decision being made: while both decide on the facts, a civil jury can award/assess damages

A civil jury

- Juries are an independent group of people chosen at random to decide on the evidence in a legal case and reach a decision.
- In civil trials, juries can be used in two situations:
    - 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 court may order that a proceeding be tried by jury, though this is rare
- The main responsibilities of a civil jury are:
    - to be objective
    - to listen and remember the evidence
    - to decide on liability, and in some cases, damages

Responsibility 1: Be objective

- The jury must be unbiased and bring an open mind to the task, putting aside any pre-conceived prejudices.
- Each juror must have no connection with any of the parties, and must to decide only on the facts as they have been presented in the trial, not on their own biases.

Responsibility 2: Listen and remember the evidence

- For ordinary laypeople, some cases, such as a business valuation case that may concern how to value a business, are very complicated to understand.
- Therefore, they must concentrate on what is taking place in the courtroom, and can take notes if it helps them remember it better.
    - They must not, however, undertake their own investigations of what happened — their decision must be informed purely on the evidence given in the trial.

Responsibility 3: Produce a verdict

- In a civil trial, the jury must decide who or what to believe, and whether the plaintiff has established their case on the balance of probabilities, and subsequently if the defendant is liable.
- A civil jury must try and reach a unanimous verdict, but the court may accept a majority verdict in all cases.
- In some cases, such as defamation, a judge, and not the jury, is required to assess the damages.

7.7: THE RESPONSIBILITIES OF THE PARTIES AND LEGAL PRACTITIONERS

1. Responsibilities of the Parties to a Civil Trial

Parties in an adversarial vs. inquisitorial system

- The trial system in Victoria operates such that 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.
    - This is known as party control.
- This is different from a inquisitorial system, where an external investigator who seeks out the truth to determine liability.
    - In an inquisitorial system, the judge would play an investigative role in deciding the winner or loser.
    - Hence, parties have less control over the conduct of the case in an inquisitorial system.

Responsibilities of the parties to a civil trial

- Make opening and closing addresses
    - Both parties will give an opening and closing address, which will outline and summarise the case for the party.
- Present the case to the judge and jury
    - The parties will present their case to the judge or jury, if present. Most of the trial is taken up with presenting their case through lay witnesses and expert witnesses.

- Comply with overarching obligations
    - There are 10 overarching obligations under the *Civil Procedure Act* 2010. The parties must comply with these obligations during and before trial. They include the obligations to:
        - disclose the existence of critical documents at the earliest reasonable time
        - only make claims that have a proper basis
        - don't mislead or deceive

2. Responsibilities of Legal Practitioners in a Civil Trial

The necessity of a (competent) legal representative

- Legal representation is often necessary in a civil trial, because the legal practitioners are experts who are familiar with civil trials.
    - It is difficult for a party to present their own case in a civil trial without legal representation.
        - As such, they may not know how to present their evidence in the most effective way, or may not know how to cross-examine a witness.
    - They may also be too emotionally invested in the case to be able to make objective decisions about the way they argue their case.
- Also, If one party is better represented than the other, this could lead to an unfair advantage and possibly an incorrect outcome. A person who is represented by a competent barrister has a better chance of winning than a person whose barrister is less experienced.

Responsibilities of legal practitioners in a civil trial

- Make opening and closing addresses
    - If a party is legally represented, the legal practitioner will ordinarily present the opening and closing address orally in court.
- Present the case to the judge and jury
    - If witnesses give evidence orally, then the barristers will ask the witnesses questions, either through examination in chief, cross-examination or in re-examination.
    - Legal practitioners have a responsibility of presenting the case in a manner that is in the best interests of their client, while also abiding by their overarching obligations.
- Comply with overarching obligations
    - Legal practitioners are subject to the same overarching obligations as their clients.
    - They should see their role as assisting the court in resolving a dispute rather than engaging in a battle with the other side.

7.8: JUDICIAL POWERS OF CASE MANAGEMENT

1. Case Management

Case management

- The Victorian Parliament has passed laws that give powers to Victorian judges and magistrates to manage civil disputes in Victorian courts.
- The overarching purpose of the *Civil Procedure Act* is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
    - One of the ways that a court achieves this is through the judges actively managing cases.
- Two of the case management powers given to judges actively managing cases are:
    - the power to order mediation
    - the power to give directions

2. Power to Order Mediation

Associate judge

- An associate judge is a judicial officer of the Supreme Court of Victoria who has power to make orders and give directions during the pre-trial stage of a proceeding.
- Associate judges also have some powers to make final orders in particular types of proceedings.

Power to order mediation

- A judge has the power to make an order referring a civil proceeding, or a part of a civil proceeding, to mediation.
    - This power is given to a judge by various sections of the *Civil Procedure Act*, in addition to court rules.
- The court can either order that a court officer, such as an associate act as the mediator, or order that the parties arrange the mediation privately, in which case the parties choose a private mediator.
- Parties can be referred to mediation at any time of the proceeding, which can include at a very early stage or even during trial.
    - Parties may even be ordered after the trial, but before the decision has been handed down.
    - Parties may also attend more than one mediation if there is a prospect that a further mediation may help settle the dispute.

Benefits of ordering mediation via case management

- The power to order parties to attend mediation can assist the prompt and economical resolution of a dispute.
    - Often with the assistance of a mediator, the parties may realise that there is a benefit to settling the dispute early and before trial, without spending the costs of going to trial.
- Most if not all civil proceedings in the Supreme Court go to mediation before trial, and mediation is considered successful in helping to resolve disputes.
    - Former Chief Justice Marilyn Warren of the Supreme Court has said that the courts would face difficulties if they did not use mediation.

3. Power to Give Directions

Directions

- A direction is 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.

Power to give directions

- The *Civil Procedure Act* states that the court may give any direction or make any order it considers appropriate at any stage of the proceeding.
    - The power to give directions is also contained in the relevant rules of the court.
- They can give directions before or during the trial.
- Sanctions can be imposed on a party who fails to comply with a direction of the court.

Directions before trial

- The judge has the power to give directions to parties about:
    - The allowance for a party to amend a pleading
    - Timetables or timelines for any steps to be undertaken
    - Expert evidence, including directions about limiting expert evidence to specific issues

Directions during trial

- The judge has the power to give directions to parties 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 number of witnesses that a party may call

7.9: COURTS AS DISPUTE RESOLUTION BODIES

1. Appropriateness of Courts as Dispute Resolution Bodies

Appropriateness

- In determining whether a court is an appropriate dispute resolution body for a dispute, one should consider:
    - whether the dispute falls within the court's jurisdiction
    - whether there are other or better ways to resolve the dispute

Jurisdiction of courts

- Both the County Court and the Supreme Court of Victoria have unlimited jurisdiction to hear civil disputes.
    - It does not matter what amount the plaintiff is seeking; both those courts are able to hear the dispute.
- The Magistrates' Court jurisdictional limit is $100 000.
    - A plaintiff who is seeking damages of more than $100,000 must issue the claim in either the County Court or the Supreme Court.
    - A plaintiff who prefers to go to the Magistrates' Court can reduce their claim to bring it within the jurisdiction.
- VCAT has exclusive jurisdiction over some matters, so courts cannot hear them. Those matters include:
    - domestic building disputes
    - retail tenancies disputes, and others

Other or better ways to resolve a dispute

- The parties should consider whether there are other or better ways to resolve the dispute. Some of the things to consider include:
    - 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
        - for example, if a party is sensitive to publicity, an arbitration may be better, because the dispute can then be heard in private
    - 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

2. Evaluation of Courts as Dispute Resolution Bodies

Strengths of courts

- Pre-trial procedures encourage out of court settlement
- Procedural fairness
- Decision makers are impartial and independent
- If a jury is present, the community's values are reflected in the legal system
- The court process engages expert opinion

Strength 1: Encouraging out of court settlement

- Various pre-trial procedures provide parties with an opportunity to settle the case before trial or before judgment, because more information about the evidence and strength of both parties' cases is revealed.

- If one sides' evidence is compelling, the other will likely consider settlement, as they will pre-empt a loss at trial.

    - This saves the costs, time and stress of going to trial, making the system more accessible for others who want their disputes resolved.

- The use of the judicial power through case management to order parties to mediation assists in providing opportunities to settle.

Strength 2: Procedural fairness and equality

- The judge can give any directions that he or she wishes to ensure the civil dispute is resolved in a just, efficient, timely and cost-effective way.

    - The judge is also responsible for ensuring the rules of evidence are followed to allow parties to be treated fairly and equally.

- Additionally, the court hierarchy allows for parties to appeal a case where an error has been made.

- The use of the jury safeguards against misuse of power by having the state decide on liability.

- Finally, the adversarial system, which allows for greater party control means that parties are more likely to be satisfied with the outcome because they have full control of how their case has been presented.

Strength 3: Impartiality of decision makers

- The judge acts as an impartial and independent referee, ensuring parties are treated equally and without any favour or discrimination.

    - The judge will make a decision based on the facts before him or her, and will have no prior connections or links with any of the parties.

- A jury, if involved, has no connection to either party and must not undertake any research or investigation about the trial — they will independently make a decision based on the evidence presented in trial.

Strength 4: Jury reflects community values

- 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, upholding the notion of democracy in our legal system.

- This is as opposed to the purely legal reasoning that a judge may bring to a decision.

- Ultimately, a jury ensures that the law is applied according to community standards.

Strength 5: Expert opinion is used

- The judge themselves are an expert in law, processes and cases, and will ensure proper procedure is followed and laws are properly applied, which ultimately attempts to guarantee procedural fairness.

- Legal practitioners, if used, are also experts and will use their skills to present their clients' cases in the best light possible.

- Expert witnesses from the appropriate field can be engaged during a trial to provide the professional opinion, which can enhance the accuracy of information being given to the decision-maker during a trial.

Weaknesses of courts

- Delays
- Costs
- Court processes are often stressful
- Judges cannot help parties
- Jurors do not have to give reasons for their decision

Weakness 1: Court delays

- Pre-trial procedures often take a long time to complete. The discovery of documents process in particular is often criticised for adding to delays.

- Judges too, have sometimes been criticised for taking too long to deliver their decision.

- Party control means that parties need time to prepare their case, also adding to delays.

- If there is a jury, the trial may take longer because information will need to be explained to the jurors, and jury empanelment processes and jury deliberations add delays to the proceeding.

Weakness 2: Costs

- The complexity of procedures, such as pre-trial procedures usually means parties have to engage legal representation, who have much more expertise and experience handling such procedures

- Also, in an adversarial system, parties are responsible for their own case, and how it is presented.

    - All the above means that an individual with low-economic status will:

        - be pressured to accept an unfair out of court settlement, resulting in their lack of access to the courts

        - or will only be able to afford mediocre legal representation — in an adversarial system of trial, how successful a party is in a case usually depends on the quality of their legal representation

- Fees for jurors also have to be paid by the party who requests a jury trial.

Weakness 3: Stress

- For one who barely faces the courts, a court trial and the formality and rules associated with such proceedings can be daunting and stressful for many, particularly when they must follow the direct orders of others.

    - This effect is exacerbated for self-represented litigants, who will be further intimidated by the rules

- Further, the trial process itself for a large part relies on oral testimony, which involves the direct questioning of witnesses — they may also feel intimidated about being questioned in such a direct manner.

- The uncertainty of outcome in a lengthy trial can be stressful to all parties involved, and their dependents.

Weakness 4: Judges cannot help parties

- Judges are impartial referees and so cannot overly interfere or help a party.

    - In spite of having years of legal education and even more experience in the field of law, judges are not given the opportunity to use their legal expertise in an adversarial system, which renders their expertise largely useless for a large part.

    - In another system, such as an inquisitorial system, their experience and wisdom could be used effectively.

- This also leaves self-represented parties, or parties with significantly worse legal representation than the other to be particularly vulnerable, in a situation where a judge's expertise could help level out the playing field.

Weakness 5: Juries do not have to give reasons for their decision

- Because jurors do not have to give reasons for their decisions, the verdict could be unjust, but a party would have no way of knowing that.

- This means that even though, in truth, a jury is meant to be unbiased and base their decision-making only off the facts as they have been provided in the court, they could be strongly prejudiced, but there are no checks and balances to protect against this eventuality.

    - Furthermore, even if they do not intend to be unfair, they may have misconstrued evidence that is very sophisticated (in particular, cases such as business evaluation), and the court would have no way of knowing

3. Comparison of Different Dispute Resolution Services

The third party

- In CAV

    - The third party is not allowed to make a binding decision — thought the terms of settlement may be binding

    - The third party is usually someone with specialist knowledge in the field, and facilitates discussion between parties and suggests opinions and possible solutions

- In VCAT

    - The third party can make a binding decision, if the proceeding reaches a final hearing
    - The third party will hear all the evidence in the final hearing and make a binding decision about the outcome

- In the courts

    - The third party can make a binding decision if the dispute reaches trial
    - The third party will hear all the evidence in the final hearing and make a binding decision about the outcome

Procedures

- In CAV

    - The resolution of the dispute is conducted in private
    - There are no rules of evidence and procedure
    - There are no juries
    - Parties do not require legal representation

- In VCAT
    - The resolution of the dispute is generally public, unless if the parties settle before the final hearing begins
    - There are some rules of evidence and procedures; albeit flexible
    - There are no juries
    - Parties are discouraged from having legal representation
- In the courts
    - The resolution of the dispute is generally public, unless if the parties settle before trial begins
    - There are strict rules of evidence and procedure
    - While juries are permitted by law for civil cases, they are not used often because the party that orders one must pay for it, or if the judge orders one, which is relatively rare
        - A 2014 VLRC Jury Empanelment Report found that 14% of jury cases were civil
    - Legal representation is generally required

Types of civil disputes

- In CAV
    - There are severe restrictions on jurisdiction, and do not hear class actions
    - Disputes heard include disputes between tenants and landlords and consumers and traders
    - Not appropriate for large and complex claims
- In VCAT
    - There are restrictions on jurisdiction, but not as severe as CAV — VCAT also does not hear class actions; VCAT also has exclusive jurisdiction
    - Disputes heard are various, which include small claims, residential tenancies claims and retail tenancies
    - Not appropriate for large and complex claims
- In the courts
        - There are restrictions on jurisdiction in the Magistrates' Court, and some disputes also fall under the exclusive jurisdiction of VCAT — the Supreme Court can hear class actions
    - All types of claims, excluding those that fall under VCAT's exclusive jurisdiction
    - Courts such as the Supreme Court are experts in hearing large and complex claims

Methods of dispute resolution

- In CAV
  - Conciliation only
- In VCAT
  - Mediation, conciliation (compulsory conferences) and arbitration (final hearing)
- In the courts
  - Mediation, generally no conciliation, with the exception of a court's order, and arbitration (all cases in the Magistrates' Court below $10,000)

Court hierarchy and appeals

- In CAV
  - No hierarchy, no appeals
- In VCAT
  - No hierarchy, appeals restricted to point of law only
- In the courts
  - Court hierarchy, with appeals based on question of fact, damages and point of law

7.10: MEDIATION AND CONCILIATION

1. Alternative Dispute Resolution

Alternative dispute resolution

- Alternative dispute resolution methods are ways of resolving or settling civil disputes that do not involve a court or tribunal hearing.
- Mediation, conciliation and arbitration are often referred to as ADR methods.
- Very few civil cases initiated in court will proceed to a final hearing or trial; in fact, it is estimated that fewer than 5% of cases will proceed to hearing.

2. Mediation

Mediation

- Mediation is a cooperative method of resolving disputes. It is a tightly structured, joint problem-solving process in which the parties discuss the issues involved, develop options, consider alternatives and reach an agreement through negotiation, with the help of a mediator.

- The role of the mediator is to aid discussion between the disputing parties, and ensure that both parties are being heard, and attempt to reach an agreement that satisfies the needs of both parties.

    - They will not interfere or make decisions about whether there has been a breach of the law, and will not offer legal advice.

    - The mediator does not need to be an expert in the field of the dispute, but does need to possess a high level of conflict resolution skills.

    - The cost of the mediator is usually split between the parties.

- Parties may bring support people or legal representatives with them.

- In 2014–15, the Supreme Court of Victoria estimated that 985 court sitting days were saved through the use of mediation.

    - This was in addition to savings in litigation costs, courtroom facilities, judgment writing time and reduction in stress on parties who are going through litigation.

Terms and deeds of settlement

- Although mediation is not legally binding, in most situations a deed or terms of settlement is drawn up once the parties reach a resolution, which is legally binding.

- The deed of settlement is then enforceable through the courts if one party does not comply with its terms.

    - In some situations, VCAT may make an order which gives effect to the terms of settlement, so that the terms will become a formal order of the tribunal and be binding.

How mediation is used in courts

- All the courts can refer civil disputes to mediation.

    - The 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.

- The parties may externally arrange a private mediator.

- The court may also refer the dispute to judicial mediation, where an officer of the court will mediate the dispute.

How mediation is used in VCAT

- VCAT often refers a claim to mediation before a final hearing.
- In small civil disputes relating to goods and services, VCAT uses the SMAH dispute resolution method.

How mediation is used in CAV

- While CAV does have the power under certain statutes to use mediation as a method of dispute resolution, its primary method to resolve disputes is conciliation.

How mediation is used privately

- Individuals may attempt mediation at any time either before or after they initiate a claim
    - The parties may contact the Dispute Settlement Centre of Victoria (DSCV) or,
    - Private mediators such as through the Resolution Institute

3. Conciliation

Conciliation

- Conciliation is a process of dispute resolution involving the assistance of an independent third party (the conciliator), with the aim of enabling the parties to reach a decision between them.
- The third party does not make the decision, but listens to the facts and makes suggestion as to possible resolution options and assists the parties to a mutually acceptable agreement or decision.
- Conciliation can differ from mediation in that the conciliator has more influence over the outcome.
    - The conciliator, who is usually someone with specialist knowledge, suggests options and possible solutions, and is more directive than a mediator.

How conciliation is used in courts

- The County Court and the Supreme Court of Victoria do not generally use conciliation as a method of dispute resolution, preferring to refer parties to mediation.
    - However, all courts have the power 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
- Conciliation is widely used in the Family Court of Australia to help resolve family disputes

How conciliation is used in VCAT

- 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.

How conciliation is used in CAV and privately

- CAV's primary method of resolving disputes is through conciliation
- Individuals may attempt conciliation at any time either before or after they initiate a claim

4. Appropriateness of Mediation and Conciliation

Disputes suitable for mediation and conciliation

- Disputes in which a relationship between the parties is wanting to be preserved
    - e.g. disputes between neighbours, friends and family
- Disputes in which both parties are prepared to meet in a spirit of compromise and are willing to stick to any agreement reached, as opposed to being acrimonious and hostile
- Disputes in which a defendant admits liability, and the only issue to determine is the amount to be paid

Disputes not suitable for mediation and conciliation

- Disputes in which overwhelming emotions might negatively interfere with the negotiating process
- Disputes in which there is a gross imbalance of power between the parties
- Disputes in which there is a history of broken promises or violent and threatening behaviour
    - e.g. domestic violence cases

5. Evaluation of Mediation and Conciliation

Strengths of mediation and conciliation

- Being much less formal than the courts and VCAT, the processes are likely to be less intimidating
- They make use of an experienced third party who has expertise in resolving disputes (mediation) or in the subject matter (conciliation)
- Since mediation and conciliation can be arranged relatively quickly, they save time rather than waiting for a final trial or hearing
- They are generally cheaper than having the matter litigated – pre-trial and legal representation costs can be avoided
- They are conducted in a safe and supportive environment, in a venue that is suitable for both parties — parties will likely feel that their needs and wants are being addressed better

Weaknesses of mediation and conciliation

- The decision may not be enforceable, depending on the terms of settlement — meaning that all the time and money spent for the process may have been completely wasted
- Because of an imbalance of power, one party may compromise too much as they are intimidated, or because they do not have legal representation
- Because there are enforceable court rules, for example, one party may refuse to attend, if, for example, they are not taking the matter seriously — wasting time and possibly money
- There is no guarantee that the matter will be resolved, meaning that there is a likelihood that it will have to be litigated anyway — wasting time and money
- One party may feel compelled to make a decision, and would therefore feel dissatisfied as they have not 'had their day in court', and have not seen the opposing side tried by due process

7.11:ARBITRATION

1. Arbitration

Arbitration

- Arbitration is a method of resolving disputes without a formal court process — an independent arbitrator, a third party given the task of presiding over the discussion, will listen to both sides and make a decision that is binding on the parties.

- Arbitration is often conducted in private, and it can be less formal and more cost-effective than attending a court hearing or trial.

- Parties have much more control over the process and are free to agree on the procedure.

- Unlike mediation and conciliation, in an arbitration the arbitrator makes a final and binding decision — known as arbitral awards, and are enforceable.

Arbitral award

- Arbitral awards are a legally binding decision made in arbitration by an arbitrator.

Qualities of the arbitrator

- The arbitrator Is not bound by rules of evidence.

    - However, but may inform himself or herself on any matter as he or she thinks fit must ensure that the parties are treated equally each party is given a reasonable opportunity of presenting their case is not required to conduct the proceedings in a formal manner.

- In Victoria, arbitration is available when: the parties have agreed to settle their dispute by arbitration. For example, a contract between two parties might include a clause stating that if a dispute arises, both parties agree to follow the decision of an independent arbitrator

- The court orders the parties to arbitration (though the consent of the parties is required for this to occur)

- The claim has been filed in the Magistrates' Court and the plaintiff is seeking $10 000 or less, in which case the Court will normally hear the case through arbitration.