**UNIT 4 AOS1**

**TOPIC 5: EVALUATING THE OPERATION OF THE COURTS AND VCAT**

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| **Explain two possible advantages of having a civil dispute resolved by the Victorian Civil and Administrative Tribunal (VCAT) rather than a court.**  2012, Question 6b (4 marks) | |
| **Task Word** |  |
| **Content** |  |
| **Time** |  |
| ***‘The existence of tribunals ensures that people have effective access to mechanisms for the resolution of disputes.’***  **To what extent do you agree with the above statement? Justify your answer.**  2010, Question 7 (5 marks) | |
| **Task Word** |  |
| **Content** |  |
| **Time** |  |
| **Compare the way courts and VCAT operate to resolve disputes. In your answer describe one dispute resolution method used by VCAT and/or the courts.**  2011, Question 12 (8 marks) | |
| **Task Word** |  |
| **Content** |  |
| **Time** |  |
| **The Victorian Civil and Administrative Tribunal (VCAT) is always a better option to resolve civil disputes than the courts because it is less expensive and quicker.’**  **Do you agree with this statement? Justify your answer.**  2013, Question 11 (7 marks) | |
| **Task Word** |  |
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**Explain two possible advantages of having a civil dispute resolved by the Victorian Civil and Administrative Tribunal (VCAT) rather than a court.**

2012, Question 6b (4 marks)



This question required an understanding of the operation of both VCAT and the courts in the way they resolve disputes, and how the use of VCAT in resolving a civil dispute may be more advantageous than the use of the courts. To answer this question, students needed to appreciate the strengths of VCAT, which may counteract the weaknesses of the courts as dispute resolvers. Students needed to make reference to the court (perhaps in relation to weaknesses of the court) for each advantage.

Weaker responses provided advantages of dispute resolution methods (such as mediation, conciliation and judicial arbitration) as opposed to VCAT, but this was incorrect and did not score any marks. Students are reminded to read the question carefully to ascertain what institution or method is being identified.

Other misunderstandings included

* VCAT hearings are not private: VCAT hearings, like court hearings, are normally open to the public.
* Stating that VCAT uses mediation and conciliation, and courts use arbitration and judicial determination: this  sort of response was focusing on dispute resolution methods as opposed to the institution (VCAT and courts) and was misguided. Courts also use mediation and conciliation as dispute resolution methods.

Other students’ explanations of advantages were too brief, such as saying that VCAT is ‘cheaper’, ‘quicker’ or ‘more informal’. However, students should have explained how or why VCAT is cheaper (for example, there is no need for legal representation or lower fees), quicker (for example, shorter waiting periods for a hearing to be determined) or more informal (for example, there is normally no need for rules of evidence and procedure).

Some of the advantages of VCAT are

* quicker: normally, the waiting time to have a matter heard in VCAT is less than for a court. Some of the lists  take 2–4 weeks to have a matter heard from the time an application is filed. This is opposed to the court system, which often takes weeks, months or even years to have a matter heard, as parties need to undertake pre-trial steps and wait for a time when the matter can be heard
* more informal: VCAT hearings normally dispense with rules of evidence of procedure, which are used strictly by the courts, thus allowing the parties to feel more at ease
* cheaper: with a low application fee for most matters, the lack of necessity to undertake pre-trial procedures and the non-requirement of legal representation in many lists, parties usually spend less money in VCAT than in court, thus allowing VCAT to be more accessible to more people
* expertise: with the designation of cases to lists, sometimes VCAT members have expertise in an area of law which may not otherwise be available in the court system, particularly in the Magistrates’ Court.
* The following is an example of a good answer.

*One advantage of having a dispute resolved by VCAT as opposed to a court is the nature of the court hearing. Normally, VCAT does not use rules of evidence and procedure when it hears a case, as opposed to a court which has strict rules of evidence and procedure. This often adds to the stress involved and the formality of the hearing, therefore this helps the parties to feel more at ease during the hearing.  Another advantage is the expense involved. Most cases heard at VCAT are small matters and the administration fee involved in filing the application is very small. Legal representation is often not needed with having a matter heard by VCAT. This is opposed to a court which normally requires legal representation for civil hearings (as it is too hard for an individual to understand the rules of procedure without a lawyer), which makes it more expensive, and the admin fees are much higher.*

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***The existence of tribunals ensures that people have effective access to mechanisms for the resolution of disputes.***

**To what extent do you agree with the above statement? Justify your answer.**

2010, Question 7 (5 marks)



Depending on the stance taken by the student, some of the following points could have been made.

* Tribunals reduce expenses as they avoid using complex pre-trial procedures and legal jargon, have low  application fees and often do not require legal representation, thus ensuring all socio-economic classes have  access to the legal system.
* Tribunals are normally much quicker than courts in terms of the amount of time it takes to have a case heard,  thereby ensuring people access the legal system effectively without having to wait too long to have their  dispute resolved.
* The cheaper and quicker nature of tribunals ensures that litigants are less stressed and more confident in using  the system.
* Tribunals are far less formal and do not follow strict rules of evidence and procedure, thereby ensuring people are more confident in accessing the legal system.
* VCAT has recently felt the impact of long delays and the necessity of particular pre-trial procedures in complex cases, such as discovery, thereby reducing people’s ability to access the legal system.
* In some lists, parties use legal representation, often requiring an unrepresented litigant to obtain legal representation to have equal standing and therefore increasing costs.
* If a decision is made in VCAT, the appeal has to be brought to the Supreme Court or Court of Appeal, thus making it more difficult for people to ensure that the decision made was the right one as costs start to increase.
* VCAT sessional members do not necessarily have the expertise that County and Supreme Court judges have, thereby reducing the level of specialisation that litigants are afforded in these courts.

This question asked students to indicate to what extent they agreed that the existence of tribunals ensures that people have effective access to mechanisms for the resolution of disputes.

* Many students simply listed three or four strengths of tribunals without explaining those strengths in detail.
* Many students provided responses that stated ‘tribunals are quicker, cheaper and more informal’; however, this did not answer the question, give any detail as to how tribunals are quicker, cheaper and more informal or relate it back to the statement of how these strengths allow people effective access to mechanisms to resolve their disputes.

Stronger responses stated to what extent the student agreed with the statement and provided detail of the strengths or weaknesses of tribunals, stating how each strength or weakness allowed or did not allow people effective access to mechanisms in order to resolve their disputes.

The following is an example of a high-scoring response.

*I believe that tribunals do allow greater access to the mechanisms of dispute resolution to some extent, although they do still have some weaknesses.*

*The most important reason that ensures individuals have access to mechanisms of dispute resolution is the cost involved in taking a matter to a tribunal. An average lodgement fee to VCAT costs around $37; furthermore, legal representation is not required as the language used is usually simple and understandable as opposed to courts. This ensures that individuals who struggle financially have the option to resolve their disputes and gain access to these mechanisms. However, some lists in VCAT allow legal representation to be used by parties, therefore one party may have an advantage over an unrepresented person, therefore it may decrease their access to tribunals to resolve their disputes as they may be deterred from pursuing their matter because of this factor.*

*As VCAT has specific lists that cater for certain types of cases, individuals are able to pursue their case and ensure that the tribunal members are specialised in hearing the case. This may increase their access to having the dispute resolved by a person who is familiar with that type of case, therefore increasing their ability to resolve disputes.*

*VCAT is generally seen to be much quicker than courts in resolving disputes as there are no pre-trial procedures involved, no rules of evidence and procedure and the trial procedures are generally not followed as strictly in tribunals, therefore increasing a person’s access to having their dispute resolved quicker. However, in recent times VCAT has suffered significant delays in hearing disputes, therefore this may decrease a person’s ability to have their dispute heard.*

*Overall, tribunals do allow greater access to people to resolve their dispute but there are some changes that need to be made to how they operate to overcome the weaknesses present.*

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**Compare the way courts and VCAT operate to resolve disputes. In your answer describe one dispute resolution method used by VCAT and/or the courts.**

2011, Question 12 (8 marks)



A comparison requires a consideration of similarities and differences. Both courts and VCAT are dispute resolution bodies and, while they have some similarities in the way they resolve disputes, there are also differences. A description of one dispute resolution method was also required.

Some of points that could be made are as follows.

Similarities

* Both involve an independent, external body (tribunal or court) to determine and resolve the dispute.
* Both involve an application fee and documents to be filed (writ/application form), although the fees and  documents differ between VCAT and courts.
* Courts and VCAT engage independent third parties who are skilled in their areas of expertise to hear the case  and make a determination.
* Both courts and VCAT can refer a case to mediation or a case conference in an attempt to resolve it before  hearing.
* Legal representatives can be engaged in both courts and VCAT, although in some VCAT lists legal  representatives are not allowed.
* The parties can still appeal a decision of VCAT as they can in courts (except for a full bench High Court  decision).
* Both make a binding decision on the parties.
* Differences
* VCAT is a one-stop shop, with different lists that deal with different subject matters/areas of law, whereas  courts’ jurisdictions in civil cases are determined by the amount of damages that are being sought.
* There is one VCAT with different lists and no hierarchy; there are a number of courts in a hierarchy.
* VCAT is much cheaper – normally a $36 application fee as opposed to a court filing fee, which can be over  $1000 in the Supreme Court.
* Some VCAT lists disallow the use of legal representatives, whereas in the court system legal representation is  usually required to deal with complex pre-trial procedures.
* A binding decision in a court can be immediately enforced, whereas a VCAT decision has to be certified in the  Magistrates’ Court before it can be enforced.
* VCAT members are usually non-judicial (except for the president and vice-presidents) and can be casual, sessional members, whereas courts utilise judges.
* VCAT is more informal, whereas courts use formal procedures and rules of evidence.
* VCAT hearings are often quicker and heard faster than a court hearing.
* VCAT does not normally use complex pre-trial procedures, as opposed to courts.

Dispute resolution method (Students should note that both VCAT and courts use each of the following methods.)

* mediation
* conciliation
* arbitration
* judicial determination (note that some VCAT members can judicially determine cases – that is, when the  president or vice-president is hearing the matter).

Many students struggled with this question.

* Some read it to mean a discussion about the strengths and weaknesses of courts and VCAT; therefore, they did not answer the question.
* Many students began discussing the similarities and differences between dispute resolution methods – that is, they explained that courts judicially determine cases and VCAT mediates and then compared judicial determination and mediation. This is not what the question asked.
* Courts and VCAT are dispute resolution bodies and each have their own way of resolving disputes.
* Students were required to undertake a comparison of the way disputes are resolved by each, not a comparison of the actual dispute resolution methods.

There were some common misconceptions about courts and VCAT, and how they resolve disputes that need to be addressed.

* For example, some students stated that VCAT uses mediation and conciliation whereas courts use arbitration and judicial determination. The above dispute resolution methods are not exclusive to either courts or VCAT; courts are able to refer matters to mediation, and VCAT can judicially determine cases.
* Some students also had a misconception that VCAT decisions are not binding on parties. VCAT decisions are binding; although a VCAT decision needs to be certified in the Magistrates’ Court before it can be enforced, this does not make the order any less binding on the parties.

The structure of answers was important in responding to this question.

* Stronger students methodically described the similarities and differences, incorporating the dispute resolution method into their answer (for example, by stating as one of their similarities that both courts and VCAT use mediation as a dispute resolution method before describing mediation).
* Weaker students made brief points about the similarities and differences (for example, by stating that VCAT is cheaper than courts without explaining why) or did not adequately describe the dispute resolution method.

The following is the beginning of a good answer.

*Both the courts and VCAT are dispute resolution bodies. Both of them use a variety of dispute resolution methods, including mediation. Mediation involves the use of an impartial third party known as a mediator who facilitates a discussion between the two parties to assist them in reaching a final decision. The mediator does not make the final decision and is required to remain unbiased and encourage the parties to stay ‘on task’. Both courts and VCAT regularly use mediation as a form of dispute resolution.*

*The courts are much more formal in resolving disputes, using rules of evidence and procedure in conducting a hearing. VCAT, on the other hand, is a more informal atmosphere where it is intended for parties to feel more comfortable and less intimidated than the courtroom.*

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**‘The Victorian Civil and Administrative Tribunal (VCAT) is always a better option to resolve civil disputes than the courts because it is less expensive and quicker.’**

**Do you agree with this statement? Justify your answer.**

2013, Question 11 (7 marks)



The statement suggested that VCAT was always a better option to resolve civil disputes than the courts because it is less expensive and quicker. In addition to stating whether they disagreed or agreed with the statement, students were expected to address all parts of the statement: that is, why VCAT was or was not always a better option than the courts, and whether it was, in fact, less expensive and quicker.

This question was marked globally. It was expected that students would draw on similarities and differences between VCAT and the courts in their justification. That is, students should have demonstrated why it was that VCAT was, or was not, the preferred dispute resolution body.

Far too many students confused dispute resolution methods (arbitration, mediation, conciliation and judicial determination) with VCAT. These types of responses argued the benefits of those dispute resolution methods rather than discussing VCAT as a dispute resolution body. It was difficult to award any marks for such responses, given they missed the point of the question. Furthermore, an argument that VCAT is better than the courts because it uses dispute resolution methods, such as mediation, cannot be supported when the court itself uses and encourages mediation as a dispute resolution method.

There is a misconception that VCAT outcomes are not binding. In fact, VCAT decisions are binding and enforceable.

It was expected that, if students claimed that VCAT had some weaknesses or was not appropriate in some cases, that their conclusion would not be that VCAT was always a better option. That is, the points raised should have coincided with the conclusion reached.

Many students argued that VCAT was appropriate for smaller claims, where the application fee was low and legal representation was not needed, and where the time to have the matter heard was generally quicker than the courts, but not appropriate for larger, more complex cases.

The following points should have been made when responding to this question, but very few students made them.

* There is a limited right to appeal a decision made by VCAT.
* VCAT does not have jurisdiction in some areas of law and so is not appropriate or not available for some civil disputes.
* The time it takes to have a hearing in VCAT is increasing; for example, in 2012/13, the average time it took to have a case heard in the Civil Claims List was 18 weeks (see *VCAT Annual Report 2012-3*).
* VCAT’s awards are generally not as enforceable as court judgments (see section 121 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic.)).
* While the application fee is small ($44.90) for many claims, that fee is normally for claims under $500. Application fees range from $44.90 to more than $3 000 (for example, for an application made in the Planning and Environment List), depending on the type of case. Further, changes to the fees in July 2013 means that there is now a hearing fee applicable for some cases.  The above points are those that help to distinguish students who understand the detail, and have an in-depth knowledge of VCAT and the courts, from those students who have learnt only brief details about both.

Some other points that could have been made include the following.

* VCAT’s waiting times are generally shorter than those of the courts. Often, it takes a few weeks to have a  matter heard. This can usually be attributed to less time taken with pre-trial procedures or determination of  evidence.
* It is not always the case that VCAT takes less time than the courts; for example, in early 2012, the Victorian  Government announced funding for VCAT to tackle the backlog in some of the lists (such as the Environment  and Planning List), where some cases had an eight-month delay.
* The speediness of a hearing date may result in evidence being missed or some issues not identified before  hearing.
* VCAT’s application fees are generally lower than those of the courts and, therefore, VCAT is more accessible  than the courts, particularly for small and simple matters.
* VCAT’s lists often do not require legal representation (normally for simple and straightforward matters, such  as a straight debt claim), which results in a less expensive exercise.

Some lists are complex and require pre-trial procedures or a lawyer, so some might spend as much as in a court  case.

The following example is the beginning of a good answer.

*I do not agree with this statement as both the courts and VCAT have their strengths and weaknesses when it comes to resolving civil disputes, and some disputes are more suitable for the courts to hear.*  *VCAT is generally better for small civil claims such as those about disputes with a neighbour or about goods or services purchased from a retailer. Their fees are low for those claims less than $10,000 and legal representation is not often needed for such a small claim involving limited facts and a small number of documents. However, over the years VCAT’s fees have increased and it has seen an increasing amount of legal representation used, thus increasing the cost to the parties.*