VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

The Civil and Human Rights Jurisdictions of VCAT

Justice Stuart Morris
President of VCAT[1]

The fields of civil disputes cover a huge expanse of our daily lives. In the past financial year, VCAT has determined 88,558 cases, and we estimate that there were more than 275,000 parties to those applications. These cases cover where and how you can build your house, whether you can break your tenancy, whether your property can be repossessed, whether you can get your money back from a dodgy builder and hundreds of other situations that directly affect the lives of Victorians.

Overview of VCAT's Civil Division

As an overview, I propose to outline the various civil jurisdictions of the tribunal. The civil division covers a wide range of disputes including civil claims, residential tenancies, retail tenancies, domestic building and credit.

Some of these are exclusive jurisdictions, and others have the work shared between the tribunal and the Supreme Court or other jurisdictions. It is important to note that where VCAT has exclusive jurisdiction, it also has unlimited jurisdiction. Many cases brought before the tribunal involve small sums of money, but this is not always the case. For example, cases in the domestic building list encompass major developments such as apartment blocks, and therefore can involve huge sums of money and complex legal issues.

The **domestic building list** hears and resolves disputes between home owners, builders, insurers and architects. Most cases involve claims about defective or incomplete work, delays in the completion of works and the reasonable costs of rectification and completion works.

In the past financial year, 825 applications were brought in the domestic building list. 71% of these cases involved disputes between owners and builders, and 29% were appeals against the decisions of insurers under builder warranty insurance policies. Disputes in this list can involve apartment buildings and can rival Supreme Court actions in both the quantum in dispute and the complexity of the issues.

In 2004-2005, 55% of cases were resolved within 20 weeks and 72% of cases were resolved within 35 weeks. These statistics can be explained by the fact that these types of

[1] A speech presented at *"VCAT: What's in a Name?"*, a seminar held by the Leo Cussen Institute on Wednesday 23 November 2005.

cases are usually very multifaceted and involve a high number of parties, a need for expert evidence, and complex issues of factual and technical disputes. Additionally, claims about defective work require monitoring for 6 to 12 months in order to ascertain the damage. These disputes can be, by their very nature, both expensive and time-consuming, and the tribunal is aware of the challenges of administering these cases through the system.

One way the tribunal is focussing on keeping the costs down and delivering a timely resolution is through adopting a policy of early intervention. The applications are assessed as soon as possible and are listed for directions hearings to determine the best course forward. Often cases are listed for mediation with the tribunal's expert mediators. Indeed, most cases are referred to mediation and approximately 65% of these are resolved through mediation.

From time to time the tribunal appoints special referees and hold expert conclaves to assist in achieving resolution in those cases with involve a highly technical point.

The **residential tenancies list** determines applications made under the *Residential Tenancies Act 1997* which generally encompasses disputes between landlords and tenants, rooming house operators and residents, and caravan park owners and residents.

The vast majority of applications in this list are brought by landlords. 68% are brought by landlords represented by estate agents or property managers. 20% of applications are brought by the Director of Housing and 7% of applications are brought by private landlords. Applications by tenants or residents comprise of only 6% of the list's workload.

The total number of applications received this financial year was 65,950, a rise of 3% from 2003-2004. Almost half of these applications related to possession orders and a quarter related to the payment of bond. Of the remaining cases, 10% considered applications for compensation or compliance orders alleging a breach of duty, and 15% were other miscellaneous applications. The majority of these cases progressed to a hearing before a member of the tribunal.

Given the enormous number of applications lodged per year in the residential tenancies list, the list's performance on timeliness is nothing short of remarkable. Cases in this list take an average of 20 days – that's 20 days from the date of lodging the application to the date of judgment. Furthermore, this is not 20 business days, but 20 days all up, including weekends.

We are able to achieve this kind of timeliness because the tribunal has very sophisticated systems set up to minimise the time it takes to move a case through the administration of the tribunal and effectively manage the list's resources across the State. Two of these systems are "VCAT Online" and the "Order Entry System".

VCAT Online allows registered users to perform a number of actions over the internet, without the need of coming into the tribunal's premises. For example, a person can lodge an application for a tribunal hearing over the internet. The system may even set a hearing date, venue and time on the spot, and give out these details immediately. People can use the system to renew or withdraw applications as well.

VCAT Online also helps landlords and tenants to fill in certain notices, such as a Notice to Vacate, or a Notice of Breach of Duty. The system will create the notice in its proper form for the user to print out and serve on the other party. There is also an extensive search facility to enable people to search for documents relating to their proceeding and print out what they need.

In the past financial year, VCAT Online attracted an increasing number of users, with over 50,000 applications being made. This means that 76% of all applications to the residential tenancies list were made online. In 43% of cases, the user received a hearing date within seconds of their application being lodged.

The other technological system that is assisting VCAT to reduce the time a person waits for judgment is the Order Entry System. This allows members sitting in the residential tenancies list to type up orders on a personal computer in the hearing room. These orders are then printed out during the hearing, signed by the member, and given to the parties on the spot. This bypasses the need for the orders to be processed by the tribunal registry and sent out in the mail – instead, the authenticated order can be used by the parties for immediate use.

During 2004-2005, 70% of all orders were made using the Order Entry System. And it is not a system that is available only at VCAT's premises. At this stage, members of the tribunal can access the system at the Magistrates' Courts in Ballarat, Dandenong, Frankston, Geelong, Heidelberg, Ringwood, Sunshine, Mildura and Werribee. VCAT plans to expand the system's operation to every Magistrates' Court in Victoria.

The **retail tenancies list** of VCAT is certainly less significant in terms of the number of cases heard, but it is still a list of great importance in the commercial world. In 2004-05, 197 applications were received, a 22% increase from the previous year. The applications involved disputes between landlords and tenants relating to the leasing of retail premises.

Before these cases were brought to VCAT, they had usually been through alternative dispute resolution processes of the Small Business Commissioner. Thus, it is common for these cases to be directly listed for a hearing at the tribunal, without going through a further mediation. In the past financial year, 61% of applications were resolved within 12 weeks, and 72% were resolved within 18 weeks.

The **credit list** deals with disputes under the *Consumer Credit (Vic) Code*, which is part of a uniform consumer code that operates across Australia.

The majority of cases in this list involve repossession orders, as a credit provider legally must have an order from VCAT or the Courts to enter a residential premise to recover mortgaged goods. Applications for repossession orders made up 74% of all applications made to this list in 2004-2005, an increase of 48% since the previous year.

The credit list, with its broad jurisdictions, also determines applications by debtors wishing to change their obligations under credit contracts, or to have enforcement proceedings against them postponed, due to hardship. The credit list also deals with applications

relating to the imposition of civil penalties on credit providers due to breaches of the Consumer Code. These cases are often large and complex, and require applicants to undertake extensive sampling processes and notifications to affected debtors.

For the less complex matters, the credit list follows a policy of referring matters to mediation as early as possible in the process.

On the subject of timeliness, applications for repossession orders were generally determined within 14 days of the application being served on the debtor. Obviously, with more complex cases, such as civil penalties matters, more time was required. Over the whole of the list, 86% of applications were resolved within 8 weeks, which was above the tribunal's objectives for the year.

The **civil claims list** hears and determines disputes in relation to the supply of goods or services for private or business use. The majority of the work in this list is generated by the *Fair Trading Act 1999.* This is the most significant list in which VCAT shares its jurisdiction with the Supreme Court.

In 2004-05 the civil claims list received 6,448 applications, more than a 25% increase from the number of applications received in the 2003-04 financial year. Of these, the tribunal resolved 6,137 cases. All of these cases proceeded to a hearing and were required to be proved. Unlike the courts, there is no provision at VCAT for default judgments.[2]

Most cases involved disputes between the purchasers and suppliers of goods and services. But the list covers the full range of buyer and seller relationships, and certainly extends beyond consumer/trader disputes. The number of businesses making applications rose from 34% on 2003-2004 to 40% in 2004-2005. Similarly, the number of individuals named as respondents rose from 24% in 2003-2004 to 29% in 2004-2005.

The types of applications lodged in the civil claims list can be broken down into the following categories:

- 31% building;
- 12% services;
- 10% motor vehicles;
- 7% household goods;
- 31% debt recovery services; and
- 24% other.

The types of applications we will see in the civil claims list in the future may change due to recent amendments made to the *Fair Trading Act.* These amendments have expanded the jurisdiction of the tribunal by deeming a number of Acts to be "Consumer Acts". If these Consumer Acts are contravened, individuals can make a claim at the tribunal for any loss, injury or damage caused by that contravention. Some of these Acts are the *Business*

[2] Section 78 of the *Victorian Civil and Administrative Tribunal Act* 1998 does give VCAT the power to determine the proceeding in favour of the applicant if the other party is conducting the proceeding in a manner that causes disadvantage to the applicant. However this is to be distinguished from a judgment in default of appearance or defence.

Names Act 1962, the *Estate Agents Act 1980,* the *Motor Car Traders Act 1986,* the *Residential Tenancies Act 1997,* and the *Sale of Land Act 1962.* Given the tribunal's performance in the past financial year where it dealt with a 26% increase in the number of applications made, I am confident that the tribunal is capable of flexibly dealing with any increase in workload from the expansion of the civil claims jurisdiction under this legislation.

91% of disputes in the civil claims list involved sums less than $10,000. In these claims the parties are generally required to represent themselves, thereby achieving significant savings in legal costs. 7% of claims involved sums between $10,000 and $50,000; and 2% of claims involved sums of over $50,000. This breakdown of statistics into three value groups has remained essentially the same from 2002 through to 2005. However, when we look at the statistics in a different light, we can see that the average amount of money being claimed in each case has been steadily increasing over the past three years.

In 2002-2003, the total value of amounts claimed was $28.6 million. This means that the average claim was for an amount of $5,598. In 2003-2004, the total value of amounts claimed was $36.9 million which represents an average claim of $7192. In 2004-2005, the total value of amounts claimed was $52.4 million. So, within three years, the average claim has steadily increased from five and half thousand to an amount of $8126. This pattern is consistent with a general shift of more significant cases from the courts to VCAT: a trend that I would attribute to the timely manner in which VCAT deals with civil disputes.

Indeed, the tribunal has spent the last financial year refocussing on the timeliness of decision-making in this list. All civil claims matters are assessed as soon as they are lodged at the tribunal, and most of those that involve less than $10,000 are listed for hearing within two days. The tribunal gives seven weeks notice of the hearing date, and more often than not, will simultaneously serve the application on the respondent.

Claims that involve more that $10,000 usually require different administrative measures. Often these cases are listed for interim steps such as directions hearings and compulsory conferences in order to narrow the issues involved and determine how the matter will proceed.

Compulsory conferences in these cases generally proceed at a vigorous pace and bring the parties together at an early stage to discuss options for settlement before too many legal costs are incurred. I am pleased to announce that the list succeeded in settling more than 90% of cases involving over $10,000 through a compulsory conference procedure.

On 12 December 2005, VCAT's civil division will take on an important new aspect. The functions of the Legal Professional Tribunal will be transferred to VCAT by the *Legal Profession Act* 2004. On that date, a **legal practice list** will be created at VCAT.

We predict at this stage that between 500 and 600 cases per year will be brought before the Legal Practice list. These cases will be made up of two different types of claims. Firstly, claims of lawyers' professional misconduct will be heard by the tribunal as an exercise of original jurisdiction. An internal appeal process at the tribunal will be available in relation to these claims. Secondly, VCAT will hear referrals from the Legal Services Commission in situations where the Legal Services Commission has been unsuccessful in mediating client / lawyer disputes. While these proceedings will be limited to circumstances involving claims of less than $25,000, proceedings of any value will still be able to be brought to the tribunal under the *Fair Trading Act* 1998.

Overview of Human Rights Division

I will now give an overview of the Human Rights Division at VCAT. This division consists of two lists – the guardianship list and the anti-discrimination list.

The **guardianship list** has the jurisdiction to make orders for the care and protection of adults who have a disability that impairs their capacity to make decisions about their lives. This jurisdiction extends to encompass the appointment of guardians to make decisions about health care and accommodation, and to manage the finances or legal affairs of a person.

The guardianship list also makes determinations dealing with enduring powers of attorney – the tribunal has the jurisdiction to revoke, suspend, vary these powers or declare them invalid. Another facet of the jurisdiction is the power to consent to certain specific procedures, including sterilisation, termination of pregnancy, donation of non-regenerative tissue and procedures carried out for medical research.

Once a guardian or administrator is appointed, this is not the end of the tribunal's involvement in the matter. The tribunal oversees the decisions of the guardian and retains the power in some situations to give or withhold approval for their proposed actions. The tribunal also uses a large percentage of its resources conducting reassessments of people's situations to see if an order of VCAT has run its course and is no longer required, or if a change of guardian or administrator might be beneficial, or if any other changes to the person's affairs or rights need to be made. Usually the orders of the tribunal regarding guardianship are reassessed within one year, and the orders of administration are reassessed within three years. Early reassessments can be made where they are required, either on the tribunal's own motion, or upon application by an interested person.

The guardianship list has to be flexible to deal with the particular requirements of its users. It is very important for the tribunal to sit in venues across Victoria in order to be accessible to the people who require our services but may not be able to make the journey into Melbourne. The tribunal makes an effort, whenever possible, to hold hearings at hospitals, nursing homes, community health centres, or other venues closer to where the represented person lives.

In the past financial year, more than half of the hearings in this list were held away from the King Street premises of the tribunal. 24% of hearings were held in suburban Melbourne and 33% were held at country venues throughout the state. The tribunal also

accommodated urgent applications that were made out of hours by conducting telephone hearings at short notice.

The **anti-discrimination list** hears applications from people who claim to have been discriminated against, under two pieces of legislation – the *Equal Opportunity Act 1995* and the *Racial and Religious Tolerance Act 2001*.

With respect to the cases under the *Equal Opportunity Act*, the tribunal has jurisdiction to hear cases from people who claim to have been discriminated against on the basis of their age, sex, race, religion, impairment, parental status or other attributes. 69% of these applications refer to discrimination in the workplace, but the tribunal also deals with claims of discrimination in education, sport or the supply of goods and services. The tribunal also hears applications relating to sexual harassment and victimisation.

The process of getting a case to the tribunal under this Act is two fold. First, a complaint is initially brought by a claimant to the attention of the Equal Opportunity Commission. The Equal Opportunity Commission usually attempts a conciliation of the matter. In cases where conciliation is successful and the parties are happy with the outcome, the matter will not come before the tribunal. However, if the conciliation is unsuccessful, or if the Commission refuses to deal with a matter on the basis that complaint is not conciliable, or that the complaint is lacking in substance, then the claimant can require the matter to be referred to the tribunal.

The anti-discrimination list also has the jurisdiction to hear complaints under the new *Racial and Religious Tolerance Act 2001*. This has been a piece of legislation that has attracted a high degree of media attention. There has been significant community concern that this Act impedes free speech and stops people voicing legitimate opinions about religious and racial issues.

These community concerns seemed to hit a high point during the VCAT hearing of the application of Robin Fletcher, a self-proclaimed witch who was serving time in prison for paedophilia, and who had brought a claim under the Act concerning a course offered in prison that offered an introduction to Christianity.[3] In my decision of 1 August 2005, I summarily dismissed his application on the basis that it was, quite simply, preposterous. I emphasised in this case that the *Racial and Religious Tolerance Act* was reserved for extreme circumstances in which a person incites hatred, contempt, revulsion or ridicule of another person on the basis of their race or religion.

I also made a recommendation that the Act be amended so that, in the future, a person will need to obtain leave of the tribunal before having a case of racial or religious vilification brought before the tribunal. The aim of this amendment is to avoid precisely what happened in the Robin Fletcher case – to avoid having a publicity storm about an unmeritorious claim, which in turn undermines the purposes of the Act.

Given the sensitivity of claims under the *Racial and Religious Tolerance Act*, the tribunal intends to promote mediation as an alternative dispute resolution for these claims. The

[3] Robin Fletcher v Salvation Army and Ors [2005] VCAT 1523

tribunal is aware that adjudication before the tribunal, accompanied by a playing out of the case in the media, can generate fresh tensions and inflame a dispute. In the tribunal's experience, mediation is often a very successful and appropriate way to deal with disputes in the anti-discrimination list. Indeed, in the past financial year, 76% of all cases referred to mediation in this list were successfully settled. And in those cases where it was unsuccessful in reaching a final settlement, the process of mediation still helped narrow the issues in dispute and set the groundwork for adjudication.

Features of Conducting a Civil Proceeding in VCAT

I will now turn to discussing the features of conducting a civil proceeding at VCAT. As practitioners, you will find that bringing a case to VCAT and moving it through the administration of the tribunal is a very different process to that of the traditional court system. It will be less formal. The fees will be lower. The time that elapses before you get your orders will be much shorter.

Recently, VCAT has endeavoured to put the spotlight on five features of the tribunal, and by aiming for these five features, the tribunal is improving in all aspects of its service. The five features the tribunal is focussing on are:

- timeliness;
- low cost;
- expert;
- accessibility; and
- independence.

Timeliness is taken very seriously at VCAT. We understand the pressing need for efficient decision making, and we understand the effect delay can have on a person's life while waiting for a decision to be made. The costs of delay, both financially and emotionally, can escalate if the decision-maker has to jump through too many administrative hoops before handing down his or her orders.

In the past two years, the tribunal has made great improvements in the process of moving a case through the system. Obviously a balance must be struck between timely justice and giving the parties adequate time to research and prepare their cases. The objective of the tribunal is not simply to speed up decision making. Rather it is to speed up decision making where a prompt decision is important to one or more of the parties. If all the parties are content to take their time, there is no reason why the tribunal should push the matter along. The spotlight on timeliness is not to improve the tribunal's statistics; rather it is to assist the parties where one of them needs a timely decision.

As I stated earlier, it is a great success of the tribunal that the Residential Tenancies list has maintained such a record of timeliness. This list determined 69,950 cases in the last financial year. The average time taken from the day the tribunal received the application, to the day the judgment was given was 20 days. The processes within this list have been streamlined with the introduction of technology such as VCAT Online and the Order Entry System.

Of course, the Residential Tenancies list determines quite discrete matters, so these statistics do not carry over into the rest of the civil division. The median time in the past financial year to determine civil claims cases was 7 ½ weeks. In 2003-4 it was 11 weeks. In 2002-3 it was 14 weeks. So within three years, the tribunal has managed to cut the time expected for a civil claims matter to be heard by half.

The tribunal focuses heavily on the issue of providing **low cost** justice to the public. To this end, the *VCAT Act* generally requires each party to a matter to bear their own costs, regardless of whether someone "wins" or "loses". The aim of this policy is to put the parties in a situation where it is always in their benefit to act reasonably and keep costs down.

Another important element of low cost justice is the tribunal's expert mediation list. The tribunal provides free, in-house mediation to appropriate cases, which significantly reduces costs in a proceeding, even when that mediation is unsuccessful.

Members who are appointed to the tribunal are considered to be **expert**, which assists in the adjudication of technically difficult disputes. The tribunal is not simply made up of lawyers and judges. Instead, members such as doctors, engineers, scientists, town planners and architects are appointed to hear disputes in their field of expertise.

The tribunal also has a large number of sessional members, who are on call at all times to hear cases in their specialist field. These members bring an enormous range of skills to VCAT, even though cases requiring those skills may be infrequent.

Occasionally, despite the broad range of skills available for the tribunal to draw on, a case will arise in which no member of VCAT has the technical, specific and expert knowledge to determine. In these rare cases, the tribunal has the power to appoint independent experts to assist the presiding member. In previous cases, the tribunal has appointed a coastal geomorphologist to assist it in the determination of a construction matter, and an experienced dentist to assist in the determination of a dental matter.

One of the features which sets VCAT apart from the courts is its **accessibility.** The tribunal promotes this feature in order to make justice accessible to every member of the public, without need to recourse to legal professionals. It often comes as a rude shock to legal professionals that in civil claims matters involving less than $10,000 VCAT does not allow lawyers to appear without leave of the tribunal. This leave is rarely given.

Even in lists where lawyers are free to attend, it is still commonplace for people to represent themselves, or to be represented by another, non-legal person.

The tribunal facilitates this by having procedures which are far less formal than those of the courts. A person does not need to know complex rules of evidence to come before the tribunal. A person does not have to wear robes or wigs. Most planning hearings are held in an informal conference room, with the member on one side of the table and the parties on the other. We try and avoid confusing rules about how and when and where to stand and sit. In some lists a person who represents themselves can simply give their evidence or submissions from the table, without entering the witness box. All of these measures are

designed to avoid parties to a dispute having an overly complex, legalistic experience in the justice system.

VCAT maintaining its **independence** as a tribunal is central to the fair determination of disputes in Victoria. Often cases before the tribunal include the Government as a party. This is why, in last year's annual report, we stressed that the tribunal pays a critical role in standing between the strong and the weak, the government and the governed, the rich and the poor. The tribunal takes this role very seriously.

These are the five central features that you, as legal practitioners, will find as you begin to use VCAT. While we recognise the central role of the Supreme Court and other courts in the justice system of Victoria, we do things very differently at the tribunal. It is important for all people who appear before the tribunal to understand the framework in which we make decisions and the values we aspire to.