THE VCAT – RECENT DEVELOPMENTS OF INTEREST TO ADMINISTRATIVE LAWYERS

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Introduction

The Victorian Civil and Administrative Tribunal ('the VCAT') is a significant feature of the Victorian legal landscape. Its significance may be attributed, at least in part, to the volume and breadth of its work. In each financial year since 1 July 1998 — when the VCAT opened its doors — it has received approximately 85,000 applications. And those applications cover areas as diverse as anti-discrimination, consumer credit, domestic building, fair trading, freedom of information, guardianship and administration, land valuation, liquor, planning and environment, residential and retail tenancies, state taxation and transport accidents.

Given the volume and breadth of its work, it is neither possible nor desirable to discuss all recent VCAT developments.[1] That said, it is both possible and desirable to discuss some recent VCAT developments of interest to administrative lawyers.

Broadly speaking, this paper deals with three such developments, which fall into the following areas:

(a) the VCAT and natural justice;

(b) the VCAT and reasons for decision; and

(c) the VCAT and appeals to the Supreme Court of Victoria.

I will deal with these three topics in turn.

The VCAT and natural justice

As is well known, there are two rules of natural justice. The first rule, the 'hearing rule', requires a decision-maker such as the VCAT to provide each party to a proceeding before it with a reasonable opportunity to present its case. And the second rule, the 'bias rule', requires that decision-maker to be free from bias when making its decision.[2]

As is also well known, natural justice does not require the inflexible application of a fixed body of rules; rather, it requires fairness in all the circumstances. Those circumstances include the nature of the decision-maker and the statutory context in which the decision is made.

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The tribunal system created by the Victorian Civil and Administrative Tribunal Act 1998 ('the VCAT Act') places a significant emphasis on fairness. Section 97 of that Act, for example, provides that the VCAT must act fairly and according to the substantial merits of the case in all proceedings. And, most relevantly for present purposes, section 98(1)(a) of the VCAT Act provides that the VCAT is bound by the rules of natural justice.[3]

Not only does the tribunal system created by the VCAT Act place a significant emphasis on fairness, it also places an emphasis on the prompt, efficient and inexpensive disposition of proceedings.[4] Consistent with this emphasis, the VCAT Act empowers the VCAT to take a more flexible and informal approach to procedural and evidentiary matters than might be expected in a court.

To start with, the VCAT has a discretion to regulate its own procedure.[5] Nevertheless, this discretion cannot be exercised in a manner that constitutes a departure from the rules of natural justice.[6] As the VCAT noted in *Re Castik Investments Ply Ltd and Stonnington CC*:[7] whilst tribunals are expected to bring a more relaxed attitude to procedural matters, they are not expected to 'play fast and loose with the substantive law or procedural fairness'.

Not only does the VCAT enjoy a discretion to regulate its own procedure, it is not bound by any practices and procedures applicable to courts of record (except to the extent that it adopts those practices or procedures).[8] It is well established, however, that this does not relieve the VCAT of its obligation to comply with the rules of natural justice.[9]

Not only is the VCAT not bound by the practices or procedures of courts of record, the VCAT may inform itself on any matter as it sees fit,[10] and is not bound by the rules of evidence.[11] Importantly, however, in *Clean Ocean Foundation Inc v Environment Protection Authority*,[12] Balmford J observed that these two privileges are 'to be exercised with care, and remembering always that the Tribunal is ... bound by the rules of natural justice'.[13]

Finally, it may be noted that not only is the VCAT able to inform itself on any matter as it sees fit, section 98(1)(d) of the VCAT Act charges it with the responsibility of conducting each proceeding with as much speed as possible and with as little formality and technicality as possible. Importantly, however, section 98(1)(d) does not relieve the VCAT of its obligation to comply with the rules of natural justice.[14] Indeed, as the VCAT observed in *Re Golem and Transport Accident Commission (No 1)*,[15] the VCAT's obligation in section 98(l)(d) does not mean that what could be described as 'Rafferty's Rules' prevail.

It can be seen from the above that whilst the VCAT has various powers that enable it to take a more flexible and informal approach to procedural and evidentiary matters than might be expected in a court, the rules of natural justice are still regarded as being applicable and of paramount importance. Indeed, in *Francis-Wright v VCAT*,[16] Gillard J observed that, in the VCAT context, 'one cannot over-emphasise the importance of complying with the rules of natural justice and acting fairly.'

The hearing rule in the VCAT

As already stated, the 'hearing rule' requires a decision-maker such as the VCAT to provide each party to a proceeding before it with a reasonable opportunity to present its case.

When considering the application of the hearing rule in the VCAT context, it is useful to distinguish between the following two scenarios:

(a) first, where a party to a VCAT proceeding did not receive a hearing at all; and

(b) secondly, where that party received a hearing, but that hearing was not 'fair' in all the circumstances.[17]

These two scenarios will be dealt with in turn.

No hearing

There are two distinct situations in which it may be said that a party to a VCAT proceeding did not receive a hearing.

The first situation is where the party was not heard on the merits of the case because the proceeding was dismissed or struck out:

(a) under section 75 of the VCAT Act (on the basis that the proceeding was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process);

(b) under section 76 of the VCAT Act (for want of prosecution); or

(c) under section 78 of the VCAT Act (on the basis that the VCAT was satisfied that the party had been conducting the proceeding in a way that unnecessarily disadvantaged another party).

In this situation, it may be said that whilst section 98(1)(a) of the VCAT Act imposes a requirement that, ordinarily, a party should be given an opportunity to be heard upon the merits, that opportunity is not absolute and may be lost without a breach of the rules of natural justice.[18]

The second situation in which it may be said that a party to a VCAT proceeding did not receive a hearing at all is where that party was not present (either personally or through a representative) at the hearing.

A useful starting point for considering this situation is the judgment of Gillard J in *Francis-Wright v VCAT*.[19] In that case, the VCAT had made findings and orders in the absence of the landlord in two proceedings in the Residential Tenancies List. It did so in circumstances where it was not satisfied that the landlord had been properly served with any documents. On appeal, Gillard J made the following observations:

(a) consistent with its obligations to act fairly and in accordance with the rules of natural justice, the VCAT does not have any general power to hear an application in the absence of a party who has not been served. In fact, the VCAT only has a limited statutory power to hear such an application: the power under section 123 of the VCAT Act to hear an application for an ex parte interim injunction;[20]

(b) except in the case of an ex parte interim injunction,[21] the VCAT 'must not proceed without notice against another party making findings and making orders and without giving that party an opportunity to be heard'; and

(c) where a party fails to attend, the VCAT must — as a first step — be satisfied that proper service has been effected on that person, and that they do not propose to appear.

In the result, Gillard J held that, by making findings and orders in the absence of the landlord who had not been served with any documentation, the VCAT had breached the rules of natural justice and the duty to act fairly.

Where, however, the VCAT is satisfied that proper service has been effected on a party and that that party does not propose to appear, section 99(2) of the VCAT Act expressly authorises the VCAT to hold the hearing in the absence of that party. Further, section 51(5) of the VCAT Act provides that if an applicant does not appear (either personally or by a representative) at the hearing of a proceeding for review of a decision, the VCAT must confirm that decision. It follows that the VCAT Act itself authorises conduct that may otherwise have been regarded as being in breach of the hearing rule.

An unfair hearing

As noted above, a distinction may be drawn between the scenario where a party did not receive a hearing at all, and the scenario where that party received a hearing but that 'hearing' was not 'fair' in all the circumstances.

A 'hearing' received by a party to a VCAT proceeding may not be 'fair' in all the circumstances due to events or conduct that took place before, during or even after the final hearing.

As for conduct before the final hearing, it is accepted that whilst the VCAT is not a court of pleading, a party to a VCAT proceeding is entitled to know the case that it must meet before the hearing commences.[22] Accordingly, the rules of natural justice may be breached if a party is not placed in that position before the commencement of the final hearing (and the matter is not rectified before the time the VCAT makes its decision).[23]

As for conduct during the final hearing, it should be noted at the outset that section 102(1) of the VCAT Act imposes a natural justice requirement on the VCAT. That section provides as follows:

> (1) The Tribunal must allow a party a reasonable opportunity —
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> (a) to call or give evidence; and
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> (b) to examine, cross-examine[24] or re-examine witnesses; and
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> (c) to make submissions to the Tribunal.

The scope of this natural justice requirement is narrowed by section 102(2), which allows the VCAT to refuse to allow a party to call evidence on a matter if the Tribunal considers that there is already sufficient evidence of that matter before it. And, as Byrne J observed in *Winn v Blueprint Instant Printing Pty Ltd*,[25] the obligation contained in section 102(1) is also constrained by the ordinary requirements of relevance.

Winn 's case is also important in this context because it emphasises the need to take into account the nature of a VCAT proceeding when determining what the 'hearing rule' requires. In this regard, his Honour said this:

> [9] It [is] accepted that the Tribunal must act fairly and that it [is] bound by the rules of natural justice. But this does not require that its procedures be that of a formal court. Indeed, the [VCAT Act] makes it clear that the Tribunal is to act in an informal way and that its procedures must be moulded to accommodate the fact that, in most cases [that would now be dealt with as 'small claims' under the Fair Trading Act 1999], the parties will not be represented by a professional advocate. This necessarily involves the Tribunal taking a more active role and identifying the real issues between the parties and directing them as to the evidence which legally and logically bears on those issues. It may be, too, that in a given case, the Tribunal will itself interrogate witnesses in a manner and to an extent which would not be expected in a court.

Although these observations are plainly important, it is critical to bear in mind that they were made in the context of applications for leave to appeal from three small claims that had been

heard and determined in the VCAT's Civil Claims List. Where the parties are legally represented and the proceeding is being conducted as an adversarial contest, the VCAT can be expected to take a much less 'active role' than the role identified by Byrne J.

Byrne J's observations in the *Winn* case were recently endorsed by Nettle J in *Collection House Limited v Taylor*.[26] That case is a useful illustration of a number of natural justice principles in the VCAT context and, as such, will now be dealt with in some detail.

Relevantly for present purposes, the facts of the Collection House case were as follows. The appellant ('Collection House') recovered part of a statute-barred debt from the respondent ('Ms Taylor'). It did so after one of its employees, Mr Hempenstall, had telephoned Ms Taylor at home in relation to the debt. Ms Taylor subsequently commenced a proceeding in the VCAT claiming that Collection House had engaged in unconscionable conduct and misleading or deceptive conduct. During the VCAT hearing, the VCAT Member raised an issue for the first time. That issue, which the Member himself described as 'significant', was whether Mr Hempenstall was genuinely on secondment to a law firm, as he had claimed. Towards the end of the hearing, the Member asked whether either party wanted to say anything further or to provide any further evidence on any aspect of the matter. Collection House's representative, Mr Easy — who was not a lawyer — responded by offering to provide further material in relation to the secondment arrangement if that would be of assistance to the VCAT (noting, however, that that material could not be provided there and then). The Member relevantly responded by saying 'I'm loathe [sic] like to adjourn it because that just means people have to come back again another day'. Mr Easy then responded by saying 'I understand that completely'. In the result, the VCAT concluded that Collection House had engaged in unconscionable conduct and in misleading or deceptive conduct. In the course of its reasons, the VCAT noted that Collection House 'did not produce any documentary evidence of the supposed secondment, although Mr Easy stated that such evidence did exist'.

On appeal to the Supreme Court, Collection House argued that the VCAT had failed to afford it natural justice by refusing to allow it time to provide additional evidence concerning the nature and terms of Mr Hempenstall 's secondment. Collection House contended that Mr Easy's suggestion late in the hearing (that he could provide the VCAT with further material in relation to the secondment arrangement if that would be of assistance) constituted a request for an adjournment and that the Member's response — that he was loath to adjourn — was tantamount to a refusal.

Ms Taylor submitted that Collection House should have anticipated that the secondment arrangements were likely to be a significant issue in the case before the VCAT and that Collection House had plenty of opportunity in advance of the hearing to prepare its evidence accordingly. As such, it was said that Collection House was given a proper opportunity to present its case and that there was no denial of natural justice. Nettle J rejected this submission. In doing so, his Honour said this:

> [23] It is not to the point that [Collection House] might have anticipated the need for evidence on the secondment arrangements. Applications for adjournments are not to be decided on the basis of whether a party could have anticipated the requirement which gives rise to a need for adjournment. It is not an occasion for punishment of a party for its mistake or for its delay in making its application. The paramount consideration is to do justice and thus to enable the parties to present their cases as fully as necessary within the limits of the law...

His Honour went on to state that the refusal of the adjournment to allow Collection House to adduce written evidence on the secondment issue — particularly where the Member himself regarded the nature and terms of the secondment arrangements as a significant issue, and where the Member also thought to be significant the fact that Collection House did not

provide any documentary evidence of those arrangements — was 'likely to create an appreciable risk of injustice'.

Ms Taylor then submitted that, regardless of whether Collection House should have anticipated the need for the evidence on the secondment issue, Mr Easy's suggestion that further evidence could be obtained did not amount to a request for an adjournment. Nettle J accepted that Mr Easy's reference to the possibility of presenting further material 'was not the most sanguine of applications for adjournment'. His Honour then went on to say this:

> [28] In court counsel are expected to make plain when and if they are seeking an adjournment, and it goes without saying that the way in which a case is presented is a matter for counsel. But that is because of the training of counsel and the etiquette of the court to which they are accustomed. It is different with laypersons before administrative tribunals. It cannot be assumed that they will make their meaning clear. They may have no experience of litigation, and they are likely to be nervous. In such circumstances it falls to the tribunal to clarify what seems obscure.
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> [29] If counsel asks a judge whether further evidence would be of assistance to the court, counsel may properly be told that the way in which they run their case is a matter for them. But if a layperson asks an administrative tribunal whether further evidence on an issue would be of assistance to the tribunal then, depending on the circumstances, the tribunal will need to say if it could be. Otherwise. there is a risk of causing the person to take a mistaken view of the state of affairs relating to the manner in which they might choose to conduct their case. That in itself would be a denial of natural justice. (emphasis added)

In the case before him, his Honour held that, in the circumstances, Mr Easy should be taken to have sought an adjournment.

The next issue was whether it could be said that the VCAT had refused to grant the adjournment sought by Mr Easy: the Member did not say that he refused to grant an adjournment; rather, he simply said that he was loath to grant it. In relation to this issue, Nettle J said this:

> [30] In court it may be assumed that counsel will not lightly be deflected from an application for adjournment. And if a judge says that he or she is loathe [sic] to grant the adjournment, counsel may rightly respond with a demonstration of why the justice of the occasion demands the adjournment, if that be the case. But that too is because of the training of counsel and the etiquette of the court to which they are accustomed. It does not apply to unrepresented laypersons appearing before administrative tribunals. When an unrepresented layperson is told by an apparently authoritative presiding member of an administrative tribunal that the tribunal is loathe [sic] to grant an adjournment, a layperson is likely and in my view entitled to treat the member as refusing to adjourn.

Accordingly, his Honour held that, in the circumstances, the VCAT should be taken to have refused Mr Easy's application for an adjournment and that, to that extent, there was a denial of natural justice.

But that was not the end of the matter. The next issue was whether it could be said that Collection House had waived its right to complain about the refusal to grant an adjournment by Mr Easy stating that he 'completely understood' the reticence of the Member to allow further time. In relation to this issue, Nettle J observed that if Mr Easy were a barrister and the VCAT a court, one might think that Mr Easy had made a calculated choice to run with his case as it was. His Honour continued:

> [26] The fact of the matter, however, is that Mr Easy was not a barrister; he was not even a lawyer; the Tribunal is not a court; and the sorts of conventions and assumptions which apply to the conduct of litigation by barristers in courts by and large do not apply to the conduct of proceedings by laypersons before the Tribunal.
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> …

> [31] ... I do not attach much significance to Mr Easy's concession before the Tribunal that he completely understood the Member's attitude. No doubt if such a thing was said by counsel to a judge, the judge might take counsel as saying that they had reconsidered their position and withdrew their application. But it is different for a layperson before an administrative tribunal. There, as in everyday society, it is commonplace for a person denied a request to respond with an expression of understanding. It may be no more than good manners to do so. But it does not mean that the person is to be taken as having withdrawn the request or that the person may not be bitterly disappointed. Granted that a layperson might also think it is in his or her interests to ingratiate themself to the tribunal, obsequious resignation is hardly reasoned retreat.

Accordingly, his Honour concluded that Collection House had not waived its right to complain about the VCAT's refusal to grant the adjournment.

This led to one final issue: whether it could be said that the VCAT's denial of natural justice could have had any impact on the outcome of the case.[27] As for this issue, Nettle J was unable to conclude that the additional evidence that Collection House would have put before the VCAT had the adjournment been granted could not have influenced the VCAT's decision. Accordingly, his Honour concluded that the VCAT's refusal to grant the adjournment deprived Collection House of a reasonable opportunity to present its case upon a significant issue.[28]

As noted above, Nettle J accepted (at [29]) that the VCAT may breach the hearing rule during the final hearing if, during that hearing, the VCAT caused a party to take a mistaken view of the state of affairs relating to the manner in which they might choose to conduct their case. It follows, for example, that the VCAT must not mislead a party into believing certain evidence is not required and then rely in part on the absence of that evidence to draw adverse inferences against that party.[29] Similarly, the VCAT must not mislead a party into believing that it had received and considered certain relevant documents when it had not done so.[30]

In addition, the VCAT may breach the hearing rule during the final hearing if it refuses to allow a party to make a submission on a relevant issue. An example of this is *Port Phillip CC v Hickey*,[31] where Smith J held that the VCAT had denied natural justice to the planning permit applicants and a local council. His Honour reached that conclusion in circumstances where the VCAT had refused to allow those parties to be heard on the merits of the permit application due to some confusion as to what submissions they were seeking to put to the Tribunal.

It follows from the above that there are a number of circumstances in which the VCAT may breach the hearing rule during the final hearing.

As for conduct <u>after</u> the final hearing, the hearing rule may be breached if, for example, the VCAT:

(a) entertained a submission from a party after the hearing in circumstances where leave to make further submissions had not been given and where the other parties had not been given an opportunity to be heard in relation to that submission;[32]

(b) relied upon its particular specialist knowledge in making its decision without giving prior notice of that fact to the parties;[33]

(c) required an extensive change to a development plan for a proposed subdivision of land in circumstances where that change had substantial adverse implications for the applicant, where the parties had no notice that the VCAT was considering such an extensive change and where, as a result, the parties had not been given an opportunity to make submissions or adduce further evidence in relation to that change.[34]

Finally, it may be noted that if the VCAT conducts a post-hearing view or an inspection in the absence of the parties and proposes to base its decision on its own observations, it may be under an obligation to give the parties an opportunity to deal with those observations by addressing argument and possibly also calling evidence.[35]

The VCAT and reasons for decision

As is well known, there is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions that have been made in the exercise of a statutory discretion and that may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.[36]

The VCAT Act, however, contains provisions dealing with the following two scenarios:

(a) first, where the maker of the decision that is (or may be) under review by the VCAT has not provided reasons; and

(b) secondly, where the VCAT has provided oral or written reasons for its final order.

These two scenarios will be dealt with in turn.

Reasons of the original decision-maker

Pursuant to section 45 of the VCAT Act, a person who is entitled to apply to the VCAT for a review of a decision, or to have a decision referred to the VCAT for review, may request the decision-maker to provide a written statement of reasons for the decision. This request for reasons must be in writing and must be made within 28 days after the date upon which the decision was made.[37] The written statement of reasons must contain the reasons for the decision and the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based. The written statement must be provided within 28 days after the request for reasons is received.[38] If this is not done, the person seeking reasons may obtain an order from the VCAT requiring the statement of reasons to be given within a time specified by the VCAT.[39]

In addition, if a proceeding is commenced for review of a decision, the decision-maker must lodge with the VCAT what is colloquially known as a 'section 49 statement'. The section 49 statement must contain the statement of reasons given by the decision-maker under section 46(1) of the VCAT Act or, if no such statement has been given, a statement containing:

(a) the reasons for the decision; and

(b) the findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based.[40]

One issue that arises in this context is this: what should the statement of reasons contain (whether required pursuant to section 46 or section 49(1)(a) of the VCAT Act)? In *Re Filonis and Transport Accident Commission*,[41] Judge Bowman VP made the following observations about this issue:

- the reasons provided should be adequate to assist the Tribunal, as a generic body, in understanding how the decision was made and the reasons for its making;

- the reasons, even in brief form, should indicate that there has been a genuine consideration and evaluation of the material available to the decision-maker;

- the reasons should ordinarily deal with any conflicts of evidence and should plainly state whether the decision-maker accepted or rejected such evidence (endorsing *Transport Accident Commission v Bausch*[42]);

- the reasons need not attain the level of perfection, nor have the precision of pleadings;

- 'pro forma' reasons will frequently not be sufficient; and

- the reasons given in response to a request under section 45 must be based upon the material available to the decision-maker at the time that the decision was made.[43]

Reasons of the VCAT

The VCAT may decide to give oral or written reasons for its final order. If the VCAT gives oral reasons, a party may request the VCAT to give written reasons. Such a request must be made within 14 days from the date upon which the oral reasons were given and the VCAT must comply with that request within 45 days after receiving it.[44]

Section 117(5) of the VCAT Act provides that if the VCAT gives written reasons, it must include in those reasons its findings on material questions of fact. One issue that arises in this context is this: what should the VCAT's written reasons contain?

Section 117(5) is modelled on section 49(3) of the (now repealed) AAT Act. The AAT's obligation to give reasons for decision and to include in those reasons its findings on material questions of fact, included a responsibility to make clear, coherent and intelligible findings.[45] In *Barlow v South East Water Ltd*,[46] the VCAT confirmed that what is required under section 117 is along the lines of what was prescribed by section 49 of the (now repealed) AAT Act.

In *Commissioner of State Revenue v Anderson*,[47] Nettle J made the following observations about the VCAT's requirement to give reasons:

- the reasons of the Tribunal are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which reasons are expressed;

- it is not necessary for the Tribunal to address every issue raised in a proceeding; rather, it is enough to make findings on the material facts upon which its decision turns and to explain the logic of the decision;

- to explain the logic of a decision requires that reasons be intelligible (which is what section 117 of the VCAT Act requires); and

- reasons are not intelligible if they leave the reader to wonder about the process of reasoning that has been followed.

Further, in *Re Lucas and Transport Accident Commission*,[48] Osborn J observed (at [8]) that it is generally incumbent upon a tribunal such as the VCAT — which is obliged to give reasons and exercises a quasi-judicial function in cases where argument and analyses are advanced on either side — to 'enter into the issues canvassed before it and explain why it prefers one case over the other'.

For completeness, however, it should be noted that, in *Gennimatas v Transport Accident Commission*,[49] Ashley J observed that the adequacy of the Tribunal's reasons should be considered in the context of the way in which the matter was conducted before it.[50]

The VCAT and appeals to the Supreme Court

A decision of the VCAT may be challenged in three ways:

(a) first, a party to a proceeding may appeal to the Supreme Court, under section 148 of the VCAT Act, from an order of the VCAT;

(b) secondly, a person may apply to the Supreme Court, under Order 56 of Chapter 1 of the Supreme Court Rules ('the SCR'), for relief in the nature of certiorari to quash a VCAT decision; or

(c) thirdly, a person may apply to the Supreme Court, under the Administrative Law Act 1978 ('the ALA'), for relief in the nature of certiorari to quash a VCAT decision.[51]

In practice, appealing under section 148 of the VCAT Act is by far the most common method used. Indeed, in *Re Buttigieg v Melton SC*,[52] Justice Morris P observed that appealing under section 148 'would generally be the most expeditious and appropriate method of challenging a VCAT decision'.

The logical starting point for a consideration of the scope of section 148 of the VCAT Act is section 148(1). That provision provides as follows:

> (1) A party to a proceeding may appeal, on a question of law, from an order of the Tribunal in the proceeding—
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> (a) to the Court of Appeal, if the Tribunal was constituted for the purpose of making the order by the President or a Vice President, whether with or without others; or
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> (b) to the Trial Division of the Supreme Court in any other case— if the Court of Appeal or the Trial Division, as the case requires, gives leave to appeal.

Four points concerning the scope of section 148 emerge from a reading of this provision.

First, only a 'party' to a 'proceeding' may challenge an order of the VCAT under section 148. The word 'proceeding' is defined in section 3 of the VCAT Act to mean a proceeding in the Tribunal,[53] and section 59 of that Act sets out when a person is to be regarded as a 'party' to such a proceeding.

Secondly, it is not strictly accurate to refer to an appeal from a VCAT 'decision'. Rather, the appeal must be from an 'order' of the Tribunal.[54] The word 'order' is defined in section 3 of the VCAT Act to include an interim order of the Tribunal. Further, by virtue of section 117(6) of the VCAT Act, the reasons for an order, whether oral or written, form part of that order.

Thirdly, a party may not appeal under section 148 unless and until leave to appeal has been granted.

And fourthly, section 148 does not confer a free-standing right of appeal; rather, the right to appeal is confined to an appeal on a 'question of law'.[55]

As stated in paragraph 54 above, there are three ways of challenging VCAT decisions: appeals under section 148 of the VCAT Act, applications under Order 56 of Chapter 1 of the SCR and applications under the ALA.[56]

There was once 'some support' for the argument that section 148 of the VCAT Act was an exclusive code for challenging an order of the VCAT and, as such, that it (implicitly) excluded the judicial review authority of the Court.[57]

It is difficult to see why section 148 of the VCAT Act should be interpreted in that manner. That is particularly because only a 'party' to a proceeding may invoke the appeal process and, in certain circumstances, a non-party may wish to challenge an order of the VCAT.[58]

In any event, the High Court has expressly doubted whether section 148 is an exclusive code in this sense:

> Although s 148 uses the word 'appeal' it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review. That is not to say that there are no other avenues for judicial review. The VCAT Act makes no express provision excluding the general supervisory jurisdiction of the Supreme Court. It may, therefore, be doubted that s 148 should be understood as doing more than providing, in some cases, an important discretionary reason for not permitting resort to that general supervisory jurisdiction on the basis that s 148 provides a suitable alternative remedy.[59]

Although section 148 is not an exclusive code, it is expressed in wide terms. In *Francis-Wright v VCAT*,[60] the respondent landlord submitted that, when the ground of appeal was a denial of natural justice, section 4(4) of the ALA prevented a party from appealing under section 148 from an order of the VCAT made under the *Residential Tenancies Act 1997*. Gillard J rejected that submission, noting that there were no words in section 148 or in any other part of the VCAT Act that supported it. According to his Honour, 'the right to appeal is with leave in relation to a question of law and there are no words in the section or the [VCAT] Act which restrict the generality of those words'.[61]

Viewed in this light, the Court of Appeal's *obiter* in *The Attorney-General for the State of Victoria v The Warehouse Group (Australia) Pty Ltd*,[62] is, with respect, curious.

The Warehouse Group case was an appeal from Balmford J, where her Honour had concluded that the VCAT had no power to hear and determine a proceeding in the Planning and Environment List. Her Honour reached that conclusion on the basis that the VCAT was constituted by a member who did not have sound knowledge of, and experience in, planning or environment practice in Victoria.[63]

The Court of Appeal unanimously allowed the appeal. It found that the VCAT member in question did have the requisite knowledge and experience and, as a result, that the VCAT did have the power to hear and determine the proceeding in question. Nevertheless, the Court went on to express the following views (in obiter):

> 22. [T]here is... a fundamental objection to the exercise of jurisdiction by the Trial Division in relation to ground 16 in the notice of appeal, which stems from the commencement of an appeal under s. 148. In ground 16 Warehouse was challenging the very constitution of the Tribunal which made the orders from which it was otherwise wishing to appeal. Such a challenge is to jurisdiction, as indeed the Trial Judge. in upholding the challenge, recognised ... Such a challenge should have been mounted by way of judicial review and not appeal: See, for example *GJ Coles & Co v Retail Trade Industrial Tribunal* in which a tribunal was wrongly constituted and prerogative relief was sought and granted Nor, in our view, was anything to the contrary said in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* ... Our dealing with the question of the constitution of the Tribunal should therefore not be taken as any endorsement of the procedure adopted by Warehouse on this occasion.
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> 23. In another case, the conclusion that a proceeding by way of judicial review was appropriate but not an appeal might mean that leave to appeal should never have been granted in the first place and that, once granted, the appeal should have been dismissed as incompetent. In this instance, however, there were many other grounds of appeal: only ground 16 was affected by the considerations of procedure to which we have referred, and ground 16 was determined as a preliminary question. [emphasis added]

With respect, the correctness of these views may be doubted. There are several reasons for this.

First, there is nothing in the language of section 148 of the VCAT Act to suggest that the 'appeal' process may not be used when the only question of law to be considered is whether the VCAT had the jurisdiction to make the order that it did. It would have been a very simple thing for the Victorian Parliament to have limited the scope of section 148 in that manner. It did not do so.

Secondly, there is nothing in the subject matter or context of section 148 that compels the conclusion that the scope of the section must be limited in the manner suggested. Importantly, as the High Court in the *Roy Morgan* case pointed out, an 'appeal' under section 148 is itself in the nature of a judicial review. It is not a free-standing 'appeal'. Given that an 'appeal' under section 148 is a proceeding in the nature of a judicial review, the Court of Appeal's insistence that a challenge only as to the VCAT's jurisdiction must be 'mounted only by way of judicial review and not [by an] appeal' under section 148 is puzzling.

Thirdly, there is nothing in the relevant second reading speech or explanatory memorandum to suggest that the Victorian Parliament intended to limit the scope of section 148 in the manner suggested.

Fourthly, the Court of Appeal's reliance upon the New South Wales decision of *GJ Coles and Co v Retail Trade Industrial Tribunal*,[64] is misplaced. Admittedly, *GJ Coles* was a case in which an order in the nature of certiorari was sought and granted in respect of a tribunal that was wrongly constituted. Critically, however, seeking prerogative relief was the only available means of challenging that tribunal's decision. That was because there was no right of appeal - on a question of law or otherwise - from that tribunal's decision.[65] In the circumstances, the New South Wales Court of Appeal in *GJ Coles* did not consider the scope or availability of any right of appeal. Accordingly, that case offers no support for the view that the right of appeal in section 148 of the VCAT Act ought be confined in the manner suggested.

Fifthly, the Federal Court has held that the comparable provision in the Commonwealth *Administrative Appeals Tribunal Act* 1975[66] - which also allows appeals on a question of law - is broad enough to allow that Court to entertain an appeal on the basis that the Administrative Appeals Tribunal did not have the jurisdiction to entertain the application in question.[67]

Finally, the High Court in the *Roy Morgan* case appears to endorse the view that section 148 of the VCAT Act, whilst not an exclusive code, may provide an important discretionary reason for not permitting resort to Order 56 or the ALA on the basis that section 148 provides a suitable alternative remedy. This suggests that section 148 provides the principal route for challenging VCAT decisions and that the other routes are to be treated as subordinate. The Court of Appeal's *obiter* not only reverses that position (where the challenge is to the VCAT's jurisdiction only), it carves out an unnecessary and unjustified limitation on the scope of section 148.

For these reasons, it is to be hoped that the Court of Appeal's *obiter* in the *Warehouse Group* case will not be endorsed in the future.

Two further points should be made for completeness.

First, in *Re Buttigieg v Melton SC*,[68] Justice Morris P referred to these criticisms of the Court of Appeal's obiter and observed (at [13]) that although it was unnecessary and undesirable for him to enter into the debate, section 148 of the VCAT Act 'will usually provide the most

convenient method of challenging a VCAT decision, including as to jurisdiction as it enables the legal correctness of that decision to be considered by the Supreme Court'.

And secondly, the Court of Appeal's *obiter* may have some far reaching implications if, as appears likely, the Court is to be taken as suggesting that a challenge to the VCAT's jurisdiction embraces a challenge made on the basis that the VCAT made a jurisdictional error. That is particularly so if the VCAT is taken to be an 'administrative tribunal' - and not an 'inferior court' - for the purposes of the High Court's decision in *Craig v South Australia*.[69] That is because an administrative tribunal will commit a jurisdictional error if it identifies the wrong issue, asks itself a wrong question, ignores relevant material, relies upon irrelevant material or, at least in some circumstances, makes an erroneous finding or reaches a mistaken conclusion.[70] Further, an inferior tribunal will make a jurisdictional error if it breaches a rule of natural justice.[71]

It follows from the previous paragraph that if:

(a) the Court of Appeal in the *Warehouse Group* case is to be taken as suggesting that a challenge to the VCAT's jurisdiction embraces a challenge made on the basis that the VCAT made a jurisdictional error; and

(b) the VCAT were treated as an administrative tribunal for the purposes of the *Craig* decision — the scope of section 148 would be significantly curtailed. That would be a most surprising outcome that Parliament could not have intended.

Conclusion

As noted at the outset, the VCAT is a significant feature of the Victorian legal landscape. And, as this paper has sought to demonstrate, a number of VCAT developments - particularly in the areas of natural justice, reasons for decision and appeals to the Supreme Court of Victoria - should be of interest to administrative lawyers in this State.

Endnotes

1 For an excellent discussion of recent developments concerning the practice and procedure of the VCAT, see S Morris, 'VCAT practices and procedures: Recent developments' (2004) 11 *Aust Jo of Admin Law* 173.

2 I will not deal with the 'bias rule' in this paper.

3 Section 98(4) of the VCAT Act provides that s 98(l)(a) does not apply to the extent that the VCAT Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice. In *PRA v MA* [2004] VSCA 20, Ormiston JA observed (at [2]) that a provision such as s 98(4) 'must in the circumstances be read and construed with some care'.

4 See *Magazzu v Business Licensing Authority* (2001) 17 VAR 264 at 277. See also the VCAT's 'User Service Charter', where the VCAT describes its purpose as being 'To provide Victorians with a tribunal that delivers a modern, accessible, informal, efficient and cost-effective civil justice service'.

5 See s 98(3) of the VCAT Act.

6 *Rumpf v Mornington Peninsula* SC (2000) 2 VR 69 at [74].

7 (1999) 3 VPR 46.

8 See s 98(1)(b) of the VCAT Act.

9 See *Rumpf v Mornington Peninsula SC* (2000) 2 VR 69 at [74]; *Francis-Wright v VCAT* (2001) 17 VAR 306 at 317.

10 See s 98(1)(c) of the VCAT Act.

11 See s 98(1)(b) of the VCAT Act.

12 [2003] VSC 335 at [27].

13 See also *Francis- Wright v VCAT* (2001) 17 VAR 306 at 317.

14 See *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd (No 2)* (2002) 11 VPR 321 at [57].

15 (2002) 19 VAR 265 at 269.

16 (2001) 17 VAR 306 at 317-318.

17 Compare C Enright, *Federal Administrative Law* (Federation Press, 2001) at [34.5].

18 See *Bell Corp Victoria Pty Ltd v Stephenson* [2003] VSC 255 at [51].

19 (2001) 17 VAR 306. See also *PRA v MA* [2004] VSCA 20.
20 But note that, in *Jacques Nominees Pty Ltd v National Mutual Trustees Pty Ltd* (2000) 16 VAR 152 the VCAT found (at 175-176) that it had the power to hear an application for an Anton Pillar order on an ex parte basis. Compare also *PRA v MA* [2004] VSCA 20 at [2], [50].
21 And, possibly, an ex parte application for an Anton Pillar order: *Jacques Nominees Pty Ltd v National Mutual Trustees Pty Ltd* (2000) 16 VAR 152.
22 See, eg, *Barbon v West Homes Australia Pty Ltd* [2001] VSC 405 at [16].
23 In *PRA v MA* [2004] VSCA 20, Ormiston JA observed (at [2]) that 'if what is being sought by a party or what is proposed by the Tribunal is not apparent on the piece of paper served, it would to my way of thinking be generally necessary for the Tribunal to give a fair opportunity to each party affected to respond, either by the calling of evidence or the preparation of appropriate submissions, to the application made'.
24 In *Re Campbell and Port Phillip CC* [1999] VCAT 128 the VCAT noted (at [32]) that, save in the most exceptional circumstances, the parties 'have an entitlement in accordance with the rules of natural justice to cross-examine any expert whose evidence is to form a key basis for a finding of fact'. Similarly, in *Chan v Kostakis* [2003] VCAT 951 the VCAT expressed the view (at [26]) that it would be contrary to the rules of natural justice to allow a letter to be the basis of a crucial finding of fact without opposing parties having the opportunity to cross-examine the author of that letter or to clarify the situation.
25 [2002] VSC 295 at [9].
26 [2004] VSC 49 at [26].
27 Nettle J observed that not every breach of the rules of natural justice will render a decision invalid. That is because the court may refuse relief if it is satisfied that what appears to have been a denial of natural justice could have had no bearing on the outcome of the case. See *Stead v State Government Insurance Commission* (1986) 161 CLR 141.
28 See also *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd (No 2)* (2002) 11 VPR. 321.
29 See *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82.
30 See *Muin v Refugee Review Tribunal* (2002) 190 ALR 601.
31 (2001) 14 VPR 108.
32 See *Rumpf v Mornington Peninsula SC* (2000) 2 VR 69 at [61]-[78]. In that case, Balmford J concluded that whilst the Tribunal had erred in law in entertaining the further submission when leave had not been given, that error, in all the circumstances, was not a vitiating error of law.
33 See *Turner v Horsfall* (2002) 11 VPR 340, where Ashley J observed (at [46]) that 'if the Tribunal had particular specialist knowledge upon which it proposed to rely, it was knowledge of which the parties should have been apprised before a decision was made in reliance upon it.'
34 See *Breese Pitt Dixon Pty Ltd v Wyndham CC* [2004] VSC 199.
35 See *Torrington Investments Pty Ltd v Shire of Bulla* (1985) 57 LGRA 181 at 185-186; *Sheedy Simmons Building Permit Service v Mornington Peninsula SC* (unreported, Vic Sup Ct, Nathan J, 3 October 1996).
36 See *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 662.
37 See s 45 of the VCAT Act.
38 See s 46 of the VCAT Act.
39 See s 47 of the VCAT Act.
40 Section 49 does not apply to all proceedings involving the exercise of the VCAT's review jurisdiction. See [2428] of *Pizer's Annotated VCAT Act* (2nd Edition, JNL Nominees).
41 (2003) 20 VAR 96.
42 [1998] 4 VR 249 at 261 per Tadgell JA.
43 See also *Re Rymarz and Transport Accident Commission* [2003] VCAT 808 at [13]-[16].
44 See s 117 of the VCAT Act. The VCAT President may extend the 45-day period in accordance with s 117(4).
45 *Noel Johnson's No 1 Pty Ltd v Kennedy-Bush* (1996)10 VAR 102 at 107 per Charles JA.
46 (2000) 17 VAR 34.
47 [2004] VSC 152.
48 [2003] VSC 97.
49 (2002) 5 VR 547
50 Similarly, in *Hamilton v White* (2000) 18 VAR 1 the Supreme Court endorsed the Federal Court decisions of *Copperart Pty Ltd v Commissioner of Taxation* (1993) 26 ATR 327 at 328-329 and *Australian Postal Corporation v Lucas* (1991) 14 AAR 487 at 495 and held that the question as to whether the findings of fact made by the VCAT are sufficient will always turn on all the circumstances of the particular case.
51 Except if the VCAT was constituted by, or presided over by, the VCAT President: see s 2 of the ALA.
52 [2004] VCAT 1048.
53 The definition goes on to state that a 'proceeding' includes an inquiry conducted by the Tribunal, a compulsory conference, a mediation, a rehearing or reassessment under Part 6 of the *Guardianship and Administration Act 1986*, but does not include a referral by the Tribunal to the Equal Opportunity Commission under section 156(1) of the *Equal Opportunity Act 1995*.
54 The VCAT must have actually made an order instead of merely being inclined to do so: *The Muir Electrical Company Pty Ltd v The Commissioner of State Revenue (No 2)* [2002] VSC 224 at [40].
55 This point was emphasised by the High Court in *The Roy Morgan Research Centre Pty Ltd v Commission of State Revenue* (2001) 207 CLR 72 at [15]:

> Section 148 of the VCAT Act is concerned with the invocation of judicial power to examine for legal error what has been done in an administrative tribunal. Although s 148 uses the word 'appeal', it is clear that the Supreme Court is asked to exercise original, not appellate, jurisdiction and to do so in proceedings which are in the nature of judicial review... [I]t is important to recognise that the essential character of s 148 is that it provides for the institution of proceedings in the Supreme Court, by leave, in which the legal correctness of what the Tribunal has done can be challenged.

56 Applications under the ALA have been made to prevent the VCAT from continuing to hear a proceeding — *The Warehouse Group (Australia) Pty Ltd v Bevendale Pty Ltd*, referred to in [2002] VSC 291 at [34] - and to quash a decision of the VCAT: *Sweetvale Pty Ltd v VCAT* [2001] VSC 426.
In the latter case the Court noted that there was no suggestion that the proceeding under the ALA could not be brought - whether or not the applicants might have proceeded under section 148 of the VCAT Act. An application for leave to appeal to the Court of Appeal was dismissed: *Sweetvale Pty Ltd v VCAT* [2003] VSCA 83. See also *Podhaski v Bennett* [2000] VSC 197; *Loh v Shi* [2003] VSC 271 at [18].

57 See *Richards v VCAT* [2000] VSC 148.

58 See, eg, *Independent Cement and Lime Pty Ltd v VCAT* (2000) 16 VAR 290; *Tamas v VCAT* [2002] VSC 309 (an appeal to the Court of Appeal was allowed: *Tamas v VCAT* (2003) 20 VAR 237).

59 *The Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 207 CLR 72 at [15].

60 (2001) 17 VAR 306.

61 It should be noted, however, that is has been said that it is 'uncertain' whether a denial of procedural fairness gives rise to a question of law for the purposes of section 148: see *PRA v MA* [2004] VSCA 20 at [36]. This issue is discussed in detail in *Pizer's Annotated VCAT Act* (2nd Edition, JNL Nominees) at pages 493 -494.

62 (2002)19 VAR 111.

63 (2002) 11 VPR 98. See clause 52 of Schedule 1 to the VCAT Act.

64 (1987) 7 NSWLR 503.

65 (1987) 7 NSWLR 503 at 519.

66 Section 44(1) of that Act provides that a party to a proceeding before the AAT may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

67 See, eg, *Deputy Commissioner of Patents v Board of Control of Michigan Technological University* (1979) 2 ALD 711 at 714 and 723. See also *Director-General of Social Services v Chaney* (1980) 3 ALD 161 and *Northcote Food Wholesalers Pty Ltd v City of Northcote* (1994) 13 AATR 175.

68 [2004] VCAT 1048.

69 (1995) 184 CLR 163 at 176-180. In *Tamas v VCAT* [2002] VSC 309 Gillard J observed (at [23]) that whether or not the VCAT is to be equated with an inferior court or an administrative tribunal (for the purposes of *Craig's* case) is an interesting and difficult question. His Honour then appeared to proceed on the basis that the VCAT was to be equated with an inferior court because the VCAT had the power to decide questions of law, and those questions must be decided by a judicial member or a member who is a legal practitioner. On appeal, the Court of Appeal was spared the need to resolve this question: see *Tamas v VCAT* (2003) 20 VAR 237 at [30].

70 Ibid at 179.

71 See *Minister for Immigration v Bhardwaj* (2002) 209 CLR 597; *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476, esp at [76] and [83].