Introduction

The Victorian Civil and Administrative Tribunal (**VCAT**) was created by the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)* (the **VCAT Act**) which received Royal Assent on 2 June 1998. The Tribunal itself came into being on 1 July 1998 and took over the jurisdiction of a number of previous statutory bodies, most notably the Administrative Appeals Tribunal. It also took over the functions of the Small Claims Tribunal, Domestic Building Tribunal, the Anti-Discrimination Tribunal and the Residential Tenancies Tribunal as well as specific functions of various administrative and disciplinary boards and tribunals.

One of the most important features of the VCAT is that it is a creature of pure statute. VCAT has no inherent jurisdiction[1], unlike the various Victorian and Federal Courts of the judicial system. As such, unless a power has been given under an "enabling enactment", (defined in section 3 of the VCAT Act), the power does not exist. A full list of the enabling enactments can be found at Appendix 4.

VCAT is divided into 3 divisions each with a number of "Lists" (each list essentially representing a previous "tribunal") in the following structure:

CIVIL DIVISION	**ADMINISTRATIVE DIVISION**	**HUMAN RIGHTS DIVISION**
Civil Claims List Credit List Domestic Building List Legal Practice List Real Property List Residential Tenancies List Retail Tenancies List	General List Land Valuation List Occupational and Business Regulation List Planning and Environment List Taxation List	Anti-Discrimination List Guardianship List

[1] Roads Corporations v Maclaw No 469 Pty Ltd (2001) 19 VAR 169

Each List follows slightly different practices and procedures, which is what can make VCAT a midfield for practitioners. In many ways VCAT still acts like a number of largely separate Tribunals housed in the same building. For the purpose of this paper, any statement applies generally to the various lists unless otherwise noted.

VCAT has a five tiered hierarchy of members.

- President of VCAT (Supreme Court judge)
- Two Vice-Presidents (County Court judges appointed to head divisions - In addition, five other Vice Presidents who are County Court Judges can be called to sit at VCAT).
- Deputy Presidents (appointed to manage one or more lists - one of whom is also appointed to head a division); and
- Senior members and other members (serve on the lists on a full-time or sessional basis).

At the time of writing this paper, VCAT currently has an "acting President" being His Honour Judge Bowman of the County Court, rather than a Supreme Court Judge.

VCAT has over 300 full time and sessional members, not all of whom are legally qualified. A full list of the members can be found on the VCAT website or in the VCAT Annual Report.

VCAT sits primarily at 55 King Street, Melbourne but also conducts some hearings (mostly residential tenancies, small claims and motor car traders disputes) at some suburban and regional locations[2]. In those cases, VCAT uses the facilities of the relevant Magistrates Court.

[2] a full list is available on the VCAT website in the "about VCAT" section

Commencing an application at VCAT

Procedure for commencing an application varies from list to list[3]. Each list has its own application form prescribed by the rules[4] all of which are available from VCAT or the VCAT website[5]. For reference, copies of some of the common application forms are annexed at Appendix 1. An application fee is payable on commencement of most applications. A full list of the fees payable for a given application is annexed at Appendix 2.

Commencement of proceeding in VCAT is regulated by sections s. 67 – 72 of the VCAT Act.

The various forms do not take the form of pleadings, and VCAT is loathe to enter into "pleading fights" save where there is an argument about correct parties or insufficient details. Such arguments are usually taken up at directions hearing, or by bringing on an application for further directions. This is only usually allowed in larger or more complex cases.

VCAT will, in certain cases, allow a case to be commenced at VCAT before requiring "Points of Claim". This is often the case, for example, in the Domestic Building List, where the Tribunal will often schedule a mediation and only if the mediation is unsuccessful will a directions hearing be scheduled and provision made for "Points of Claim", discovery and the like be made. While this can often assist in resolving the dispute, as mediation is held before legal expenses have gotten too high, it can equally mean that the parties go some way through the process before the issues are fully ventilated. The Tribunal has discretion to timetable a case in any way it sees fit, so the larger the amount in dispute, the more "Court like" the procedures become.

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[3] Rule 4.03 of the VCAT Rules prescribes the standard form, but this is varied for most of the civil lists.
[4] Pursuant to s.67 of the VCAT Act.
[5] The content of such forms is prescribed by Schedule 2 of the VCAT Rules, with the exception of the Civil Claims form, which is "for guidance" rather than prescribed. See Rule 6.11 of the VCAT Rules.

Determining relevant practice & procedure

Practice and procedure in VCAT is set out in the VCAT Act and Victorian Civil and Administrative Tribunal Rules 1998 (**VCAT Rules**). There is, in certain cases, a significant variance between lists.

The VCAT Act sets out powers (and in some cases, procedure) for the entire Tribunal. However, importantly, Schedule 1 of the VCAT Act can exclude certain provisions of the Act for individual lists or specific kinds of cases. As such, each section must be reviewed in light of the exclusions in the Schedule when determining what power VCAT has in any given case.

The VCAT Rules work in a similar fashion. Order 4 sets out "General Procedure". Orders 5 and 6 then set out specific exclusions or additions to the procedure of any given list.

There are also a number of Practice Notes[6] followed by each list[7], which clarify or define certain issues. These Practice Notes are published by VCAT and can be found on the VCAT website.

As such, determining relevant procedure can be a tricky and often time consuming venture. The important thing to remember is to check the relevant exclusions/additions to the Act and Rules and the relevant list Practice Note.

Handy Hint: Not all of the VCAT Practice Notes are found on the VCAT "Practice Note" page. You should check the specific section for the relevant list to ensure you have all the relevant information.

[6] Pursuant to s.158 of the VCAT Act.
[7] Some lists have a number of Practice Notes.

Selecting VCAT or a Court

Much of VCAT's jurisdiction is now exclusive or mandatory and parties have no choice but to bring their disputes to VCAT. For example:

- Domestic Building claims[8];
- Planning disputes;
- Retail Leasing/Tenancy disputes[9];
- Residential Tenancy disputes[10];
- Certain property disputes such as between co-owners of land[11] or land valuation disputes[12].

However, other claims, such as claims under the Fair Trading Act 1999 (Vic) (**FTA**) could, in many cases, also be properly brought in the Court with the appropriate monetary jurisdiction. I will address below some of the relevant factor that can be relevant to the parties when considering the best jurisdiction for them.

Small Civil Claims – under $10,000.00

Most "small claims" brought in VCAT could equally have been brought in the Magistrates Court. Most small monetary disputes are basically contractual in nature, and so can be brought under a breach of contract type claim in the Magistrates Court or a claim under the FTA (for example, a breach "merchantable quality"[13] or "fitness for purpose"[14] provisions.)

There is little difference between procedure in the Magistrates Court and VCAT for claims under $10,000.00. Such claims are heard pursuant to the "arbitration" procedure

[8] Part 5 of the *Domestic Building Contracts Act* 1995 (Vic)
[9] Part 10 of the *Retail Leases Act* 2003 (Vic)
[10] *Residential Tenancies Act* 1997 (Vic)
[11] Part IV of the *Property Law Act* 1958 (Vic)
[12] Part III of the *Valuation of Land Act* 1960 (Vic)
[13] s.32I of the FTA
[14] s.32IA of the FTA

of the Magistrates Court or listed in the Small Claims list at VCAT. Neither VCAT nor the Magistrates Court is bound by the rules of evidence in such hearings and both may select the procedure it deems appropriate. Both usually proceed to final hearing without directions or mediation. Both have power to strike out contractual provisions pursuant to Part 2B of the FTA, but VCAT's powers are limited to statutory powers, whereas the Magistrates Court has certain inherent powers. Neither requires formal pleadings or discovery. Filing fees for VCAT are slightly lower ($33 for VCAT, $138.70 for Magistrates[15]). While it is difficult to say with certainty, it appears VCAT matters are finalised faster than in the Magistrates Court[16]

Parties have an automatic right to legal representation in the Magistrates Court, but may only be represented in small claims at VCAT in very limited circumstances[17]. VCAT will often refuse an application for leave to appear. VCAT **can not** award costs in civil claims under $10,000.00[18] whereas costs are usually awarded to the successful party in a Magistrates Court application but such costs are capped at $1,114.00[19] pursuant to Regulation 6 of the *Magistrates Court (Arbitration) Regulations* 2000.

Civil Claims – over $10,000.00

The difference between the various Courts and VCAT in larger civil claims is more marked.

VCAT is not bound by the rules of evidence, whereas each of the relevant Courts are. Courts will require pleadings, whereas VCAT will only ask for "Points of Claim" and "Points of Defence" (essentially pleadings) where it is deemed appropriate.

The Magistrates Court will usually order a "pre-hearing conference" while VCAT may order directions or a compulsory conference depending on the complexity of the matter

[15] Filing fee can be recovered by the successful party in the Magistrates Court.
[16] 80% of Civil List cases are finished with 12 weeks in VCAT according to the 2005/2006 Annual Report, whereas the 2004/2005 Magistrates Annual Report indicated that 84% of cases had been pending for less than 6 months.
[17] See section on Representation at VCAT, below.
[18] Clause 28GG(1) of Schedule 1 of the FTA
[19] for cases under 2 hours only – after that point usual cost scale applies.

(directions hearings are only required in more complex matters, but compulsory conferences are ordered in most claims over $10,000.00). Parties can request a compulsory conference or directions in VCAT if they believe it will assist.

Parties can be represented in VCAT in certain circumstances[20] (but leave is more likely to be given in cases over $10,000.00) whereas parties have an automatic right to representation in the Courts. Costs **may** be awarded by VCAT[21] but do not automatically follow the event like the Courts. There is no "scale" applicable to VCAT so the sum of any costs award is not certain.

Alternative Dispute Resolution at VCAT

VCAT has two main alternative dispute resolutions procedures:

(a) Compulsory Conferences;

(b) Mediations.

VCAT can order a mediation and/or a compulsory conference. Usually one or the other is held rather than both. Which is held depends on practice in any given list. The table below summaries general practice.

Mediations	Compulsory Conferences
Retail Tenancies small claims (1.5 hours maximum) Retail Tenancies standard ($15,000 to $100,000) claim (no time limit) Retail Tenancies complex (over $100,000) claim (after directions hearing) Domestic Building standard claims Domestic Building Complex claims	Domestic Building small claims (& other claims at the discretion of the Tribunal) Real Property List Civil List – Small Claims

[20] Pursuant to s. 62 of the VCAT Act – see section on representation, below.
[21] Pursuant to s.109 of the VCAT Act – see section on Costs, below.

(usually referred after directions) Credit list (usually within 14 days) Planning & Environment (at discretion of member, often in consultation with the parties)	

VCAT have a stated aim to resolve disputes "quickly and fairly" and have indicated that "mediation plays an essential role in resolving a wide range of disputes informally and cost-effectively".

Compulsory Conferences

Compulsory conferences are the VCAT equivalent of pre-hearing conferences in the Magistrates Court.

Relevant sections of the VCAT Act: s83 – 87.

Generally, compulsory conferences are without prejudice and no evidence can be called in relation to statements or admissions at compulsory conference without consent of both parties[22]. The major exception to this is contained in the Practice Note in the Real Property List[23] which states that "if, the presiding member is of the view that an issue of fact or law relied upon by a party should have been raised at compulsory conference, the Tribunal may give appropriate weight to this consideration on the question of costs". The Real Property List also requires that "each party to the proceeding must file and serve on every other party a short statement of that party's case and any other information which is likely to facilitate the efficient conduct of the conference including any expert reports upon which that party will rely"[24].

[22] s.85 VCAT Act
[23] Practice Note RP1
[24] Rule 6.35 *Victorian Civil and Administrative Tribunal R*ules 1998 (**VCAT Rules**)

The Tribunal can order the parties to attend personally or by a representative who has authority to settle the dispute[25]. Not surprisingly, such order is commonly made.

VCAT also has the power to strike out a party's application or make an adverse finding against the party for failure to attend a compulsory conference[26].

Useful fact: Section 86 provides that a party can object to the member who presided over the compulsory conference being the presiding member at the hearing of the dispute. Unlike mediation, this is not a given and the objection must be made at or before the commencement of the hearing.

Mediations

Mediations are the primary method of alternative dispute resolution, used generally in the more complex matters at VCAT.

Relevant sections of the VCAT Act: s. 88 – 93

VCAT may make an order requiring a party to appear personally or through a representative with authority to settle[27]. As with Compulsory Conferences, such orders are common.

Mediations are without prejudice and the evidence is inadmissible at final hearing without the consent of both parties[28]. This rule has been read widely and it has been held that VCAT can not override the prohibition[29] and the Tribunal has held that a contention by one party that the mediation was not undertaken properly by the other party will not

[25] s. 84 VCAT Act
[26] s. 87 VCAT Act
[27] s. 89 VCAT Act
[28] s. 92 VCAT Act
[29] A*l-Hakim v Monash University* (unreported VCAT decision of McKenzie DP, 30 July 1999)

override the provision[30]. One exception to the rule is that the fact of settlement and the terms of settlement are admissible to allow VCAT to satisfy itself as to the fact of settlement[31].

Section 88(6) provides that a VCAT Member who has sat as the mediator in a matter may not then sit as the Tribunal in the matter[32].

Mediations in VCAT are subject to the Code of Conduct published in the 2002-2003 VCAT Annual Report (and now published on VCAT website in the mediation section).

Representation at VCAT

Parties do not have an automatic right to legal representation at VCAT. In fact, in many ways, representation works in the opposite way to the Courts. Leave must usually be sought before legal representation is allowed. Law Clerks and Article Clerks are treated as legal representatives for VCAT's purposes. The relevant provision of the VCAT Act is section 62[33], which provides:

62. Representation of parties

(1) In any proceeding a party—

(a) may appear personally; or

(b) may be represented by a professional advocate if—

(i) the party is a person referred to in sub-section (2); or

(ii) another party to the proceeding is a professional advocate; or

(iii) another party to the proceeding who is permitted under this section to be represented by a professional advocate is so represented; or

(iv) all the parties to the proceeding agree; or

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[30] *D & M Gude v Grant Stephens* [2007] VCAT 810, Aird DP

[31] See *Hart v Kuna* (unreported VCAT decision of McKenzie DP, 30 June 1999) in which the Tribunal determined that, in order to exercise its functions under s.93, the Tribunal must be satisfied that the parties agreed to settle and may look at terms of settlement and oral agreements to settle in order to do so.

[32] Except in the Civil – Small Claims list (pursuant to Clause 28EE & 28FF of Schedule 1 of the VCAT Act) and in the Residential Tenancies List (pursuant to Clause 70 of Schedule 1 of the VCAT Act). In both lists there is no prohibition, but a party may object to the mediator constituting the Tribunal at hearing.

[33] Except for "small claims" in the civil list – see below.

(c) may be represented by any person (including a professional advocate) permitted or specified by the Tribunal.

(2) The following persons may be represented by a professional advocate in a proceeding—

(a) a child;

(b) a municipal council;

(c) the State or a Minister or other person who represents the State;

(d) a public entity within the meaning of the P*ublic Administration Act* 2004;

(e) the holder of a statutory office within the meaning of the *Public Administration Ac*t 2004;

(f) a credit provider within the meaning of the C*onsumer Credit (Victoria) Code* or the *Credit Act* 1984;

(g) an insurer within the meaning of the *Domestic Building Contracts Act* 1995.

S.62(8) defines a "professional advocate" as either:

(a) a person who is or has been a legal practitioner; or

(b) a person who is or has been an articled clerk or law clerk in Australia; or

(c) a person who holds a degree, diploma or other qualification in law granted or conferred in Australia; or

(d) a person who, in the opinion of the Tribunal, has had substantial experience as an advocate in proceedings of a similar nature to the proceeding before the Tribunal.

Subsection (d) can include persons such as town planners or other relevant experts.

Representation in the Civil Claims List

Representation is considered on a case by case basis in the Civil List. There is no Practice Note in place regarding representation, but the "Civil Claims Guide" published by VCAT provides as follows:

May I use a lawyer?

Where the claim is for $10,000 or less, in almost all circumstances parties must present their own case. Lawyers will not be allowed.
If more than $10,000 is in dispute, lawyers are sometimes allowed to represent those involved.

Clause 28BB of Schedule 1 of the VCAT Act provides that s.68(2) does not apply to "small claims". Instead, the relevant test is as follows:

> **(1) A party to a proceeding relating to a small claim may be represented by a professional advocate only if—**
>
> **(a) the Tribunal is satisfied that no other party to the proceeding will be unfairly disadvantaged if the representation is allowed; and**
>
> **(b) either—**
>
> **(i) all parties to the proceeding agree; or**
>
> **(ii) the Tribunal directs that the representation be allowed.**

As such, for claims over $10,000.00, the test set out in s.68 applies. In claims under $10,000.00 the test is as set out in Schedule 1.

Representation in the Planning and Environment List

On an application by a party under section 62(1)(c) of the Act, the Tribunal will ordinarily permit the party to the represented by any person (whether or not a professional advocate)[34].

Representation in the Land Valuation List

On an application by a party under Section 62(1)(c) of the Victorian Civil and Administrative Tribunal Act 1998, the Tribunal will ordinarily permit a party to be represented by any person (whether or not a professional advocate)[35].

[34] Item 3.1 Practice Note PE5
[35] Item 12, Practice Note LV1

Representation in the Domestic Building List

The Domestic Building List operates, in reality, on the assumption the parties will be legally represented[36] (often because one party is an insurer and entitled to representation pursuant to s. 62(2)(g)), and it is reflected in the general practices of the list (i.e. requiring Points of Claim where parties are represented[37], allowing representatives to attend certain hearings[38] etc)

Nevertheless, Practice Note DB1 provides:

> *[In small claims] Unless all parties agree, legal representation will only be permitted by order of the*
>
> *Tribunal under s62 of the Act except as otherwise provided in s62 including where: the application is an appeal against a decision of an insurer which is entitled to*
>
> *a. be legally represented under s62(2)(g) of the Act; or*
>
> *b. another party to the proceeding is a professional advocate[39].*

Representation in the Retail Tenancies List

Practice Note RT1 provides as follows:

> *On an application by a party under section 62(1)(c) of the Act, the Tribunal-*
>
> *a. will ordinarily permit the party to be represented by a legal practitioner; and*
>
> *b. may be expected to require to be satisfied that permission ought to be given for the party to be represented by a person who is not a legal practitioner.*

Representation in the Credit List

No Practice Note on the Credit List exists regarding representation, however the "Credit List – Users Guide" provides indicates it will allow representation when it provides:

> *Many other people arrange for lawyers to present their cases before the Tribunal. The **Consumer Credit (Victoria) Code** and the **Credit Act** 1984 are complex*

[36] Item 11.4, 11.5, 12.1 Practice Note DB1 (2007)
[37] Item 6.2 Practice Note DB1 (2007)
[38] Item 11.4 Practice Note DB1 (2007)
[39] Item 8.1(iv) Practice Note DB1 (2007)

pieces of legislation, and, with more complex disputes, you may be assisted by the advice of a lawyer.

Representation in the Taxation List.

Practice Note T1 provides as follows:

On an application by a party under section 62(1)(c) of the Act, the Tribunal -

a. *will ordinarily permit the party to be represented by a legal practitioner; and*
b. *may be expected to require to be satisfied that permission ought to be given for the party to be represented by a person who is not a legal practitioner.*

Representation at mediation

Representation at mediation is also subject to s.68 in the same manner as hearings before the Tribunal. As such, whether representation is allowed will depend on the type of case, its complexity and, to a lesser extent, the amount of the claim.

In relation to legal representation, the Mediations Code of Conduct, somewhat cryptically, states that:

Advocates, professional advisers and/or "support people" may attend unless the mediator believes their presence would make the mediation unfair. An unrepresented party will generally be considered to be acting reasonably in refusing to continue with a mediation where another party is represented, just as a represented party will generally be considered to be acting reasonably in refusing to continue with a mediation if another party is insisting that all parties should be unrepresented. However, a party who does not give the mediator the opportunity to resolve the issue of representation is acting unfairly. It is noted that under s62 of the VCAT Act, parties to a "proceeding" (which term includes a mediation) generally do not have an automatic right to representation.

Evidence at VCAT

Evidence Generally

Section 102(1) of the VCAT Act provides that:

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

Like everything else at VCAT, the level of formality in hearings varies from list to list and parties should always check the practice note for guidance.

Procedure and formality is a matter to be determined by the sitting member as he or she sees fit. As a general rule, the more "commercial" the dispute, the more formal the procedure adopted. For instance, the Retail Tenancies List commonly runs in a very formal manner, with counsel attending and presenting the case as they would to a Court. On the other hand, in small claims or in the Residential Tenancies List the procedure is informal, with parties and the representatives sitting at the bar table, no formal objections being taken and the like.

Other aspects of the hearings include:

- Evidence may be given may be given orally or in writing and, where required by the Tribunal must be given on oath or by affidavit[40];
- VCAT must observe the requirement of natural justice, unless the enabling enactment expressly provides to the contrary[41];
- VCAT is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures[42];

[40] s.102(3) of the VCAT Act
[41] s.98(1)(a) of the VCAT Act
[42] s.98(1)(b) of the VCAT Act

- VCAT may inform itself on any matter as it sees fit[43];
- VCAT must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed as practicable[44].

The wide discretion given to the Tribunal means that the Tribunal can consider hearsay evidence, non-original and self serving documents, the submissions of non-parties to the hearing[45] and "judicial notice" of well known facts. Nevertheless, the Tribunal and subsequent Court decisions have indicated that the rules of evidence should be used as a guide and dispensed with only when there is sound reason[46]. As such, practitioners should always prepare their case as if the rules of evidence applied, and have reason why those rules should be departed from to present to the Tribunal (i.e. documents lost, persons unable to be called etc).

Expert Evidence

The use of expert evidence is regulated by s. 94 of the VCAT Act and Practice Note VCAT2, which is based on the Code of Conduct for Experts in the Supreme Court. Importantly, the Practice Note provides[47]:

> *2.1 An expert witness has a paramount duty to the Tribunal and not to the party retaining the expert.*
>
> *2.2 An expert witness has an overriding duty to assist the Tribunal on matters relevant to the expert's expertise.*
>
> *2.3 An expert witness is not an advocate for a party to a proceeding.*

In most lists where Expert Evidence is going to be used, the parties will be required to submit a report from the expert prior to the hearing for example, in Domestic Building[48] and Planning Disputes[49].

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[43] s.98(1)(c) of the VCAT Act
[44] s.98(1)(d) of the VCAT Act
[45] See for example *Re Maroondah CC v Jeng* [1999] VCAT 43
[46] See for example *Clean Ocean Foundation Inc v EPA* [2003] VSC 335 & *Re Curcio v Business Licensing Authority* (2001) 18 VAR 155
[47] Item 2 Practice Note VCAT2
[48] See Item 18 of Practice Note DB1 (2007)
[49] See Item 4.2 of Practice Note PE1

In some cases, especially Building or Planning Disputes, the majority of the evidence is provided by experts. The Tribunal may, if it sees fit, require a meeting of the experts in an attempt to resolve the dispute. The Domestic Building Practice Note provides as follows:

> *From time to time the Tribunal may order a meeting of experts – either between the experts themselves or facilitated by a mediator or member, with a joint report to be provided to the parties and the Tribunal.*
>
> *Parties and their legal advisors shall not attend a meeting of experts ordered by the Tribunal unless granted leave to do so by order of the Tribunal.*
>
> *Where a meeting of experts is ordered as part of a mediation or compulsory conference, unless the parties agree or it is otherwise ordered, all discussions, concessions and agreements reached, including any joint report prepared as part of the mediation or compulsory conference process, shall be on a 'without prejudice' basis and for the purpose of the mediation or compulsory conference.*[50]

Discovery

VCAT does not have a process for formal discovery. As such, it is common, in smaller cases at least, for the first time documents are seen to be on the day of hearing.

Orders for "lists/copies of documents on which parties intend to rely" are more common in more complex hearings[51] and are commonly part of orders made at directions hearings[52]. Such lists or copies are usually required 7 or 14 days prior to hearing. The

[50] Item 19 Practice Note DB1 (2007)
[51] Such as civil claims over $10,000.00, standard and complex retail or building claims
[52] Directions hearings usually only held in more complex cases.

Tribunal also has the power to compel production of documents from third parties[53] or from witnesses pursuant to a summons[54].

Privilege

In the "Review" jurisdiction of VCAT, s.80(3) provides a waiver of almost all forms of privilege. The power contained in s.80(3) does **not** apply to civil matters. As such, the relevant sections regarding privilege are s. 105 which provides that the rule against self incrimination does not apply in VCAT and s.105 which provides that other forms of privilege remain.

Section 105 provides as follows:

> **(1) A person is not excused from answering a question or producing a document in a proceeding on the ground that the answer or document might tend to incriminate the person.**
>
> **(2) If the person claims, before answering a question or producing a document, that the answer or document might tend to incriminate them, the answer or document is not admissible in evidence in any criminal proceedings, other than in proceedings in respect of the falsity of the answer.**

Section 106 provides as follows:

> **(1) Except as provided by section 80(3) or 105, a person is excused from answering a question or producing a document in a proceeding if the person could not be compelled to answer the question or produce the document in proceedings in the Supreme Court.**

[53] Pursuant to s.81 of the VCAT Act
[54] Pursuant to s. 104 of the VCAT Act

Remedies and enforcement

VCAT's powers to make orders and declare relevant remedies is quite similar to those powers of a Court.

Potential Remedies

Some of the potential remedies available in VCAT are[55]:

- Order payment of money
- Order compliance with a contract (including work to be done)
- Order the return of goods
- Order payment of damages (including exemplary damages in some cases)
- Order payment by way of restitution
- Review or vary a contract
- Order a party to comply with a contract
- Cancellation (rescission) of a contract
- Make a declaration pursuant to s. 124 of the VCAT Act;
- Grant an injunction (permanent or interim, ex parte or not) pursuant to s.123 of the VCAT Act
- Order a party to do or not to do something (retraining injunction, pursuant to s.123)
- Declare a term of a consumer contract unjust pursuant to Part 2B of the *Fair Trading Act*;

[55] see VCAT website

Other powers of VCAT

Additional powers, not in the nature of a remedy, include:

- Power to enter or inspect land or order an occupier of land to allow access to a party or third party pursuant to s.129 of the VCAT Act;
- Make any order or decision subject to conditions pursuant to s.130(1)
- Require a party to provide an undertaking to the Tribunal as a condition of further orders pursuant to s. 130(2)(d) of the VCAT Act;
- Retain documents or exhibits pursuant to s.128 of the VCAT Act.

Enforcement

When a monetary order of the Tribunal has not been complied with, in order to enforce the order as a judgment debt, the holder of the order must make application to the Registrar of the Magistrates' Court (or such higher Court if the debt is over $100,000) the following documents:

(1) a certified copy of the order of the Tribunal; and

(2) a sworn affidavit stating:

(a) that the applicant is the person to whom payment is to be made under the order; and

(b) the amount of money that has not been paid.[56]

The documents must be filed at a Magistrates Court with a "nexus" to the parties (i.e. where the applicant lives, the debt was due or the place of business of the judgment debtor). Once these documents are filed, the judgment creditor and debtor have the same rights as if the order had been made by the Court (i.e. rights under the *Judgment Debt Recovery Act* 1984, the *Bankruptcy Act* 1966 etc)[57].

[56] Pursuant to s.121 of the VCAT Act.
[57] See "Enforcing a VCAT order for the payment of money" fact sheet on the VCAT website for further information.

Enforcement of non-monetary order requires the following documents be lodged with the Supreme Court[58]:

(1) a certified copy of the order of the Tribunal; and

(2) a sworn affidavit stating:

(a) that the applicant is the person to whom payment is to be made under the order; and

(b) the amount of money that has not been paid; and

(3) a certificate from a judicial member of the VCAT stating that the order is appropriate for filing in the Supreme Court.

Once filed, the order is taken to be an order of the Supreme Court and can be enforced accordingly[59].

Costs

Costs Generally

VCAT was set up to be a no cost/low cost jurisdiction.

Costs in VCAT are generally regulated by s.109 of the VCAT Act[60]. Section 109(1) provides that, except as set out, *each party is the bear its own costs* in the proceeding[61] but that VCAT has power to award costs at any time[62].

Section 109(3) provides that VCAT may make an order for costs "only if satisfied that it is fair to do so, having regard to:

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—

[58] Pursuant to s.122 of the VCAT Act
[59] s.122(3) of the VCAT Act.
[60] except Retail Tenancies – see below.
[61] s.109(1) VCAT Act
[62] s,109(2) VCAT Act

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant."

The wording of both s.109(1) and s.109(3) indicate a presumption against the grant of costs. It should be noted that, nonetheless, there is a wide discretion on costs. Specifically, McNamara DP stated:

> *Sub-section (1) provides and establishes a presumption that in Tribunal matters costs are to lie where they fall. Sub-sections (2) and (3) permit this prima facie situation to be departed from in a number of circumstances. The last of those circumstances referred to in paragraph (e) of Section 109(3) is "any other circumstances which seem to the Tribunal to be relevant". The consequence therefore is to give this Tribunal a discretion in the widest possible terms as to what costs orders ought to be made, subject of course to the presumption that generally costs would lie where they fall. In considering Section 109 in the course of a seminar at Leo Cussen Institute on the Retail Premises Reform Act 1998 Mr*

> *Golvan QC said that the section provided the widest possible discretion to the Tribunal and I respectfully agree with that opinion.*[63]

Notwithstanding the presumption against costs, the argument that the award of costs is limited to "gross unreasonableness" or "bad faith" was rejected by VCAT[64].

In the Domestic Building List, practitioners are required to notify their clients in writing of the potential costs of proceeding with the case[65] and draw their attention to the provisions of section 109.

VCAT also has power to make an award against a "representative" of the party rather than the parties themselves if it believes the "representative" are responsible for the contravening behaviour[66]. It must, however, give the representative an opportunity to be heard before such an order is made[67].

The Court of Appeal[68] determined that the phrase "representative" in s.109 was a reference to the concept of representation in s.62 of the VCAT Act and did not generally refer to any representative. In that case, the Court of Appeal overturned a decision ordering a director of a corporate respondent to pay costs. The Court of Appeal determined that s.109(4) was directed primarily at "professional representatives" such as legal representatives.

Additional costs provisions

An additional head of power on the question of costs is found in section 74(b) of the VCAT Act which provides that:

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[63] Re *Nicol v VOCAT* [2001] VCAT 840 at para 26.
[64] See for example *Maltall Pty Ltd v Bevendale Pty Ltd* (1999) V Conv R 58-528 and *Schou v State of Victoria* (unreported, VCAT, McKenzie DP, 20 July 1999)
[65] Practice Note DB1 (2007) item 32.2
[66] s.109(4) VCAT Act
[67] s.109(5) VCAT Act
[68] in *Tamas v VCAT* [2003] VSCA 113

> **if an applicant withdraws an application or referral …the Tribunal may make an order that the applicant pay all, or any part of, the costs of the other parties to the proceeding.**

The VCAT Act also makes provision for the award of costs when a case has been summarily dismissed (as being vexatious or an abuse of process) pursuant to s.75[69]. Section 75(2) provides that:

> **If the Tribunal makes an order under sub-section (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.**

Section 78 of the VCAT Act, which deals with "conduct of a proceeding causing disadvantage" also provides a power to award costs. It should be noted, however, that s.78 merely enlivens the jurisdiction of the Tribunal pursuant to s.109 rather than providing an additional head for the award of costs. As such, the conditions in s.109 must be satisfied before an award can be made, notwithstanding that the Tribunal determines that a party has acted in a manner causing disadvantage under s.78.

Circumstances for the award of Costs

Section 109(3)(a) generally requires that a party have behaved in a way that "unnecessarily disadvantaged another party to the proceeding". VCAT has held, however, that this does not necessarily have to be "serious". In the case of *Nakkasoglu v Bayside City Council* [2000] VCAT 682, Member Moles stated that:

> *I reject [the] argument that the Council's mistaken actions needed to be, and were not, serious enough to justify an award of costs. It is my assessment that Section 109(3) of the VCAT Act lists not merely "very serious" matters or deliberate actions which justify costs, but refers to a range of ways in which parties may cause unnecessary disadvantage to others. There is no requirement that the action be deliberate or malicious. Nor is there a requirement that the actions be very*

[69] No such power exists when a claim is summarily dismissed for want of prosecution pursuant to s.76

serious. While I agree some of the matters listed are of that kind, Section 109(3)(a), relates to actions which are not necessarily very serious: it simply refers to conducting the proceeding "in a way that unnecessarily disadvantages another party". It seems to me that a Responsible Authority by not performing its statutory duty, could well find itself unnecessarily disadvantaging some persons.

Costs in Civil Claims

Pursuant to Clause 28GG(1) of Schedule 1 VCAT Act, VCAT can not order costs in a "small claim" (claim under $10,000.00) except on a reopening of a case on substantive grounds pursuant to s.120 of the VCAT Act[70]. Costs in "standard" civil claims (over $10,000.00) are pursuant to s.109 of the VCAT Act.

Costs in Planning and Environment List

Clause 63 of Schedule 1 of the Planning and Environment Act provides that, in addition to the matters listed in s.109 of the VCAT Act, VCAT may have regard to whether or not the proceeding in the list was brought primarily to secure or maintain a direct or indirect financial advantage.

Section 150(4) of the Planning and Environment Act also provides that compensation for loss and damage and costs may be ordered by the Tribunal when a case is brought vexatiously or frivolously or primarily to secure a financial advantage.

Costs in the Land Valuation List

Section 109 of the VCAT Act does not apply to proceedings brought under the *Land Acquisition and Compensation Act* 1986[71] or the *Valuation of Land Act* 1960[72]. See

[70] S.120 provides for a procedure similar to "rehearing applications" in the Magistrates Court.
[71] Clause 26 of Schedule 1 of the VCAT Act
[72] Clause 99 of Schedule 1 of the VCAT Act

section 25(2) of the *Valuation of Land Act* and section 91 of the *Land Acquisition and Compensation Act* 1986 for the relevant cost provisions.

Costs in the Retail Tenancies List

S.92 of the Retail Leases Act 2003 (Vic) provides a different regime for costs in the Retail Tenancies List. Section 92 provides as follows:

> **(1) Despite anything to the contrary in Division 8 of Part 4 of the Victorian Civil and Administrative Tribunal Act 1998, each party to a proceeding before the Tribunal under this Part is to bear its own costs in the proceeding.**
>
> **(2) However, at any time the Tribunal may make an order that a party pay all or a specified part of the costs of another party in the proceeding but only if the Tribunal is satisfied that it is fair to do so because—**
>
> > **(a) the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding; or**
> >
> > **(b) the party refused to take part in or withdrew from mediation or other form of alternative dispute resolution under this Part.**

Section 92 was inserted into the Retail Leases Act 2003 after a series of decisions in the Retail Tenancies List pursuant to the Retail Tenancies Reform Act 1998 in which VCAT had exercised its jurisdiction to award costs in favour of successful parties in the basis that cases in the Retail Tenancies List were "essentially commercial in nature". Given the limited circumstances in which costs can be awarded, very few such awards have been made since the introduction of the Retail Leases Act in 2003.

Amount of Costs

The amount of costs awarded by the Tribunal is regulated by s.111 of the VCAT Act. VCAT does not have a "scale" like the various Courts and may, on a taxation, use any scale it deems appropriate[73]. It may also make an order for costs on a party-party, solicitor-client or indemnity basis[74]. It appears, however, that the relevant County Court scale appears to be favoured by the Tribunal.

Offers of Compromise

Sections 112 – 115 of the VCAT Act set out the procure relating to "settlement offers". This system is similar to the standard "offer of compromise" procedure used in the Courts.

Section 112 provides (in part):

> **112. Presumption of order for costs if settlement offer is rejected**
>
> **(1) This section applies if—**
>
> **(a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and**
>
> **(b) the other party does not accept the offer within the time the offer is open; and**
>
> **(c) the offer complies with sections 113 and 114; and**
>
> **(d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.**

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[73] See for example *LJ Constructions Pty Ltd v Four Six Two Beach Road Pty Ltd* [2003] VCAT 1345 in which the Supreme Court scale was used or *Re White and Secretary, Department of Justice (No.2)* (2001) 18 VAR 39 in which the County Court scale was used.

[74] See L*aing v FAI General Insurance Co Ltd* [2000] VCAT 1290 in which case Member Davis affirmed a decision to grant solicitor/client costs on County Court "Scale D" despite the claim being for less than $25,000.

> **(2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.**

Sections 113 and 114 deal with formal matters. The offers may be with or without prejudice[75], must specify a period of time for which the offer is open[76] not less than 14 days[77] and must provide a time for the payment of any money[78]. Offers must not be withdrawn in the specified period[79] without the consent of the Tribunal and can only be accepted by way of signed notice of acceptance[80].

Important to note: VCAT does not have power to take offers of settlement in account on the question of costs unless those offers comply with the formal requirements. As such, standards "Calderbank offers" will not necessarily assist. Remember offers must be in writing and open for at least 14 days.

Security for Costs

Section 79 provides as follows:

> **(1) On the application of a party to a proceeding, the Tribunal may order at any time—**
>
> **(a) that another party give security for that party's costs within the time specified in the order; and**
>
> **(b) that the proceeding as against that party be stayed until the security is given.**

[75] S. 113(1)
[76] S.114(1)
[77] s.114(2)
[78] s.113(4)
[79] s.114(3)
[80] s. 114(6)

VCAT's discretion in relation to security for costs is considered unfettered[81] but follows similar procedures to that of Courts when determining security for costs. That is, VCAT will consider[82]:

(a) whether the applicant's claim is made bona fide and has reasonable prospects of success;

(b) whether the applicant has a lack of funds;

(c) whether the applicant's lack of funds has been caused by the conduct of the respondent;

(d) whether the making of the costs order would unduly damage the applicant's ability to pursue the proceedings.

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[81] *Red Earth Building Maintenance Services Pty Ltd v Dura (Australia) Constructions Pty Ltd* [1999] VCAT 54.

[82] As set out in the leading case of *Sydmar Pty Ltd v Statewide Developments Pty Ltd* (1987) 73 ALR 289.