Civil Litigation: VCAT and the Courts

By Justice Stuart Morris[1]

No-one underestimates the importance of the criminal justice system in Victoria; but it is civil litigation that directly affects more people, more often. A civil justice system is a foundation stone to a democratic state, based upon rule of law. Without such a system trade and commerce would be impossible. Yet the civil system remains the poor cousin in the Victorian justice family. It receives quite modest government funding considering the role it plays in creating a civilised and just society[2]; and its judges and tribunal members are apparently less worthy than those in other Australian jurisdictions.

But while some radio commentators and the Herald Sun seem obsessed with such things as gangland murders, most Victorian litigants are more likely to focus on the operation of civil litigation in this state. In particular, they worry about the time it takes to have their cases heard and the cost of the process.

Sadly research about the performance of Victoria's civil justice system is lacking. The discussion paper by Peter Sallman and Richard Wright, "Going to Court", published in April 2000, helped fill this void; but it contained little by way of statistical analysis. Information can be gleaned from the annual report of the courts and VCAT, but comparisons are difficult by reason of different methods and even different reporting periods.[3]

Notwithstanding the lack of any detailed statistical analysis, one thing is clear. The Victorian Civil and Administrative Tribunal has now emerged as the principal jurisdiction for the resolution of mainstream civil disputes in Victoria. VCAT touches the lives of more Victorian civil litigants, more often, than any other jurisdiction. Indeed, the Principal Registrar of VCAT estimates that in the current financial year there will be more than 275,000 different parties to proceedings before VCAT.

What is even more remarkable is that VCAT determines about 85,000 cases each year on a total allocation of $23 million.

I have spoken elsewhere about the emergence of administrative tribunals in Victoria, but what is less obvious is the gradual manner in which tribunals, now consolidated in VCAT, have gained ascendency in resolving civil disputes.

When I talk to public groups about VCAT most associate it with the Planning List.[4] Sometimes an audience is aware of the tribunal's extensive Guardianship List[5]; and the

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1 A paper delivered at a seminar held by the Law Institute of Victoria as part of its Advanced Civil Litigation Seminar Series 2004 on 15 April 2004.

2 The Report on Government Services 2004 published by the Productivity Commission states that the net cost of court administration recurrent expenditure in 2002-03 for civil courts in Victoria was $35.9 million; and for criminal courts was $83.9 million. VCAT's expenditure was $22.73 million, of which $13.90 million was funded by appropriations. The balance was funded by various trust funds.

3 For example, for a reason unknown to the author, the Supreme Court of Victoria has the practice of reporting by the calendar year rather than the financial year.

4 In 2002-03 the Planning and Environment List decided 3,448 cases. The cost of running the list was $5.54 million.

newspapers love to report cases in our Anti-discrimination List[6]. But these three lists, important though they are, consume just less than 40% of VCAT's resources. The balance of the tribunal's resources are essentially directed at resolving civil litigation.

At the risk of restating old ground, I propose to outline the various civil jurisdictions of the tribunal. Some of these are exclusive jurisdictions; others are shared with the Supreme Court of Victoria or with other jurisdictions.

The exclusive civil jurisdictions of the tribunal are principally in the fields of residential tenancies, retail tenancies, domestic building, transport accident injuries, credit and drainage. These fields cover a huge expanse of our daily lives; yet the parliament has determined that disputes that arise must be determined by VCAT, not any of the courts.

In the 1950s residential tenancy disputes were the lifeblood of the young barrister. The Court of Petty Sessions was the venue. But since 1981, these disputes have been the province of a specialised tribunal, which is now the Residential Tenancies List of VCAT. In 2002-03, the list determined 68,103 cases. Ninety-five per cent of these cases are brought by landlords, including the Director of Housing. Of all applications received:

- 59% related to possession orders;
- 23% were in relation to the forfeiture or payment of bond money;
- 8% related to compensation or to alleged breach of duty; and
- 10% related to other tenancy issues.

The Retail Tenancies List of VCAT is certainly less significant in terms of the number of cases heard, but the very broad definition of what constitutes a *retail* tenancy makes the list of great importance in the commercial world. In 2002-03 a total of 227 cases were heard, the majority of them by the highly regarded Deputy President Michael Macnamara.

Since 1996 domestic building disputes have been exclusively heard by a tribunal, now the Domestic Building List of VCAT. This list hears more building cases than all the courts in Victoria put together. In 2002-03, the list decided 859 cases. Sixty per cent of these were disputes between owners and builders, with the balance being appeals against insurers. Some cases involved residential apartment buildings, with very large sums at stake. The scope of what is a building dispute also appears broad. For example, it has recently been interpreted to include a dispute about the civil works undertaken for a residential subdivision.[7]

Disputes about the extent of injury suffered by victims of traffic accidents must also be determined in VCAT. These cases constitute over 80% of the work of the General List of the tribunal; and in 2002-03, some 1,267 cases were finalised. These cases have many of the trappings of a County Court civil dispute; although, hopefully, not that of cost to the litigants.

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5 In 2002-03 the Guardianship List decided 8,762 cases. The cost of running the list was $2.64 million.

6 In 2002-03 the Anti-discrimination List decided 464 cases. The cost of running the list was $0.90 million.

7 See the decision of Balmford J in *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSC 38.

In the Credit List, the majority of cases the tribunal hears relate to requests for repossession orders; as, without such an order, a credit provider must not enter residential premises to recover mortgaged goods.

Drainage disputes have been a matter for a tribunal, not the courts, since 1975, when the Drainage Tribunal was established. It was initially chaired by the late Russell Barton, who went on to record many years of service on tribunals in Victoria. Later the Drainage Tribunal was merged with the Planning Appeals Board, then with the Administrative Appeals Tribunal of Victoria and then with VCAT. You know, the first case I was asked to study as a first year law student was *Rylands v Fletcher*.[8] I suspect many of you were in the same boat. What is remarkable is that if the facts of the case occurred today the claim would need to be determined at first instance by VCAT.

It is important to emphasis that where VCAT has exclusive jurisdiction, it has *unlimited* jurisdiction. Of course, many cases before the tribunal involve relatively small sums. But this is not always the case. Particularly in a field such as domestic building, which includes apartment buildings, disputes can rival Supreme Court actions in both the quantum in dispute and the complexity of the issues. To some extent, this is reflected in the structure of VCAT. But it also emphasises the important role played by VCAT's non-judicial members.

I now turn to the various civil jurisdictions where VCAT shares its powers with other courts.

In the field of land valuation, the tribunal has essentially concurrent jurisdiction with the Supreme Court in relation to disputes about valuation of land for rating and taxing purposes, and compensation for compulsory acquisition. This is also the case in relation to judicial review of decisions by responsible authorities under the *Planning and Environment Act*.[9] Similarly, both the tribunal and the Supreme Court may hear State taxation matters, such as disputes over stamp duty or land tax.

But the most significant area in which the tribunal shares its jurisdiction with other courts is in the field of civil claims. Victorian tribunals have existed since 1973 for the purpose of hearing claims pursuant to the *Small Claims Act*. But this Act is no longer relevant; it has been overtaken by the *Fair Trading Act* 1999. The latter Act has made a substantial difference to the tribunal's Civil Claims List. And I predict this list will continue to grow in importance and complexity.

In 2002-03 the Civil Claims List of VCAT received 5,109 cases; and it resolved 4,835 cases. All of these cases proceeded to a hearing and were required to be proved. Unlike the courts, there is no provision at VCAT for default judgments.[10]

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8 (1868) LR 3 HL 330.

9 See section 149B of the *Planning and Environment Act* 1987. Compare *No 2 Pitt Street Pty Ltd v Wodonga Rural City Council* [1999] SCV 133, per Balmford J. By contrast, it would appear that the tribunal's jurisdiction in relation to the judicial review of decisions of *planning authorities* under that Act may be exclusive: see section 39 of the Act.

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

Most cases involved disputes between the purchasers and suppliers of goods and services. But 31% of the applicants were businesses; and 21% of respondents were individuals. This illustrates that the list extends beyond consumer/trader disputes.

Over 90% of disputes in the Civil Claims List involved sums less than $10,000. In these claims the parties are generally required to represent themselves, thereby achieving considerable savings in legal costs. But 8% of claims involved sums between $10,000 and $50,000; and 2% of claims involved sums of over $50,000. In 2002-03 the total amount claimed was $28.6 million; which represents an average (mean) claim of $5,598.

The types of applications lodged in the Civil Claims List comprised:

- 24% building;
- 13% services;
- 13% motor vehicles;
- 12% household goods;
- 15% debt recovery services; and
- 23% other.

The *Fair Trading Act* generates the majority of the work in the list. This Act confers two classes of jurisdiction on the tribunal.

First, Part 9 confers jurisdiction over a *consumer and trader dispute*, which is a dispute between a purchaser (or possible purchaser) and a supplier (or possible supplier) of goods or services in relation to a supply (or possible supply) of goods and services. The word *services* is defined very widely, but would appear to be confined to things that are, or are to be, provided, granted or conferred in *trade or commerce.* The width of the definitions are such they can cover a wide array of disputes, even including the sale and leasing of land and the granting of a mortgage.[11] In determining a fair trading dispute, VCAT may make a variety of orders: for example, it may vary any term of a contract or order a party to do, or refrain from doing, something; and, in a *consumer dispute* or a *trader-trader dispute*, it may make any order it considers fair.[12]

Second, section 159 of the Act confers on VCAT jurisdiction to award compensation for loss or damage caused by contravention of a provision of the Act. The most common allegation is a breach of duty of section 9(1), which provides:

> [a] person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

If damage is proved, remedies include an order that the contract is void or that the contract is varied. VCAT can also order the supply of replacement goods or services.[13]

Once again, I must emphasise that in consumer disputes the tribunal's jurisdiction is *unlimited* in quantum.

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[11] *Pricom Pty Ltd v Sgarioto* (1994) V ConvR 54-508, 65,852; *Cash Resources Australia v Bentley* [2002] VSC 271.

[12] See sections 108 and 109 of the *Fair Trading Act* 1999.

[13] This summary draws upon a useful, and succinct, article by Philip Barton and Alan Vassie, *Which Court – Choices in Civil Litigation*, 77(6) LIJ 45, June 2003.

I should also note that once an application has been made to VCAT in respect of a consumer and trader dispute, the issues in dispute are generally not justiciable by a court unless the proceeding in the court was commenced before the application to the tribunal was made.[14] Further, as a result of a recent change to the *Fair Trading Act*, there is a mechanism whereby a purchaser of goods or services can effectively require that proceedings that have been commenced in a court be dismissed and for the matter to be resolved in VCAT.[15] Provided the court hearing has not commenced, the purchaser can achieve this by making application to the tribunal and by lodging with the tribunal the amount in dispute.

I have no doubt that this is yet another field of law where statutory provisions are gradually replacing the common law. Whither the law of contract? Or should that be *wither* the law of contract!

It is worthwhile to reflect on the growth in the Civil Claims List at VCAT since 1998.

In the five year period from 1998-99 to 2002-03 the number of matters initiated in VCAT's Civil Claims List has more than doubled: from 2,498 to 5,109.

The growth of civil litigation in VCAT and its predecessors has seen a drop in case numbers in the courts, especially the Magistrates' Court. In 1996-97 there were 107,030 civil cases filed in the Magistrates' Court, of which 14,328 were defended. In 2002-03 there were 74,269 civil cases filed, of which 10,930 were defended. Thus, notwithstanding a substantial increase in Victoria's population and economy since 1997, the number of cases brought in that court has declined by over 30% in seven years. This is illustrated in the table.

Magistrates' Court of Victoria
Cases in Civil Jurisdiction

Year	Filed	Defended	< $10,000	> $10,000
1997	107,030	14,328	13,989	339
1998	102,497	15,098	13,654	1,444
1999	92,595	13,692	12,335	1,357
2000	78,949	12,918	9,988	2,930
2001	77,427	12,648	9,149	3,499
2002	71,485	12,253	8,775	3,478
2003	74,269	10,930	7,605	3,325

In the last financial year the Magistrates' Court finalised 10,601 non-default civil cases. Of these, 4,036 were settled at pre-hearing conferences, 2,793 were claims of less than $5,000 and were dealt with by arbitration and the balance, 3,772 cases, were finalised at conventional court hearings. No doubt this number included many settlements. Thus the

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[14] See section 111 of the *Fair Trading Act* 1999; see also *Cash Resources Australia Pty Ltd v Bentley* [2002] VSC 271.

[15] See section 112A of the *Fair Trading Act* 1999.

number of civil judgments in the Magistrates' Court is quite modest compared with VCAT.

This should not be taken, in any way, as a criticism of the Magistrates' Court. I know that the Magistrates' Court, led by my old friend and former class captain, Ian Gray, provides an important and valuable service to all Victorians. But, increasingly, that service is being provided in the criminal jurisdiction, in therapeutic justice, in new areas such as drug courts and Koori courts, and in the rapidly growing family violence jurisdiction. Contested civil cases are drifting elsewhere, mainly to VCAT.

VCAT does not generally deal with personal injury claims, other than assessments under the *Transport Accident Act* 1986 and the *Victims of Crimes Assistance Act* 1996. The County Court of Victoria is now the main jurisdiction which deals with personal injury actions. This court deals with major transport accident claims, workplace injuries and injuries resulting from medical negligence. The County Court also deals with a range of commercial disputes, although the effect of its limited monetary jurisdiction and the exclusivity of a number of VCAT jurisdictions, limits its role in this respect. Nonetheless in 2001-02 almost 7,000 cases were issued in the civil jurisdiction of the County Court. These consisted on 3,340 damages cases, 2,869 business cases, 571 Workcover cases and 157 other cases. Only 33 cases were issued in the court's building division.

The situation with the Supreme Court is more complex. In 2002 it disposed of 1,770 cases.

Supreme Court of Victoria
Civil Cases Disposed Of in 2002

List	Disposed Of
General	501
Long cases	27
Corporations	1,054
Commercial	99
Building	11
Admiralty	3
Intellectual Property	0
Victorian Taxation Appeals	16
Major Torts	43
Valuation	16
Total	**1,770**

These statistics do not tell the full story, as, except in the Corporations List, most cases do not go to final judgment. In fact, in 2002, only 105 cases were the subject of final judgment in the General, Long Cases and Commercial lists of the Supreme Court. This illustrates the different nature of the jurisdiction to that of VCAT and the lower courts: in the Supreme Court the cases tend to be long, complex and often unique.

Supreme Court of Victoria
Civil Cases Disposed Of in 2002

List	Disposed of	Judgments	Median elapsed time (months)
General	501	78	18.5
Long cases	27	5	25.5
Corporations	1,054	727	1.4
Commercial	99	22	7.5

It is worth reflecting on how the distribution of civil jurisdictions in Victoria has occurred. Although VCAT is now one of the four jurisdictions in Victoria – and is recognised as such – its powers and responsibilities are really the product of an evolutionary process over the last 40 years. During this process particular responsibilities have been redirected from the courts to a tribunal: whether it be in relation to drainage, land valuation, small civil claims, residential tenancy or domestic building. The common thread is that in each case the Parliament has been dissatisfied with the courts in resolving particular types of disputes. This dissatisfaction has normally been in relation to three things:

- lack of specialist knowledge;
- lack of timely decision making; and
- cost, particularly cost to the parties.

It may also be that there has been a degree of concern about the legalisation of minor civil disputes, in particular. By this I mean an undue emphasis upon procedural considerations compared with the substance of a dispute. For my part, I do not believe that courts must operate in a legalistic and pedantic manner, where the emphasis is on form rather than substance. But parliaments have generally taken the view that to effect a change in the culture of dispute resolution it is better to vest the responsibility with a new organisation.

From its outset VCAT adopted a system of separate lists in order to ensure that it continued to operate, within each list, as a specialist tribunal. In a large part, this has been a success. Occasionally the demands placed upon the system by budgetary constraints may have meant that some members may have sat in a list which stretched their special knowledge; but overwhelmingly my experience, and feedback, would indicate that disputes are being resolved by persons with specialist knowledge. This is not only likely to achieve a better outcome in a particular case, but also is much more efficient. I believe this is the inevitable direction in which the law is heading; and more and more it will be the case that there will be specialist judicial officers in all courts, except the High Court of Australia.

Having regard to the reason why Parliament has vested civil jurisdiction in tribunals, the issue of the timeliness of decisions is obviously of great importance. In the last financial year the average waiting time in the Residential Tenancies List, from application to resolution, was 23 days. The resolution of disputes in the Domestic Building List took much longer. But even there, 61% of cases were resolved within 20 weeks of application and 79% of cases were resolved within 35 weeks of application. In the Civil Claims List 39% of cases were resolved within 12 weeks and 80% within 19 weeks. This fell short of the aim of hearing and determining 80% of claims within 12 weeks. But I am pleased to

report that over the last nine months there has been a substantial improvement in the timeliness of the list. Most applications received by VCAT today where the amount in dispute is less than $10,000 will be listed for a final hearing in eight weeks. This is also illustrated by reference to the number of matters pending. In May 2003 there were 1,826 cases pending in the Civil Claims List. At the end of March this year the number had been reduced to 1,320 cases.

It is inappropriate that I make lengthy comparisons between the timeliness of decision making in VCAT's civil lists and other jurisdictions. But I should observe that 63% of all arbitrations in the Magistrates' Court (in respect of claims under $5,000) are completed within 3 months of lodgement, which is an excellent result. Claims that are processed using more conventional methods take longer. Only 19% of cases resolved in a pre-hearing conference are settled within 3 months of lodgement; the vast majority are finalised between 3 and 6 months after lodgement. And, of the cases that go to a conventional hearing, 18% are finalised within 3 months of lodgement, a further 26% between 3 and 6 months, and a further 32% within 6 and 9 months. The median figure would appear to be 7 months, or 30 weeks.

I now turn to the question of the cost of litigation. This is a subject which deserves its own seminar, so my comments will be fairly broadbrush. In my opinion, some of the processes which are traditionally undertaken in civil disputes before the courts add little to the justice of the process. Things that spring to mind include the extent of discovery (and photocopying) and the application of exclusionary rules of evidence which have been designed for jury trials. A system of justice must be designed, not only to achieve just outcomes in particular cases, but to achieve justice in the resolution of civil disputes when considered overall. Obviously the burden of costs plays a major role in this.

Even if there is a trade-off between the cost of resolving a dispute, and the quality of the dispute resolution process and outcome, it is legitimate to choose a substantially less costly process if this has a minimal impact upon the fairness of the process or the justice of the outcome. I suspect this is a choice the parliament has made when it has vested so much responsibility in the tribunal.

VCAT's solution varies from list to list. In the transport accident area and in the Domestic Building List, costs are usually awarded to the successful party. However even in these lists the typical time taken to resolve a case is substantially less than in comparable jurisdictions. This partly results from case management techniques, but is also the result of the cultural factor that the hearing is before a tribunal. In the Retail Tenancies List costs are not awarded, except where the proceeding has been conducted vexatiously or where a losing party has declined alternative dispute resolution. At the other end, small civil claims of less than $10,000 are typically heard without lawyers representing the parties and costs are not awarded. These sorts of cases typically take less than two hours to be heard and determined and provide a convenient, timely and cheap method of achieving just outcomes in small civil disputes.

We live in a changing world. It is difficult to make predictions about the future direction of change. It may be that VCAT continues to grow, particularly in its civil jurisdictions, as the benefits of its approach are more widely recognised. On the other hand, existing and long standing judicial institutions are also capable of change to respond to the community's thirst for convenient, accessible and inexpensive justice. Only time will tell.