

VCAT's jurisdiction: An endangered species?

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☐ Substantive law or ☐ Professional skills

A. The cases

1. In 2018, the High Court handed down its decision in *Burns v Corbett*,¹ and held that the New South Wales Civil and Administrative Tribunal did not have jurisdiction over federal subject matter, and therefore, could not hear and determine cases between residents of different States.²
2. That case 'kick started' a number of cases involving VCAT's jurisdiction including:
 - 2.1 *Meringnage v Interstate Enterprises Pty Ltd*,³
 - 2.2 *Thurin v Krongold Constructions (Aust) Pty Ltd*,⁴ and
 - 2.3 *Krongold Constructions (Aust) Pty Ltd v Thurin*,⁵
 - 2.4 *Owners Corporation 1 Plan No. PS707553K v Shangri-La Construction Pty Ltd (No 3)*,⁶
 - 2.5 *Box v Stonnington CC*,⁷

¹ (2018) 265 CLR 304.

² See also recent decision of the High Court in *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216.

³ (2020) 60 VR 361 ('*Meringnage*').

⁴ [2022] VSCA 226 (also reported at (2022) 407 ALR 187) ('*Krongold No. 1*').

⁵ [2023] VSCA 191 (also reported at (2023) 414 ALR 1) ('*Krongold No. 2*').

⁶ [2022] VCAT 1385 ('*Shangri-La Construction*').

⁷ [2024] VCAT 149.

2.6 *Plunkett v Portier Pacific Pty Ltd*;⁸ and

2.7 *Koolio Pty Ltd v Owners Corporation 1 PS618397Y*.⁹

3. We will consider some of these decisions.

4. In *Meringnage*, the Court of Appeal held:

4.1 VCAT is not a ‘court of a State’ within the meaning of Chapter III of the Commonwealth Constitution capable of exercising judicial power in a matter in which the Commonwealth was a party.

4.2 As the VCAT proceeding called for the exercise of judicial power, the presence of the Commonwealth as a party thus demanded the exercise of federal judicial power because the dispute thereby became a ‘matter’ within the meaning of s 75(iii) of the Constitution.

4.3 Accordingly VCAT could not hear and determine the claims brought against the Commonwealth in the proceeding.

5. In *Krongold No. 1*, the Court of Appeal held that:

5.1 Given that a claim was made under the *Trade Practices Act 1974* (Cth), the proceeding involved a matter arising under a law of the Parliament within the meaning of s 76(ii) of the Constitution, and hence a matter in federal jurisdiction which VCAT lacked jurisdiction to hear and determine.

5.2 A matter is not one in federal jurisdiction merely by reason of the fact that the defendant to the VCAT proceeding is a corporation incorporated under the *Corporations Act 2001* (Cth).

5.3 VCAT has jurisdiction to refer a matter to the Supreme Court under s 77 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (the ‘VCAT Act’) (discussed in more detail below).

⁸ [2024] VCAT 205.

⁹ [2024] VCAT 273.

6. In *Krongold No. 2*, the Court of Appeal held summarised important constitutional propositions:

First, only a court established under Ch III of the Constitution or a court of a State within the meaning of that Chapter can exercise federal judicial power.

Second, only the Commonwealth Parliament can confer federal jurisdiction on a court and regulate its exercise.

Third, it follows from the second proposition that State Parliaments have no power to legislate with respect to the conferring of federal jurisdiction or regulating its exercise. This is a limitation on State legislative power. It is not a product of the application of s 109 of the Constitution.

Fourth, federal judicial power is conferred and regulated in respect of a ‘matter’ within the meaning of Ch III which for present purposes can be described, incompletely, as a justiciable controversy in respect of existing rights, duties or liabilities that might come before a court.

Fifth, the Commonwealth Parliament through ss 39, 68 and 79 of the *Judiciary Act 1903* (Cth) has invested State courts with federal jurisdiction and regulated the exercise of that jurisdiction, essentially by ‘picking up’ State laws so that they apply in federal jurisdiction, subject to the Commonwealth otherwise providing in relevant respects.

Sixth, the determination by VCAT of a ‘building dispute’ by the making of binding orders involves the exercise of judicial power.

Seventh, although VCAT can and does validly exercise State judicial power, VCAT is not a court of a State within the meaning of Ch III and cannot be invested with or exercise federal judicial power.¹⁰

7. Other aspects of *Krongold No. 2*, will be considered below.
8. In *Shangri-La Construction*,¹¹ Judge Anderson found that the Tribunal had jurisdiction to hear and determine claims brought under the Australian Consumer Law contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth) as that law is ‘picked up’ and applied as a law of Victoria. Section 8 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) (the ‘**Victorian Consumer Act**’) provides that the Australian Consumer Law ‘applies as a law of this jurisdiction’.

¹⁰ *Krongold No. 2* [2023] VSCA 191, [37].

¹¹ [2022] VCAT 1385.

B. What effect did these cases have on VCAT's jurisdiction?

Legislative amendments

9. Following the decisions of *Burns v Corbett* and *Meringnage*, the Victorian Parliament introduced the *Victorian Civil and Administrative Tribunal and Other Acts Amendment (Federal Jurisdiction and Other Matters) Act 2021* (Vic) (the 'Amending Act') to 'fixup' the range of jurisdictional problems created by these decisions. The Amending Act received Royal assent on 10 October 2021 and by 29 November 2021 all parts of it had come into effect.
10. Importantly, the Amending Act amended the VCAT Act to allow the Magistrates' Court of Victoria to hear and determine proceedings that the Tribunal would have had jurisdiction to hear and determine in its original jurisdiction if the proceedings did not involve federal subject matter, and their determination did not involve the exercise of judicial power. Consequential amendments are also made to the *Magistrates' Court Act 1989* (Vic).
11. The second reading speech to the Amending Act gives a good overview of the purpose of the amendments:

The Victorian Civil and Administrative Tribunal and Other Acts Amendment (Federal Jurisdiction and Other Matters) Bill will make critical changes to Victoria's court system to ensure all Victorians can get access to justice. In particular, it will empower the Magistrates' Court of Victoria to resolve disputes relating to federal jurisdiction matters that cannot be heard by the Victorian Civil and Administrative Tribunal (VCAT).

Recent decisions by the High Court¹² and Victorian Court of Appeal¹³ make clear that VCAT is not a 'court of the state' for the purposes of the Commonwealth Constitution and therefore does not have jurisdiction to resolve what are known as 'federal jurisdiction matters' arising under the Constitution. These include matters where the Commonwealth is a party; where the dispute arises under a Commonwealth law; and where the dispute is between residents of different states (such as residential tenancy disputes where the landlord lives outside Victoria).

...

The Bill will address both these issues, by conferring new jurisdiction on the Magistrates' Court to resolve federal jurisdiction matters which cannot be resolved

¹² *Burns v Corbett* (2018) 265 CLR 304.

¹³ *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361.

by VCAT for Constitutional reasons, and validating past VCAT decisions in federal jurisdiction matters. These reforms will benefit the Victorian community.¹⁴

12. The Minister went on to set out the mechanics of an application to the Magistrates' Court where VCAT lacks jurisdiction:

Parties in federal jurisdiction matters will apply directly to the Magistrates' Court to have their matters heard. If a party applies to VCAT but the matter is a federal jurisdiction matter, VCAT will refund that party's filing fee and assist them to apply to the Magistrates' Court. The Bill provides that the filing fee for these matters is the same across the Magistrates' Court and VCAT. In practice, parties will only need to pay one filing fee, meaning they are not further out of pocket due to their matter being a federal jurisdiction matter.

This new process will be available in new disputes, and for parties who have previously been affected by the gap in jurisdiction, such as those who previously applied to VCAT but were unable to have their matters heard due to a lack of jurisdiction.

The Magistrates' Court will have power to hear and determine these applications if it is satisfied that it involves a federal jurisdiction matter in VCAT's original jurisdiction. In addition, the Magistrates' Court may hear proceedings where there is some doubt as to whether they would involve an exercise of federal jurisdiction. While in most cases federal jurisdiction will be clear, it is important that cases in which there is some doubt may be determined by a Court of the State to ensure the validity of such decisions.

In hearing and determining these federal jurisdiction matters, the Magistrates' Court will have the same functions and powers that VCAT would have had, in addition to its existing functions and powers. The Bill also seeks to ensure consistency between VCAT processes and the Magistrates' Court's processes for handling federal jurisdiction matters where appropriate. For example, the same rules relating to legal representation will apply in these matters as apply in VCAT. Like VCAT, the Court will not be bound by rules of evidence under the Evidence Act 2008 in federal jurisdiction matters (unless it decides to adopt those rules) and the privilege against self-incrimination will not apply. This promotes fairness and consistency by ensuring that the procedure in relevant Magistrates' Court hearings, and the treatment of parties, are consistent with VCAT practice wherever possible.

Importantly, parties in federal jurisdiction matters will have access to the Magistrates' Court's existing alternative dispute resolution ('ADR') processes. This will enable parties to avoid the time and expense of hearings in appropriate cases.

Orders made by the Magistrates' Court will be enforced in the same way as other orders of the Court. Appeal processes will also follow the general Magistrates'

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Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2021 (Hutchins).

Court processes. In addition, parties will be able to appeal interim and interlocutory orders, to align with appeal rights of parties in VCAT.

13. Critically, s 100 of the *Magistrates' Court Act* limits the jurisdiction of the Magistrates' Court for civil disputes to claims not exceeding \$100,000. That cap has been removed for 'federal matters' (i.e. matters ordinarily heard in VCAT).¹⁵

Part 3A of the VCAT Act

14. Part 3A of the VCAT Act deals with 'Federal subject matter'. That part includes ss 57A to 57K, and we **attach** that to this handout.
15. Section 57A sets out the relevant definitions. 'Federal subject matter' means subject matter of a kind referred to in section 75 (other than section 75(v)) or 76 of the Constitution of the Commonwealth'.
16. There are some important things to note about ss 57B and 57C.
17. **First**, s 57B(2) appears to create a jurisdictional threshold. The Magistrates' Court may hear and determine an application made under this section if satisfied that:
 - 17.1 the application raises, or there is some doubt as to whether it raises, a controversy involving federal subject matter; **and**
 - 17.2 resolution of that controversy would involve, or there is some doubt as to whether it would involve, an exercise of judicial power; **and**
 - 17.3 the Tribunal would have had original jurisdiction enabling it to determine an application involving the same subject matter if the application did not raise a controversy involving federal subject matter the resolution of which would involve an exercise of judicial power.
18. If satisfied of these matters, the Magistrates' Court *must* 'hear and determine' the dispute under s 57C(1), and 'may make any orders it considers appropriate to facilitate the hearing and determination of the application'.
19. **Second**, the Magistrates' Court has all those powers that VCAT would have had 'if the proceeding were before the Tribunal and it had jurisdiction to exercise judicial power to

¹⁵ Section 8 of the Amending Act inserts s 100(1)(ca) of the *Magistrates' Court Act 1989* (Vic) which states that the Court can 'to hear and determine applications made under section 57B of the *Victorian Civil and Administrative Tribunal Act 1998*'.

resolve controversies involving federal subject matter, including functions and powers conferred or imposed by or under this Act or an enabling enactment’ (s 57C(2)).

20. In our view, this is a broad and unwieldy statement likely to generate appeals in future.
21. **Third**, the procedure of the Magistrates’ Court applies unless the Court determines otherwise (s 57C(3)(b)). The important aspects of VCAT’s procedures appears to have been dealt with in the subsequent sub-paragraphs.
22. **Fourth**, the *Evidence Act 2008* (Vic) does *not* apply as there are no rules of evidence in VCAT.
23. **Fifth**, and most importantly, the Magistrates’ Court ‘may award or order costs or reimbursement or payment of fees in the proceeding only in the circumstances that the Tribunal would have been permitted to award or order costs or reimbursement or payment of fees (and costs are to be assessed in the same way as they would have been) if the proceeding were before the Tribunal’. So we are therefore still in a default no-costs jurisdiction.
24. We note that under s 109 of the VCAT Act, parties must bear their own costs unless the Tribunal is satisfied that ‘it is fair’ to award costs in one party’s favour having regard to a list of criteria.
25. Under s 92(2) of the *Retail Leases Act*, the costs rule is even more narrow. The default position is that each party must bear its own costs unless the Tribunal ‘is satisfied that it is fair’ to order that one party pay another’s costs 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.
26. Usually only s 92(2)(a), being the circumstance where ‘the party conducted the proceeding in a vexatious way that unnecessarily disadvantaged the other party to the proceeding,’ arises.
27. We note that the seminal authority on this section is *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd*,¹⁶ the Court of Appeal said:

Section 92(2)(a) was considered by Deputy President Bowman in *State of Victoria v Bradto Pty Ltd and Timbrook Pty Ltd* (‘Bradto’). He observed that the provision requires the Tribunal to be satisfied that it is fair to order costs because a party conducted the proceeding in a vexatious way and that such conduct unnecessarily

¹⁶ *24 Hour Fitness Pty Ltd v W & B Investment Group Pty Ltd* [2015] VSCA 216.

disadvantaged another party to the proceeding. Deputy President Bowman referred to the distinction between a proceeding which is conducted in a vexatious manner and the bringing or nature of the proceeding being vexatious. He held that a proceeding is conducted in a vexatious manner ‘if it is conducted in a way productive of serious and unjustified trouble or harassment, or if there is conduct which is seriously and unfairly burdensome, prejudicial or damaging.’ This encapsulates the circumstances in which conduct may be classified as vexatious.¹⁷

C. What happens if you have already filed in VCAT?

Part 3A of the VCAT Act

28. On our reading of Part 3A of the VCAT Act, there is no ability for VCAT to transfer a proceeding to the Magistrates’ Court.
29. What about a transfer under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Vic)? That Act allows State and Federal Courts to move proceedings between themselves. As we know from the cases above, VCAT is not a court and therefore that Act does not apply to it.
30. Therefore, the only option must be for VCAT to dismiss the proceeding.
31. This view is supported by numerous sections in Part 3A of the VCAT Act which refers to a proceeding being ‘struck out, dismissed, rejected or withdrawn’ on the ground that the Tribunal had no jurisdiction to exercise judicial power to resolve controversies involving federal subject matter.
32. VCAT has a useful page on its website on its jurisdiction.¹⁸ The website confirms this view:

If you have applied at VCAT, and it involves the exercise of federal jurisdiction, we cannot continue to hear your case. In this situation, VCAT will have no choice but to make orders striking out your case.

¹⁷ Ibid [4].

¹⁸ <https://www.vcat.vic.gov.au/what-vcat-does/what-vcat-cannot-do>

Section 77 of the VCAT Act

33. Section 77(1)–(3) of the VCAT states:

More appropriate forum

- (1) At any time, the Tribunal may make an order striking out all, or any part, of a proceeding (other than a proceeding for review of a decision) if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a tribunal (other than the Tribunal), a court or any other person or body.
- (2) An order under subsection (1) may be made on the application of a party or on the Tribunal's own initiative.
- (3) If the Tribunal makes an order under subsection (1), it may refer the matter to the relevant tribunal, court, person or body if it considers it appropriate to do so.

34. In *Krongold No. 2*, the Court of Appeal found that where a referral is made to a court by VCAT under s 77 of the VCAT Act, the receiving Court must first determine whether it has jurisdiction to hear the matter. There are of course many instances where VCAT may have exclusive jurisdiction (such as under the *Retail Leases Act*, *Water Act 1989* (Vic), *Domestic Building Contracts Act 1995* (Vic)).

35. The Court held:

A referral under s 77 to the Supreme Court invokes the jurisdiction of the Court. On receipt of a referral, the first task of the Court is to satisfy itself that it has jurisdiction with respect to the referred matter and, if an affirmative answer is given to that question, the Court is required, in the sense of being under a duty, to exercise jurisdiction in respect of it. In order to do so, it will usually be necessary to give directions to enable the issues to be presented in a form appropriate for judicial determination by the Court. Contrary to Victoria's primary submission, that does not mean that it will be necessary for a proceeding to be commenced by originating process. It may be accepted that the jurisdiction of a court will usually be engaged by the moving party filing an originating process. In the Supreme Court this will generally take the form of a writ or originating motion. Yet there is no universal requirement that the originating process take a particular form.

The purpose of commencing a proceeding is to enliven the jurisdiction of the court. In the context of a referral under s 77, that step is achieved by the making of the referral itself. Once the Court's jurisdiction is thereby enlivened, the filing of some fresh initiating process would not be necessary for that purpose.¹⁹

¹⁹ *Krongold No. 2* [2023] VSCA 191, [58]–[59].

36. The Court of Appeal helpfully noted that:

The availability in pt 3A of the VCAT Act of a different mechanism to bring into the state court system controversies that had started within VCAT but which are doomed for want of jurisdiction does not require s 77 to be read down or be given a different operation. Part 3A operates independently of s 77 and, importantly, is dependent on the making of an application by an appropriate party. There is no reason to construe it as limiting the powers of VCAT, including its own motion powers, under s 77.²⁰

37. In *Plunkett v Portier Pacific Pty Ltd*,²¹ Woodward J (sitting as President of VCAT) referred a proceeding to the Supreme Court on the basis that the case was complex and would be better suited for determination in the Supreme Court. That case involved claims under the Australian Consumer Law under which the Court also had jurisdiction.

38. Most recently, in *Koolio Pty Ltd v Owners Corporation 1 PS618397Y*,²² Judge Kirton effectively recalled an order transferring a VCAT proceeding to the County Court where the County Court had no jurisdiction to hear and determine claims under the *Domestic Building Contracts Act* and the *Water Act*. Unlike the new Part 3A of the VCAT Act, a transfer under s 77 of the VCAT Act does not pass VCAT's jurisdiction onto the receiving Court.

39. This was a very tricky matter, and of course the question is whether the Tribunal was *functus officio* on transfer to the County Court. Her Honour relevantly said:

Accordingly, my view is that the better approach is to conclude that the referral purportedly made under s 77(3) has failed, and the order currently in force is the order made under s 77(1) striking out the proceeding.

It is well accepted that striking out of a proceeding at VCAT merely removes it from the list of active cases. It does not mean that the proceeding has been adjudicated on the merits or dismissed. A VCAT member has an implied power to reinstate a proceeding that has been struck out.

Similarly, the referral under s 77(3) is not a final order, as the proceeding has been struck out and not finally determined. In *Krongold No 2*, the Court of Appeal noted that VCAT does not determine the proceeding, but instead sends the subject matter elsewhere. It is well accepted that the Tribunal has power to, “give directions at any time in a proceeding and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding.”

²⁰ Ibid [71].

²¹ [2024] VCAT 205.

²² [2024] VCAT 273.

Accordingly I am satisfied that as a VCAT Vice President, I have the power, and I consider it appropriate, to make the orders requested by Koolio. That is, to revoke the s 77(3) referral and to reinstate the struck out proceeding.²³

D. What does all this mean for lease disputes in VCAT?

Retail leases

40. Retail leases disputes must be heard and determined in VCAT as it has exclusive jurisdiction.

41. Section 89(1) of the RLA provides:

(1) The Tribunal has jurisdiction to hear and determine an application by any of the following persons seeking resolution of a retail tenancy dispute—

- (a) a landlord or tenant under a retail premises lease;
- (b) a guarantor of a tenant's obligations under a retail premises lease;
- (c) a person who has given an indemnity to a landlord for loss or damage arising as a result of a breach by a tenant of a retail premises lease;
- (d) a specialist retail valuer.

...

(4) Subject to section 23(4) (key-money and goodwill payments prohibited), a retail tenancy dispute other than—

- (a) an application for relief against forfeiture; or
- (b) a claim under Part 9 (Unconscionable Conduct); or
- (c) **a retail tenancy dispute** referred to in section 81(1A)—

is not justiciable before any other tribunal or a court or person acting judicially within the meaning of the *Evidence (Miscellaneous Provisions) Act 1958* .

[Emphasis added]

42. Section 81 of the RLA defines a ‘retail tenancy dispute’, which in effect means any dispute between a landlord, tenant and/or guarantor relating to a retail lease.

²³ Ibid [29]–[30].

43. 'Retail leases' are defined in s 4 of the RLA and heavily supplemented by case law, in particular, the 'ultimate consumer test'
44. Therefore, any retail leases dispute involving either inter-state parties, or where the Commonwealth is a party, must be heard and determined in the Magistrates' Court under Part 3A of the VCAT Act.

Commercial leases

45. 'Non-retail' or 'commercial leases' may be heard and determined in VCAT.
46. In *Zeus and Ra Pty Ltd v Nicolaou*,²⁴ the Court of Appeal found that VCAT had jurisdiction to hear commercial lease disputes pursuant to VCAT's 'fair trading' jurisdiction under the *Fair Trading Act 1999* (Vic).
47. This case has subsequently been applied to allow VCAT to hear 'consumer-trader disputes' under the Victorian Consumer Act.²⁵ Section 8 of this Act provides that the 'Australian Consumer Law' being schedule 2 of the *Competition and Consumer Law Act 2010* (Cth) applies as a law of Victoria. The effect of this incorporation was to remove the delineation between the application of the *Fair Trading Act 1999* (Vic) to natural persons, and the *Trade Practices Act 1974* (Cth) to corporations. The Australian Consumer Law applies to all 'persons' natural or legal.
48. Where a tenant breaches a non-monetary covenant in lease, that is any covenant that does not concern the payment of rent or outgoings, the landlord must issue a default notice under s 146(1) of the *Property Law Act 1958* (Vic). That well-known section provides that a tenant must remedy a breach (insofar as it is capable of doing so) within 14 days of the issue of the notice or the lease may be terminated.
49. Under s 146(2) of the *Property Law Act*, the Supreme or County Courts can grant relief against forfeiture of a lease²⁶ (in addition to any inherent power).²⁷ Section 94A of the *Retail*

²⁴ (2003) 6 VR 606.

²⁵ As defined above (*Australian Consumer Law and Fair Trading Act 2012* (Vic)).

²⁶ An equitable remedy that allows a Court to reinstate a lease which had otherwise been lawfully terminated.

²⁷ See *Shiloh Spinners Ltd v Harding* [1973] AC 691; *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 236; *Lontav Pty Ltd v Pineross Custodial Services Pty Ltd* [2011] VSC 485.

Leases Act provides that: ‘To avoid doubt, section 146 of the *Property Law Act 1958* applies to a retail premises lease.’

50. The question is: ‘Does the Tribunal have jurisdiction to grant relief against forfeiture of a commercial/non-retail lease?’
51. The Tribunal’s powers to grant relief in a ‘consumer and trader dispute’ are now contained in the Division 9 of Part 6.9 of Victorian Consumer Act.
52. Section 182 of the Victorian Consumer Act defined ‘a consumer and trader dispute’ as ‘a dispute or claim arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services’.
53. VCAT has powers under ss 184 and 185 of the Victorian Consumer Act to make a wide range of orders. See **attached** legislation.
54. Importantly, there is no express power to allow VCAT to grant relief against forfeiture of a commercial lease.
55. Section 184(2)(j) of the Victorian Consumer Act allows VCAT to make an make an order for the possession of land, however this power is only exercisable by a judicial member (i.e. a Vice-President of VCAT being a County Court judge, or the President of VCAT or other acting member who is a Supreme Court judge).
56. Section 184(2)(k) of the Victorian Consumer Act allows VCAT to order a party to do or refrain from doing something. However, the express limitation in s 184(2)(j) suggests that a VCAT member cannot use s 184(2)(k) to compel a party to give possession of land.
57. Simply giving a party possession of land, or ordering them to give possession, is not the same as relief against forfeiture which brings back from the dead a lease otherwise validly terminated.

E. *Limitation of Actions Act*

58. Section 5 of the *Limitation of Actions Act 1958* (Vic) provides that certain actions shall not be brought after six years from which the cause of action to sue accrued. This section encompasses contract, tort and breach of statutory duty claims.
59. Actions was defined to include ‘any proceeding in a court of law’.
60. In *Lanigan v Circus Oz*,²⁸ McDonald J found the six-year limitation period under the *Limitation of Actions Act* did not apply to proceedings in VCAT, as VCAT is not a ‘court of law’ for the purposes of the definition of ‘action’ in s 3(1) of the *Limitation of Actions Act*. The proceeding related to a statutory claim under the *Equal Opportunity Act 2010* (Vic).
61. However, a short time later in *Ajaimi v Giswick Pty Ltd*,²⁹ M Osborne J found the six-year limitation period *did* apply to a contractual claim in VCAT, as the definition of ‘action’ in s 3(1) of the *Limitation of Actions Act* was not limited to proceedings in a court and would extend to VCAT.
62. Lastly, in *Steedman v Greater Western Water Corporation*,³⁰ Quigley J (sitting as President of the Tribunal), together with Deputy President Wilson, considered these earlier decisions and held that the *Limitation of Actions Act* did *not* apply to proceedings brought in the Tribunal’s original jurisdiction. The Tribunal decided that it was bound to follow *Lanigan*.
63. On 10 October 2023, the *Justice Legislation Amendment Act 2023* (the ‘2023 amending Act’) received Royal assent and came into force. One of the purposes of the Act was to amend the VCAT Act, the *Wrongs Act*, *Limitation of Actions Act* and the *Domestic Building Contracts Act* in ‘response to recent court decisions’.
64. Section 73 of the 2023 amending Act amended the definition of ‘action’ in the *Limitation of Actions Act* to specifically include a proceeding in VCAT. The definition enables VCAT matters to be subject to the same limitation periods as claims brought in a ‘court of law’.
65. Importantly, s 74 of the 2023 amending Act included a new s 39B of the *Limitation of Actions Act* which provided that the limitation periods apply to both current and future proceedings at VCAT.

²⁸ [2022] VSC 35.

²⁹ [2022] VSC 131.

³⁰ [2023] VCAT 128.

F. Urgent applications and VCAT's exclusive jurisdiction

66. VCAT has no after hours duty member like the Supreme and County Courts have duty judges.
67. The question is: what happens if an urgent injunction is required after hours over a matter that VCAT has exclusive jurisdiction?
68. The Supreme Court has inherent jurisdiction to grant an interlocutory injunction to preserve the subject matter of a dispute.
69. The seminal case on this point is *Tait v the Queen*,³¹ where the High Court stayed an execution of a prisoner without any underlying proceeding in the Court as following the execution the subject matter of the dispute (being the life of the prisoner) would be spent.
70. This doctrine has been applied in less dramatic cases.
71. In *Rowson v Secretary, Department of Justice*,³² the plaintiff was a prisoner at Port Phillip Prison. He was 52 years old and suffered from a number of health issues. He sought orders releasing him from prison because of his health risks, including the risk of dying, if he were to be infected with novel coronavirus (COVID-19).
72. Justice Ginnane held:

For instance, the Court has power at an interlocutory hearing to make orders to protect the subject matter of the proceeding, which in this case includes Mr Rowson's health. The Supreme Court, as a common law court, has 'ample jurisdiction'¹ to preserve the subject matter of litigation by interlocutory order whether by a stay, mandatory injunction or otherwise. Dixon CJ in *Tait v The Queen* described the exercise of power as follows:

We are prepared to grant an adjournment of these applications without giving any consideration to or expressing any opinion as to the grounds upon which they are to be based, but entirely so the authority of this Court may be maintained and we may have another opportunity of considering it.³³

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7 May 2024

³¹ (1962) 108 CLR 620.

³² (2020) 60 VR 410; [2020] VSC 236.

³³ Ibid [9]. See also *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] (1998) 195 CLR 1, [35]; *United Firefighters' Union of Australia v Country Fire Authority* [2022] FCA 727.

Pt 3A
(Heading and
ss 57A-57K)
inserted by
No. 31/2021
s. 3.

Part 3A—Federal subject matter

S. 57A
inserted by
No. 31/2021
s. 3,
amended by
No. 20/2022
s. 39 (ILA
s. 39B(1)).

57A Definitions

(1) In this Part—

designated judicial officer has the same meaning as in the **Courts (Case Transfer) Act 1991**;

federal subject matter means subject matter of a kind referred to in section 75 (other than section 75(v)) or 76 of the Constitution of the Commonwealth;

S. 57A(1)
def. of *invalid Tribunal decision*
substituted by
No. 26/2023
s. 64.

invalid Tribunal decision means a decision, order or declaration, or purported decision, order or declaration, made on or before the date on which the **Justice Legislation Amendment Act 2023** receives the Royal Assent by the Tribunal in any proceeding determined by exercising judicial power involving federal subject matter which is invalid only because of that reason;

substituted proceeding means a proceeding in the Magistrates' Court on an application made under section 57B.

S. 57A(2)
inserted by
No. 20/2022
s. 39.

(2) In this Part, a reference to an application to the Tribunal includes a reference to a referral of a matter to, or a matter that is the subject of a referral to, the Tribunal, except for the purposes of section 57B(1)(a).

S. 57A(3)
inserted by
No. 20/2022
s. 39.

(3) For the avoidance of doubt, subsection (2) does not prevent a referring entity under an enabling enactment from referring a matter, or a matter that is the subject of a referral, to the Magistrates' Court under this Part.

57B Applications to Magistrates' Court

**S. 57B
inserted by
No. 31/2021
s. 3.**

- (1) The following persons may apply to the Magistrates' Court under this section—
 - (a) a person who is entitled to apply to the Tribunal in its original jurisdiction, or would have been so entitled if the Tribunal had jurisdiction to exercise judicial power to resolve controversies involving federal subject matter;
 - (b) a person whose application to the Tribunal in its original jurisdiction was, before, on or after the commencement of this Part, struck out, dismissed, rejected or withdrawn on the ground that the Tribunal had no jurisdiction to exercise judicial power to resolve controversies involving federal subject matter;
 - (c) a person who was a party to a proceeding in the Tribunal in which an order of the Tribunal was set aside by a court, on an appeal or review commenced on or before the date on which the **Justice Legislation Amendment Act 2023** receives the Royal Assent, on the ground that the Tribunal had no jurisdiction to exercise judicial power to resolve controversies involving federal subject matter.
- (2) The Magistrates' Court may hear and determine an application made under this section if satisfied that—
 - (a) the application raises, or there is some doubt as to whether it raises, a controversy involving federal subject matter; and
 - (b) resolution of that controversy would involve, or there is some doubt as to whether it would involve, an exercise of judicial power; and

**S. 57B(1)(c)
substituted by
No. 26/2023
s. 65(1).**

- (c) the Tribunal would have had original jurisdiction enabling it to determine an application involving the same subject matter if the application did not raise a controversy involving federal subject matter the resolution of which would involve an exercise of judicial power.
- (3) The fee payable for an application under this section is the relevant fee (if any) payable to the Tribunal under this Act.
- (4) Subject to section 57D, any limitation period that would apply to the making of an application to the Tribunal applies to the making of an application to the Magistrates' Court under this section.
- (5) The Magistrates' Court may strike-out, dismiss or reject an application if the Court is not satisfied under subsection (2).

S. 57B(6)
repealed by
No. 26/2023
s. 65(2).

* * * * *

S. 57C
inserted by
No. 31/2021
s. 3.

57C Substituted proceedings

- (1) If the Magistrates' Court decides to hear and determine an application made under section 57B—
 - (a) the Court must hear and determine it in accordance with this Part; and
 - (b) the Court may make any orders it considers appropriate to facilitate the hearing and determination of the application.
- (2) Without limiting any other function or power of the Magistrates' Court but subject to subsection (3), the Magistrates' Court has, and may exercise, all of the functions and powers in relation to a substituted proceeding that the Tribunal would

have had if the proceeding were before the Tribunal and it had jurisdiction to exercise judicial power to resolve controversies involving federal subject matter, including functions and powers conferred or imposed by or under this Act or an enabling enactment.

- (3) For the purposes of a substituted proceeding—
- (a) the Magistrates' Court is to be constituted as provided for by or under the **Magistrates' Court Act 1989** instead of as provided for by or under this Act or an enabling enactment; and
 - (b) subject to paragraphs (c) to (i), the practice and procedure applicable in the Magistrates' Court (including in relation to enforcement of orders) apply, unless the Court determines otherwise; and
 - (c) the **Evidence Act 2008** and the rules of evidence do not apply except to the extent that the Court determines otherwise; and
 - (d) sections 62 (representation of parties), 63 (interpreters) and 63A (support persons) of this Act apply as if a reference in those sections to a proceeding were a reference to the substituted proceeding; and
 - (e) section 105 of this Act (self-incrimination) applies as if a reference in that section to a proceeding were a reference to the substituted proceeding; and
 - (f) a person who could have been made a party to, or intervened in, the proceeding if it were before the Tribunal, with the leave of the Court, may also be made a party or intervene; and

- (g) section 120 of this Act (re-opening an order on substantive grounds) applies in addition to section 110 of the **Magistrates' Court Act 1989**; and
- (h) section 120A of this Act (re-opening an order for enforcement reasons) applies; and
- (i) the Court may award or order costs or reimbursement or payment of fees in the proceeding only in the circumstances that the Tribunal would have been permitted to award or order costs or reimbursement or payment of fees (and costs are to be assessed in the same way as they would have been) if the proceeding were before the Tribunal; and

Note

See sections 74(2), 75(2) and 109 and Division 8A of Part 4 of this Act in relation to costs and reimbursement or payment of fees.

- (j) subject to subsection (4), the law applicable to appeals from the Magistrates' Court in civil proceedings applies to decisions of the Court in the substituted proceeding instead of Part 5 of this Act.
- (4) A party to a substituted proceeding may appeal against an order of an interim or interlocutory nature made by the Magistrates' Court in the proceeding in the same way as a party may appeal against a final order made by the Magistrates' Court.
 - (5) A party that appeals under subsection (4) must notify the principal registrar of the Magistrates' Court.

(6) A reference to the Tribunal in this Act or an enabling enactment includes a reference to the Magistrates' Court in relation to any function or power conferred on the Court because of the operation of this section.

(7) In this section—

costs include amounts of the nature referred to in section 75(2).

57D Extension of limitation periods

S. 57D
inserted by
No. 31/2021
s. 3.

(1) The Magistrates' Court may extend any limitation period that applies to the making of an application under section 57B so as to allow the application to be made and determined, if satisfied that—

- (a) the application involves the same subject matter as an application to the Tribunal that was struck out, dismissed, rejected or withdrawn for lack of jurisdiction; and
- (b) the late making of the application is attributable to additional steps the applicant was required to take to have the matter determined by the Court because the application to the Tribunal was struck out, dismissed, rejected or withdrawn; and
- (c) it is fair and reasonable to extend the limitation period.

(2) The Tribunal may extend any limitation period that applies to the making of an application to the Tribunal so as to allow the application to be made and determined, if satisfied that—

- (a) the application involves the same subject matter as an application to the Magistrates' Court under section 57B that was—

- (i) struck out, dismissed, rejected or withdrawn because the Court was not satisfied as referred to in section 57B(2); or
 - (ii) withdrawn before the Court had determined whether or not it was satisfied as referred to in section 57B(2); and
 - (b) the late making of the application is attributable to additional steps the applicant was required to take to have the matter determined by the Tribunal because the application under section 57B was struck out, dismissed, rejected or withdrawn; and
 - (c) it is fair and reasonable to extend the limitation period.
- (3) A limitation period may be extended under this section even though the limitation period has already expired.

S. 57E
inserted by
No. 31/2021
s. 3.

57E Time limits for dealing with applications

- (1) Any time limits for dealing with an application that would apply to the Tribunal if an application that is the subject of a substituted proceeding had been an application to the Tribunal apply to the Court, with any periods being reckoned from the time the application was made to the Court.
- (2) Despite subsection (1), if a substituted proceeding involves the same subject matter as an application to the Tribunal that was struck out, dismissed, rejected or withdrawn for lack of jurisdiction, the Magistrates' Court must—
 - (a) have regard to that fact in observing any time limits; and
 - (b) hear and determine the proceeding as expeditiously as possible.

- (3) If an application to the Tribunal involves the same subject matter as an application to the Magistrates' Court under section 57B that was struck out, dismissed, rejected or withdrawn because the Court was not satisfied as referred to in section 57B(2), or withdrawn before the Court had determined whether or not it was satisfied as referred to in section 57B(2), the Tribunal must have regard to that fact in observing any time limit that applies to the Tribunal in dealing with the application.

Note

See also section 98(1)(d) as to the requirement for the Tribunal to determine a proceeding speedily.

57F Rights and liabilities—past invalid Tribunal decisions

**S. 57F
inserted by
No. 31/2021
s. 3.**

- (1) By force of this section, the rights and liabilities of all persons are deemed to be, and always to have been, the same as if—
- (a) in relation to a proceeding in which an invalid Tribunal decision was made, any decision, order or declaration in the proceeding had been made by the Magistrates' Court in accordance with this Part as if this Part had been in operation at the time of the invalid Tribunal decision; and
 - (b) the decision, order or declaration referred to in paragraph (a) were valid orders of the Magistrates' Court in relation to such a proceeding.
- (2) A right or liability conferred, imposed or affected by subsection (1) is exercisable or enforceable, and is deemed to have always been exercisable or enforceable, as if it were a right or liability conferred, imposed or affected by a valid order of the Magistrates' Court made under this Part,

including any right to seek review of, or appeal against, the order, whether in accordance with section 57C(3)(j) or (4) or otherwise.

S. 57G
inserted by
No. 31/2021
s. 3.

57G Effect of things done or omitted to be done under or in relation to rights and liabilities

- (1) Any act or thing done or omitted to be done before, on or after the commencement of this Part under or in relation to a right or liability conferred, imposed or affected by section 57F—
 - (a) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law; and
 - (b) is deemed to have always had the same effect, and given rise to the same consequences, for the purposes of any written or other law—

as if it were done, or omitted to be done, to give effect to, or under the authority of, or in reliance on, a valid order of the Magistrates' Court made under this Part.

- (2) Any act or thing done or omitted to be done before, on or after the commencement of this Part gives rise to the same consequences, and is to be regarded as always having given rise to the same consequences, as if each invalid Tribunal decision were a valid order of the Magistrates' Court made under this Part for the purposes of a provision of a law (other than a law relating to contempt of court) that sets out a consequence for a person if—
 - (a) the person contravenes a judgment or order, or a particular kind of judgment or order, given by a court; or

- (b) the person acts in a specified way while there is in force a judgment or order, or a particular kind of judgment or order, given by a court.
- (3) Without limiting subsection (1), if, before, on or after the commencement of this Part, a person has—
 - (a) interfered with a right or liability conferred, imposed or affected by section 57F; or
 - (b) failed to satisfy or comply with a liability conferred, imposed or affected by section 57F—

the interference or failure is, and is deemed always to have been, a matter that can be dealt with by way of a proceeding for contempt in the same manner as if the interference or failure had been in relation to a right conferred, imposed or affected, or a liability conferred, imposed or affected, by an order of the Supreme Court.
- (4) Nothing in subsection (3) limits sections 121, 122 or 137.

57H Powers of Magistrates' Court in relation to rights and liabilities

**S. 57H
inserted by
No. 31/2021
s. 3.**

- (1) The Magistrates' Court may vary, revoke, set aside, revive or suspend a right or liability conferred, imposed or affected by section 57F as if it were a right or liability validly conferred, imposed or affected by the Magistrates' Court in or in relation to a substituted proceeding of the kind in relation to which the invalid Tribunal decision was made.
- (2) In addition to its powers under subsection (1), the Magistrates' Court also has power to make an order achieving any other result that could have been achieved if—

- (a) the invalid Tribunal decision had been a valid order of the Magistrates' Court made in or in relation to a substituted proceeding of the kind in or in relation to which the invalid Tribunal decision was made; and
- (b) the Magistrates' Court had been considering whether—
 - (i) to vary, revoke, set aside, revive or suspend that order; or
 - (ii) to extend the time for the doing of any thing; or
 - (iii) to grant a stay of the proceeding.

S. 57I
inserted by
No. 31/2021
s. 3.

57I Rights and liabilities do not apply in certain circumstances

- (1) Sections 57F, 57G and 57H do not apply if any order is made by the County Court or the Supreme Court (including the Court of Appeal) before the commencement of this Part which quashes, overturns or reverses a decision, order or declaration of the Tribunal on the ground that the Tribunal has no jurisdiction to exercise judicial power to resolve controversies involving federal subject matter.
- (2) Sections 57F, 57G and 57H do not apply if an appeal or a review which includes the ground that the Tribunal has no jurisdiction to exercise judicial power to resolve controversies involving federal subject matter has been commenced but not determined before or on the date on which the **Victorian Civil and Administrative Tribunal and Other Acts Amendment (Federal Jurisdiction and Other Matters) Act 2021** receives the Royal Assent.

- (3) Sections 57F, 57G and 57H do not apply if an appeal or a review which includes the ground that the Tribunal has no jurisdiction to exercise judicial power to resolve controversies involving federal subject matter has been commenced but not determined after 10 August 2021 and before or on the date on which the **Justice Legislation Amendment Act 2023** receives the Royal Assent.

S. 57I(3)
inserted by
No. 26/2023
s. 66.

Note

10 August 2021 is the day of Royal Assent of the **Victorian Civil and Administrative Tribunal and Other Acts Amendment (Federal Jurisdiction and Other Matters) Act 2021**.

57J Transfer of substituted proceedings

S. 57J
inserted by
No. 31/2021
s. 3.

- (1) A substituted proceeding may be transferred from the Magistrates' Court to the Supreme Court or the County Court (the *transferee court*) under this section, after it has been referred under subsection (2) to the designated judicial officers of the Magistrates' Court and the transferee court.
- (2) A judicial or administrative officer of the Magistrates' Court (which may include the designated judicial officer of that Court) or a party to a substituted proceeding may refer the proceeding to the designated judicial officers of the Magistrates' Court and the transferee court.
- (3) A substituted proceeding may be transferred under this section only if—
- (a) the designated judicial officers of the Magistrates' Court and the transferee court are of the opinion that the transfer is appropriate; or
 - (b) in a case of disagreement between the designated judicial officers, the designated judicial officer of the transferee court is of the opinion that the transfer is appropriate.

- (4) In forming an opinion for the purposes of subsection (3), the designated judicial officers may consider—
 - (a) any amount claimed in the substituted proceeding; and
 - (b) the complexity of the substituted proceeding; and
 - (c) whether, if the Tribunal had jurisdiction to determine the subject matter of the substituted proceeding, it is likely that the matter would have been heard by the President or a Vice President; and
 - (d) which court in the circumstances is the most natural forum for resolution of the matters in dispute in the substituted proceeding; and
 - (e) anything else that the designated judicial officers consider relevant.
- (5) If the designated judicial officer or officers form the opinion referred to in subsection (3), the Magistrates' Court constituted by its designated judicial officer, as soon as practicable, must make an order transferring the substituted proceeding to the transferee court and, on the making of that order—
 - (a) the proceeding is discontinued in the Magistrates' Court; and
 - (b) the Magistrates' Court must cause the record and all documents relating to the proceeding to be sent to the transferee court.
- (6) If the substituted proceeding is transferred—
 - (a) the transferee court has, in addition to its existing jurisdiction, functions and powers, any jurisdiction, functions and powers the Magistrates' Court would have had if the proceeding had not been transferred; and

- (b) unless the transferee court otherwise orders, the practice and procedure applicable in the transferee court apply in relation to the proceeding; and
 - (c) unless the transferee court otherwise orders, anything done or omitted to be done in the proceeding under or in accordance with the rules of court that applied to it before the transfer must be taken, so far as possible, to have been done or omitted under the rules that apply in the transferee court; and
 - (d) the transferee court must endeavour to ensure that the proceeding is heard and determined no later than it would have been if it had not been transferred; and
 - (e) a judgment given or order made by the transferee court in the proceeding has effect and may be enforced or appealed against like any other judgment or order of that court; and
 - (f) the transferee court may award costs in any manner it sees fit; and
 - (g) the transferee court may transfer the proceeding to the Tribunal if satisfied that the Tribunal has jurisdiction to determine the subject matter of the substituted proceeding.
- (7) This section is in addition to anything in the **Courts (Case Transfer) Act 1991**.

57K Part prevails

If a provision of this Part is inconsistent with another provision of this Act or a provision of an enabling enactment, the provision of this Part prevails to the extent of the inconsistency.

**S. 57K
inserted by
No. 31/2021
s. 3.**

Chapter 7—Functions of VCAT

182 What is a consumer and trader dispute?

- (1) In this Chapter a *consumer and trader dispute* is a dispute or claim arising between a purchaser or possible purchaser of goods or services and a supplier or possible supplier of goods or services in relation to a supply or possible supply of goods or services.
- (2) For the purposes of subsection (1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass that relates to the supply or possible supply of goods or services but (except as provided in subsection (3)) does not include a dispute or claim related to a personal injury.
- (3) For the purposes of subsection (1), a dispute or claim includes a claim related to personal injury if—
 - (a) the claim is for an amount not exceeding \$10 000; and
 - (b) the claim relates to a supply or possible supply of goods or services; and
 - (c) the supply or possible supply of goods or services is the subject of a related consumer and trader dispute.

183 What is a small claim?

In this Chapter *small claim* means a consumer and trader dispute in relation to—

- (a) a claim for payment of money in an amount not exceeding \$15 000 or other prescribed amount; or

S. 183(a)
amended by
No. 15/2018
s. 3.

S. 183(b)
amended by
No. 15/2018
s. 3.

- (b) a claim for performance of work of a value not exceeding \$15 000 or other prescribed amount—

that in either case arises out of a contract for the supply of goods or the provision of services other than a contract of life insurance.

184 Settlement of consumer and trader disputes or small claims

- (1) VCAT may hear and determine a consumer and trader dispute.
- (2) VCAT may do one or more of the following in relation to a consumer and trader dispute—
 - (a) refer a dispute to a mediator appointed by VCAT;
 - (b) order the payment of a sum of money—
 - (i) found to be owing by one party to another party;
 - (ii) by way of damages (including exemplary damages and damages in the nature of interest);
 - (iii) by way of restitution;
 - (c) vary any term of a contract;
 - (d) declare that a term of a contract is, or is not, void;
 - (e) order the refund of any money paid under a contract or under a void contract;
 - (f) make an order in the nature of an order for specific performance of a contract;
 - (g) order rescission of a contract;
 - (h) order rectification of a contract;
 - (i) declare that a debt is, or is not, owing;

(j) make an order for the possession of land;

S. 184(2)(j)
amended by
No. 38/2017
s. 75(a).

(k) order a party to do or refrain from doing something.

S. 184(2)(k)
amended by
No. 38/2017
s. 75(b).

Example

If the supplier has default listed the purchaser with a credit reference agency in relation to a perceived debt owing, VCAT, in addition to declaring that there is no debt owing, may order the supplier to contact the credit reference agency and have the default listing removed from the purchaser's credit record.

- (3) The power to make an order under subsection (2)(j) may only be exercised by a judicial member of VCAT.
- (4) In awarding damages in the nature of interest, VCAT may base the amount awarded on the interest rate fixed from time to time under section 2 of the **Penalty Interest Rates Act 1983** or on any lesser rate it thinks appropriate.

185 Additional powers of VCAT

- (1) In addition to its powers under section 184, VCAT, in determining a consumer dispute or a trader-trader dispute, may make any order it considers fair including declaring void any unjust term of a contract or otherwise varying a contract to avoid injustice.
- (2) In determining whether a term of a contract is unjust under subsection (1), VCAT may have regard to—
- (a) the intelligibility of the contract generally, and of the term in particular;
 - (b) the extent to which the term, and its legal and practical effect, were accurately explained to the relevant party before the

- term was agreed to and the extent to which the relevant party understood the term and its effect;
- (c) the relative bargaining power of the parties to the contract;
 - (d) the consequences to the parties to the contract if the term is complied with or not complied with and the relative hardship of those consequences to each party;
 - (e) whether or not it was reasonably practicable for the relevant party to reject, or negotiate for a change in, the term before it was agreed to;
 - (f) the relationship of the term to the other terms of the contract;
 - (g) whether the relevant party obtained independent legal or other expert advice before agreeing to the term;
 - (h) whether unfair pressure, undue influence or unfair tactics were used to obtain the relevant party's consent to the contract or the term;
 - (i) whether at the time the term was agreed to the relevant party knew, or could probably have found out by asking, that the term would cause any other relevant party hardship;
 - (j) the conduct of the parties to the contract after the term was agreed to;
 - (k) whether the term is usually found in contracts of that kind;
 - (l) the justification for the term;
 - (m) whether the term is unconscionable, harsh or oppressive;
 - (n) any other factor VCAT thinks is relevant.
-

(3) Despite anything to the contrary in this section, in determining whether a term of a contract is unjust, VCAT must not have regard to any injustice arising from circumstances that were not reasonably foreseeable when the term was agreed to.

(4) In this section—

consumer dispute means a dispute relating to the supply or possible supply of goods or services of a kind ordinarily used for personal, household or domestic purposes but does not include a dispute relating to the supply or possible supply of goods if the supply or the possible supply of the goods is for the purpose of re-supply, in trade or commerce, or for the purpose of using the goods up or transforming the goods in trade or commerce;

trader-trader dispute means a dispute between a purchaser or possible purchaser and a supplier or possible supplier in relation to the supply or possible supply of goods or services in trade or commerce which involves—

- (a) a claim for payment of money in an amount not exceeding \$10 000; or
- (b) a claim for performance of work of a value not exceeding \$10 000.

186 Who can ask VCAT to resolve a consumer and trader dispute?

VCAT may only make an order to resolve a consumer and trader dispute on the application of—

- (a) a party to the dispute; or

- (b) the Director acting on behalf of one or more of the parties to the dispute.

187 Exclusion of other jurisdiction

- (1) Once an application has been made to VCAT in accordance with the **Victorian Civil and Administrative Tribunal Act 1998** in respect of a consumer and trader dispute or in respect of any other matter in respect of which VCAT has jurisdiction under this Act, the issues in dispute are not justiciable at any time by a court unless—
 - (a) the proceeding in that court was commenced before the application to VCAT was made and that proceeding is still pending; or
 - (b) the application to VCAT is withdrawn or struck out for want of jurisdiction; or
 - (c) VCAT refers the proceeding to that court under section 77 of the **Victorian Civil and Administrative Tribunal Act 1998**.
- (2) Subsection (1) applies to all the issues in dispute, whether as shown in the application or emerging in the course of the proceeding in VCAT.

188 More appropriate forum

- (1) This section applies if a person—
 - (a) commences proceedings in a court; and
 - (b) the proceedings arise wholly or predominantly from a consumer and trader dispute or are other proceedings in respect of which VCAT has jurisdiction under this Act.
- (2) The court must stay the proceedings if—
 - (a) the proceedings could be heard by VCAT under this Act; and

- (b) the court is satisfied that the proceedings would be more appropriately dealt with by VCAT.
- (3) In determining whether proceedings would be more appropriately dealt with by VCAT, the court must consider—
 - (a) whether, having regard to the likely costs and duration of the proceedings and any other matters the court considers relevant, a party is reasonably likely to gain a material advantage if the proceedings are determined by VCAT; and
 - (b) whether that advantage is outweighed by a material disadvantage that would be reasonably likely to be suffered by another party if the proceedings were determined by VCAT.
- (4) If proceedings are stayed under this section, any party to the proceedings may apply to VCAT for an order with respect to the dispute or matter on which the proceedings were based.
- (5) If a person applies to VCAT under subsection (4) VCAT must notify the court and on such notification the court must dismiss the proceedings.
- (6) Subsection (5) does not apply if VCAT refers the matter to the court under section 77(3) of the **Victorian Civil and Administrative Tribunal Act 1998**.

189 Small claim commenced in court

- (1) This section applies if a supplier, or person acting on behalf of the supplier—
 - (a) commences proceedings in a court; and
 - (b) the proceedings arise wholly or predominantly from a small claim.

- (2) The court must dismiss the proceedings if—
 - (a) the court has not yet commenced to hear the matter; and
 - (b) the purchaser has applied to VCAT to have the matter heard and determined by VCAT; and
 - (c) the purchaser has lodged with VCAT—
 - (i) the whole of the amount sought by the supplier; or
 - (ii) if any payment has been made to the supplier (including any deposit), the outstanding amount sought; and
 - (d) VCAT has notified the court of that application to VCAT and lodgement.
- (3) If the court dismisses the proceedings under subsection (2), the court must not make an order as to costs in respect of those proceedings.

190 Small Claims Suspense Account

- (1) The principal registrar of VCAT must keep an account called the Small Claims Suspense Account and pay into that account all money lodged with VCAT under section 189(2).
- (2) The principal registrar must deal with money lodged with VCAT under section 189(2) as follows—
 - (a) if VCAT makes an order with respect to the money, the principal registrar must comply with the order;
 - (b) if the proceeding is struck out for want of jurisdiction or otherwise withdrawn, the principal registrar must—

- (i) return the money to the person who paid the money or that person's personal or legal representative; or
- (ii) pay it in accordance with the directions of the person who paid the money or that person's personal or legal representative;
- (c) if the person who paid the money dies before a final order is made with respect to the matter, the principal registrar must pay the money to the personal or legal representative of the deceased person.

191 VCAT may hear dispute regardless of related criminal proceedings

If a consumer and trader dispute involves the failure, or the alleged failure, of a supplier to comply with this Act or any other Act (or any regulations made under this Act or any other Act), VCAT may make an order to resolve the dispute even though the supplier—

- (a) has not been charged with the offence; or
- (b) has been charged with the offence, but has not had the charge heard; or
- (c) has had the charge heard, but was not convicted of committing the offence; or
- (d) has had the charge heard and was convicted of committing the offence; or
- (e) has been sentenced in relation to the offence; or
- (f) is the subject of pending disciplinary action; or
- (g) may be, or has been, subject to disciplinary action.

192 VCAT may order the provision of information

- (1) A person may apply to VCAT for an order requiring the Director to provide the full name and address of a supplier, who is not registered or licensed or whose details are not contained on any public register established under a business licensing Act or other Act.
- (2) VCAT may make the order referred to in subsection (1) if it is satisfied that, in all the circumstances, it is just and convenient to do so.