VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

Fair Trading Laws: A Judicial Perspective[1]

By Justice Stuart Morris
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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 fair and relevant civil justice system is a foundation stone for a democratic state, based upon rule of law. Without such a system trade and commerce would be impossible. But it is insufficient to have a fair and relevant civil justice system. A modern economy also needs a practical, inexpensive, accessible civil justice system.

It is in this context that I make the observation that the *Fair Trading Act* 1999 has now emerged as the key legislative instrument that governs commercial relationships in the Victorian market place. As I will explain, the Act is extremely broad in its ambit. The recent amendments to the Act effected by the *Fair Trading (Enhanced Compliance)Act* 2004 have reinforced the central role of fair trading legislation.

The amendments brought about by the 2004 Act include:

- A limitation upon persons other than the Director of Consumer Affairs bringing prosecutions for offences;
- Arming the Director with coercive powers to obtain information;
- Empowering the courts to grant mandatory injunctions; and
- Broadening the courts that might grant relief and fine-tuning some aspect of the remedies available.

In presenting the 2004 Act to Parliament, the Minister said:

> "The bill is the first part of the implementation of the consumer justice strategy. It will enable the government to re-orient enforcement of consumer protection legislation from reliance on criminal prosecutions to a greater reliance on civil and administrative interventions."[2]

Only time will tell whether this re-orientation will actually occur.

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1 A paper delivered at the 2005 Fair Trading Compliance Conference, 13 May 2005.

2 Hansard, 11 November 2004, page 1509.

The role of courts in relation to the new powers

When it comes to ascertaining the future scope and operation of the new consumer affairs powers, we can be certain of at least one thing: courts will play a central role. Courts will need to interpret the legislation; courts will hear evidence and make findings; courts will exercise discretion in determining what, if any, relief should be provided. But it would be unwise to seek to predict how these responsibilities will be discharged.

One thing that must be stressed is this. The courts in Victoria – and this applies with equal force to the Victorian Civil and Administrative Tribunal – are independent of the executive and legislative arms of government. Judges and VCAT members are not beholden to Ministers, departmental heads, or even CAV Directors. Rather the role of judges and VCAT members is to be an umpire, not only between private citizens, but also between the State and a private citizen.

In my last annual report to Parliament as VCAT President, I said:

> "VCAT plays a critical role in standing between the strong and the weak, the government and the governed, the rich and the poor. Indeed, more than one third of cases before the tribunal involve government as a party. Thus the independence of the tribunal is fundamental."

When a judicial officer is required to adjudicate between a private citizen, on the one hand, and a government minister, or a senior government official, on the other hand, it is crucial that the independence of the judicial officer be acknowledged and protected. Typical cases might involve the release of controversial documents under freedom of information laws or the review of a ministerial decision. Cases brought by the CAV Director under the *Fair Trading Act* are also likely to fall into this category.

The ultimate test of independence is likely to arise in cases where the conduct of the private citizen is said to be despicable and where the press is baying for blood. An enthusiastic prosecutor – or official plaintiff – might be fanning the flames. In such a situation there will be pressure upon the judicial officer to become part of the public outrage at the despicable conduct of the private citizen. But the judicial officer must hear the matter according to law, without fear, favour or affection. That is the judicial oath, solemnly taken.

The Supreme Court is not "Business Unit 19".

Injunctions

Courts typically ascertain the scope of new powers by first examining the plain and ordinary meaning of the words used in the empowering provision. It will often be also necessary to understand the policy basis of the powers, in order to give effect to the intentions of Parliament. The common law may also play a role. For example, the courts have evolved various principles in relation to the grant of injunctions. It is likely that these will be relied upon when it comes to granting mandatory injunctions under the new legislation.

Justice McHugh of the High Court of Australia has stated that the term "injunction", where use in a statute,

> "is a wide term which should be given its ordinary meaning, a meaning wide enough to embrace any form of curial order which requires a person to refrain from doing or to do some act which infringes or assists in restoring another person's right, interest or property."[3]

This is a useful starting point. However, ultimately, where the power to grant an injunction is specified in an Act such as the *Fair Trading Act*, the content of the term "injunction" must derive from the provisions of the Act itself.[4]

No doubt any precedents under comparable legislation, whether in the Commonwealth or other States, will also be relevant in giving meaning to the Act.

But I cannot stress too much that the fundamental question which is likely to determine litigation under these new fair trading laws is not so much the interpretation of the law, but: what is the just result? This is likely to turn on the evidence adduced and the merits of the case. Courts are not like computers, where it is enough to press a button and produce an outcome.

The principal role of judicial bodies in relation to fair trading

Although courts will play a role in relation to powers introduced by the 2004 Act, it must be remembered that the main role played judicial bodies in relation to fair trading laws will be in efficiently and fairly hearing cases between private citizen and private citizen. This brings me to discuss the special role of the Victorian Civil and Administrative Tribunal in relation to fair trading laws.

When I talk to public groups about VCAT most associate it with the Planning List. Sometimes an audience is aware of the tribunal's extensive Guardianship List; and the newspapers love to report cases in our Anti-discrimination List. But these three lists, important though they are, consume less than 40% of VCAT's resources. The balance of the tribunal's resources are essentially directed at resolving civil disputes.

What makes VCAT particularly important is that it has now emerged as the principal jurisdiction for the resolution of everyday civil disputes in Victoria. VCAT touches the lives of more Victorian civil litigants, more often, than any other jurisdiction. One of the most significant areas of VCAT's jurisdiction 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*, which 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.

The Director of Consumer Affairs in Victoria is an important public official. Not surprisingly, he is mentioned 248 times in the *Fair Trading Act*. What you may not expect,

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3 *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd* (2001) HCA 1, at [120].
4 *Cardile v LED Builders Pty Ltd* (1999)198 CLR 380 at 395.

however, is that VCAT is also frequently mentioned in the Act: in fact, 141 times. VCAT is intimately involved in resolution of civil disputes, and enforcement of some regulatory action that the Director undertakes. It is important to understand the reach of VCAT.

Number of Cases in VCAT

In 2004/05 the Civil Claims List of VCAT will determine about 6,100 cases. All of these cases will have proceeded to a hearing and be required to be proved. Unlike the courts, there is no provision at VCAT for default judgments.[5]

In theory, this number could be much higher. After all, any debt claim may be brought to the Tribunal. Any dispute arising out of the purchase or sale, or rental of real estate in trade or commerce, may be brought. Any dispute relating to financial services, insurances (other than life insurance in the pure form), purchase or sale or repair of motor vehicles, purchase or sale of businesses, boats, motor cycles – you think of it – could be brought at VCAT, because it is probably under the *Fair Trading Act*.

And that is only for the Civil Claims List. Often claims in VCAT's Retail Tenancies and Domestic Building lists include claims under the *Fair Trading Act*; and some claims also arise in the Residential Tenancies List. The *Fair Trading Act* is a broad sweeping Act.

Most cases in VCAT's Civil Claims List involved disputes between the purchasers and suppliers of goods and services. This financial year about 40% of the applicants have been businesses (up from 34% in 2003/04 and 31% in 2002/03); and 28% of respondents were individuals (up from 24% in 2003/04 and 21% in 2002/03).

Over 90% of claims in the Civil Claims List have 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 2003-04 the total amount claimed was $36.9 million. We expect this will rise for 2004/05.

The *Fair Trading Act* generates the majority of the work in the Civil Claims list. The subject matter of applications lodged comprised:

- 21% building services;
- 18% general services;
- 11% motor vehicles;
- 6% household goods;
- 21% debt recovery services; and
- 23% other.

[5] 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.

The number of civil claims in VCAT can be partly explained by looking to the broader context in which VCAT operates. Parties only call on VCAT in a small percentage of civil disputes, because most contracts in society are completed with no problem. And where issues do arise, most parties can work it out for themselves. When parties need assitance to help themselves, they can access high quality advice and assistance from a variety of sources including Consumer Affairs Victoria and Building, Advice and Conciliation Victoria. These bodies not only provide effective information to laypeople, but also take the extra step of providing conciliation/mediation functions if this is necessary.

In this context, civil claims only arise at VCAT as a last resort. And VCAT, as an independent body, not linked to CAV in any way, would not have it any other way. Parties can come to the tribunal either by direct application of the parties, or by automatic transfer from the courts system.

Automatic Transfer From Court

The *Fair Trading Act* is biased towards bringing every-day cases to VCAT rather than the courts. The Act provides that where a court is entertaining a claim for $10,000 or less, and the purchaser of those goods or services lodges an application with VCAT and pays the amount sought in the court claim into trust, the court, upon notification of lodgement and payment, must dismiss the proceeding if it has not yet commenced to hear the matter. The matter is then heard by VCAT.

Further VCAT does not have to wait until criminal proceedings are resolved before hearing civil actions that are brought to it under the *Fair Trading Act.*

Remembering that VCAT has a unlimited jurisdiction in *Fair Trading Act* matters, the Act also provides that where proceedings are in a court for any amount and the proceedings arise predominantly in a consumer and trader dispute, or there are other proceedings in respect of which the Tribunal has jurisdiction under the Act, the proceedings must be stayed. The stay is made where the Tribunal could hear the proceedings under the Act and the court is satisfied that the proceedings would be more appropriately dealt with by the Tribunal. The court must consider, having regard to the likely costs and duration and other relevant matters, whether a party will gain a material advantage in the Tribunal and whether that material advantage is outweighed by the material disadvantage of another party in the Tribunal. Although not many cases have been transferred under this provision, it indicates the legislative preference that *Fair Trading Act* matters be heard and determined in the less formal atmosphere of a tribunal.

Types of Actions in VCAT

If the *Fair Trading Act* was a person, and lived next door to you, it might not be thought to be a popular neighbour. That is because it is a busy body. It intrudes in all matters of relationships between people, possibly in ways which may not have been contemplated by the legislature. This is because of the extraordinarily wide, inclusive, definitions of “goods and services” which are based on those used in the Commonwealth *Trade Practices Act*. Basically all supplier and purchaser transactions relating to goods and services may be subject to action in VCAT.

Prior to the *Fair Trading Act*, the courts dealt with most contractual disputes arising in relation to goods and services. The Small Claims Tribunal, and from 1998 the Civil Claims List of VCAT, had a limited role up to $10,000. With the introduction of the *Fair Trading Act* on 1 September 1999, VCAT's jurisdiction became unlimited, eventually leading to the abolition of the small claims legislation in 2003.

The *Fair Trading Act* gave VCAT a chunk of dispute resolution that was previously the domain of courts. In most areas covered by the Act, VCAT has a dispute resolution jurisdiction that is the equivalent of the Supreme Court – any value on any dispute between a purchaser and supplier of goods; and limited in relation to services only by the necessity that the services arise in trade or commerce.

The words used in the *Fair Trading Act* are not good examples of drafting, in that the section giving VCAT jurisdiction refers to a *consumer and trader dispute*, which in the minds of most people raise a spectre of individuals versus business. The correct term should be purchaser and supplier dispute (or for that matter supplier and purchaser dispute).

I will now take you through a few specific examples of the long arm of VCAT and the jurisdiction entrusted to the tribunal.

The *Fair Trading Act* allows actions for recovery of loss, injury or damage as a result of a contravention of the Act. That loss may be recovered against any person involved in the contravention. What are contraventions? Well, the Act has many examples. To give a few in trade or commerce: if you engage in unconscionable conduct, misleading or deceptive conduct, false representations, bait advertising, pyramid selling or sending unsolicited goods, you might contravene the Act. But equally it may apply to such things as demanding early payment of a lay-by or including in a contact a term that is prohibited under the Act.

The tribunal can also deal with unfair terms in consumer contracts. At present the Director has only brought one such case to the Tribunal; and, to my knowledge, there have been no cases instigated by individuals where the tribunal has found an unfair term. But it would seem to be only a matter of time. The definitions of "unfair" terms are very wide. Many existing contracts would on their face probably include such a term.

The *Fair Trading Act* allows the Director to institute proceedings in respect of a consumer dispute, not just on the basis of unfair terms, but on a general complaint against a supplier. The Director may also bring, continue or defend a consumer dispute of behalf of a consumer.

Although there are generally no limitations to the amount or value of the price of goods or services which may give rise to the dispute for breach of contract or for contravention of the Act, the section of the Act which deals with unconscionability in business transactions contemplates a $3 million cap on the price of goods or services which may give rise to the dispute.

VCAT is nothing if not versatile. In addition to all I have discussed, which are actions between at least two persons or companies, VCAT may also review an administrative decision of the Director in relation to a ban order or compulsory recall notice. The Tribunal

may also review, in very general terms, notices issued under the right to suspend licences, the latter in association with the powers under various business and occupational licensing Acts.

The Tribunal has the power to grant injunctions arising out of the purchase or sale of goods and services. It can also grant injunctions to prevent the continued use of unfair terms and make declarations concerning certain unfair terms in consumer contracts and related matters.

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If the Tribunal is satisfied, on application by the Director, that any provision of a consumer contract is not easily legible, uses a font less then 10 point or is not clearly expressed, the Tribunal may by order prohibit a supplier from using the provision in the same or similar terms in consumer contracts.

The Director may also request VCAT to provide advisory opinions on certain unfair terms and related matters.

A person may apply to the Tribunal to require 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.

As you can see, the list is a long one!

Growth of Civil Claims in VCAT

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

In the six year period from 1998-99 to 2005 the number of matters initiated in VCAT's Civil Claims List has more than doubled: from 2,498 to 6,100.

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 should not be taken, in any way, as a criticism of the Magistrates' Court. That court provides an important and valuable service to all Victorians. But, increasingly, its work is 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.

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 manner in which the courts were 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.

Benefits of VCAT as a Forum: The Five Pillars

As I like to think of it, VCAT provides a five-legged table. It emphasises:

- Accessibility;
- Low cost;
- Timeliness;
- Expertise; and
- Fairness.

I will run you through each of these factors, with focus on how they relate to the determination of civil disputes brought under the *Fair Trading Act*.

Accessibility

Historically it has been difficult for the ordinary person to access the courts. You need a lawyer, special forms, special language, and the like. This is changing but largely remains the case.

The Civil Claims List at VCAT is different.

- The application form is simply designed (by Leanne Gil from CAV), uses plain language and it requires no technical knowledge in order for parties to ask for the right remedy.

- In most cases lawyers are not allowed, nor are they essential to resolve the typical type of disputes. The tribunal is informal to allow for people to feel comfortable in telling their own stories.

- The dispute is usually resolved quickly. It often takes an hour or less.

- We hold hearings all over Victoria, in rural and regional areas.

- While we encourage people to use services such as CAV before coming to VCAT, if they choose they can make an application and access us directly.

Low cost

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 broad brush. 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.

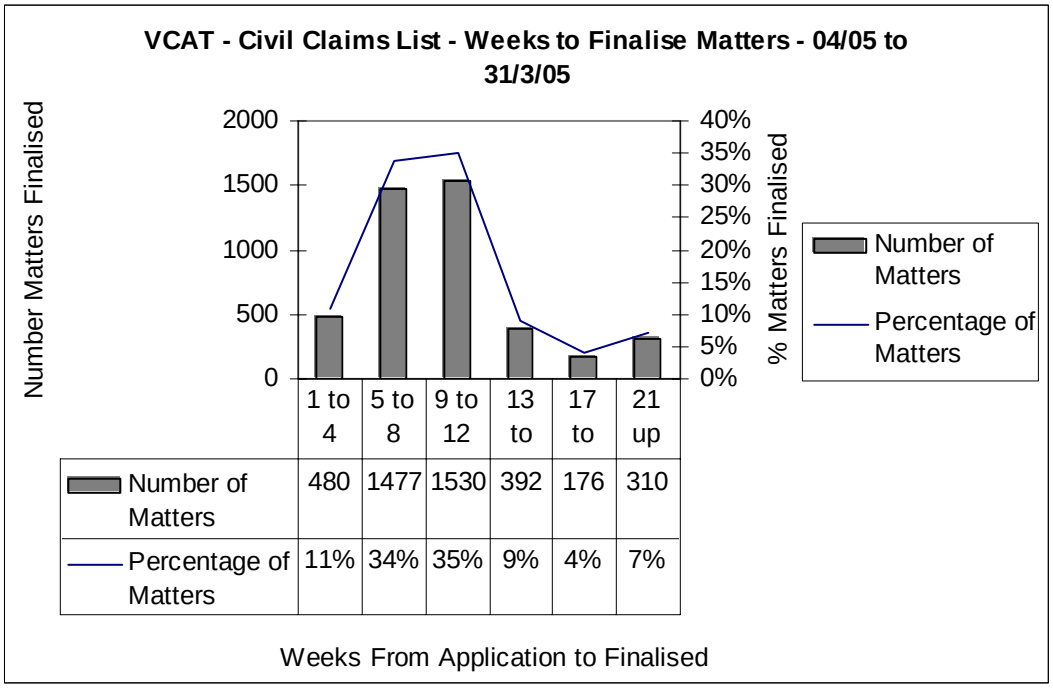
Even if there is a trade-off between the cost of resolving a dispute, and the quality of the dispute resolution process and outcome, it is legitimate to choose a substantially less costly process if this has a minimal impact upon the fairness of the process or the justice of the outcome. I suspect this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

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 usually 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. With most parties paying a $31 application fee and representing themselves in a hearing held at a venue within easy reach, the Civil Claims list is about as inexpensive as it can get.

Timeliness

For the first 9 months of 2004/05 the median time in the Civil Claims List, from application to the final orders being posted out (usually a few days after the hearing), was just over eight weeks.

The more detailed results are set out in the table.



It is inappropriate that I make detailed 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 good 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.

Expertise

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.

The Civil Claims List has a broad civil dispute resolution jurisdiction. Its expertise lies in application of the relevant law, dealing with unrepresented parties and assessing evidence which is perhaps not as complete as may be provided by lawyers in the courts.

Fairness

Fairness is a very difficult thing to prove. I say the Civil Claims List decides matters fairly. The members are independent, well qualified and are generally seen by consumer and trader alike to be independent. We receive very few complaints about the fairness of decisions.

The Civil Claims List meets regularly with a user group which provide general and often frank feedback on our performance. Issues of fairness are rarely if ever raised.

Conclusion

Civil litigation under fair trading laws directly affects the lives of members of the community each and every day. These people, engaged in supplier and purchaser disputes, debt claims, financial services, sale of vehicles and businesses, and other daily transactions, require a forum that is accessible, timely, inexpensive, expert and fair. They require a forum that they can approach as laypeople and not be overwhelmed by formality and procedure.

The Victorian Civil and Administrative Tribunal has evolved to a point where it is now the principal forum in which everyday civil claims are brought. Recent amendments to the fair trading laws have cemented this position.

VCAT plays the role of an umpire when all else fails and the parties cannot come to an agreement, either by themselves or with the guiding hand and information of Consumer Affairs Victoria. What must be stressed is that, like the courts, VCAT must be supported in carrying out its role as an *independent* umpire.