

THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL - THE FIRST DAYS

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The first tribunals

I am here tonight at the request of your Committee to speak on the Victorian Civil and Administrative Tribunal (VCAT), the first days. The Committee did not define for me precisely the first days about which it wished me to speak. It can be said that there are a number of events which can be established in the broad sense as being the first days of the Tribunal. The very first tribunal of course, was a raised semi-circular or square platform in the Roman Basilica at which the magistrates were placed, the word "tribunal" coming from the Latin "Magistratus Tribus" or "Magistrate of a Tribe". One definition of the word "tribunal" in the Shorter Oxford Dictionary is "a raised throne or chair of state". So clearly, many distinctions can be drawn between VCAT and the first tribunal. First, I do not believe that any of our members can be said to be representatives of a tribe. Secondly, I believe that we do not have to have raised thrones from which to adjudicate, although it may well be said that at least some of the

hearing rooms from which VCAT operates are even less comfortable than the picture I have in mind of the semi-circular stone steps in the Roman Basilica at which hearings were conducted. Another clear difference is that leave must be sought to appear before VCAT. No such leave was required for an advocate in the ancient tribunal. Indeed, as is the case in some circumstances at VCAT, the advocate could be an inexperienced layman. Scipio when *Praetor* offered a man an advocate in the shape of the man's own landlord who was a rich oaf said, "let him act for my opponent my Lord, I'll defend myself".

The first tribunal attracted famous advocates - Cicero, Hortensius and Crassus. In their early lives each of these advocates spent considerable time debating topics which sprang from logic rather than real life, such as the famous crocodile problem.

A crocodile seized a woman's son, "I'll give him back", it promised her, "if you'll tell me the truth about his taste". The woman answered, "You won't give him back" as she looked the crocodile straight in the face. This means the crocodile would either return the child to its mother in which case she would keep the child, or it would not return the child in which case the mother was correct and would be entitled to be given back the child in any event. This showed a brilliant grasp of logic but a profound ignorance of crocodiles. VCAT members will be required not merely to be logical but from time to time may

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need to have a knowledge of crocodiles.

However, many of the cases before the early tribunal dealt with the completely practical matters that VCAT also deals with in everyday life. It has been said that only the Bible had more influence in civilising the western world than Roman law has had. The digest of Roman Law compiled long after Cicero lived and died, set out many problems which had been debated in the tribunals of Rome and provided the answers given by learned jurists. I pose two of them in question and answer form as they appeared in the Roman Digest.

Question: A pregnant woman gives birth to a child during a voyage. Is the ship's captain entitled to charge an extra fare for the child?

Answer: No, the child takes up very little room and uses none of the facilities available to the other passengers.

I commend that to members of the Civil Claims List of VCAT.

Question: It is well known that if you buy a slave and then discover that he has a hidden bodily defect, you can return him and claim your money back. Does this apply if you find he wets his bed?

Answer: It depends why he does it. If he wets his bed when he's fast asleep or dead drunk or because he's simply too lazy to get up during the night, you cannot return him. But if he has a weak bladder, which is a bodily defect, you may do so.

I commend that to the members of the Anti-Discrimination List of VCAT. It appears to me that many of the day to day practicalities of the early tribunal have some similarity to the problems

we face on a day to day basis. Like VCAT, the conduct of a hearing, and case management, were problems for the first Tribunal. From Cicero's time, water clocks were used regularly. Pompey who brought a handsome water clock back from Egypt decreed that prosecuting counsel should address the Court for six hours and defence counsel for nine. From that time on clocks were kept in Court. Advocates who ran out of time had sometimes to bring their speeches to an abrupt close which could be something of a mercy after so many hours. We might all wish for an hour glass or a water clock from time to time.

To a degree, tribunals have not found favour in the world in which we are experienced until the last quarter of a century. As we know in Victoria and indeed throughout Australia, tribunals have been set up to deal with a variety of different issues. Throughout the post-war era tribunals in Victoria and other parts of the Commonwealth grew dramatically to the point where they came to be considered as an integral part of the justice system. In general they were established as specialist bodies to deal with a variety of issues as particular needs arose often on a relatively *ad hoc* basis.

It has always been the intention of governments that by comparison with courts, tribunals should be informal, speedy and inexpensive. Recent decisions of the Court of Appeal in Victoria underline the inquisitorial role of a tribunal, at least in the review jurisdiction.

VCAT - early days

The next period which might be identified as the first days of VCAT was the period of some months following the release of a discussion paper by the Department of Justice in

late 1996 headed "Tribunals and the Department of Justice - A Principled Approach". There can be no doubt that this discussion paper and the responses to it can be identified as the conception of VCAT. That discussion paper identified a number of perceived deficiencies in the structure and operation of Department of Justice tribunals including the exponential growth in the number of tribunals resulting in the creation of a perplexing mosaic of tribunal jurisdictions, and lack of independence of tribunal members from the executive government, in particular. The proposed logical structure for Victoria's tribunals set out in the discussion paper, although substantially different from what finally evolved, is clearly the genesis of the VCAT Act.

I turn now to the first 10 weeks of operation since 1 July 1998. Most people in this room are familiar with the structure of VCAT, but for those who are not, it is appropriate to describe its structure in a brief form. VCAT is split into two divisions - a Civil Division and an Administrative Division. Basically, the Administrative Division has a review jurisdiction. It incorporates much of the review jurisdiction of the former Victorian AAT but in addition, assumes the licensing appeals functions and the inquiry and disciplinary functions of the previous Motor Car Traders Licensing Authority, Prostitution Control Board, Travel Agents Licensing Authority and Estate Agents Disciplinary Tribunal. The Civil Division has what might be described as an inter-parties jurisdiction. Decisions under the Guardianship and Administration Act, although not strictly speaking, inter-parties matters, are also dealt with under this Division. Each of the two Divisions has a Vice-President as its head who in each case is a County Court Judge. Each of the 13 Lists has a Deputy President as

its head although in a number of cases Deputy Presidents have responsibility for more than one List. VCAT has 3 judicial members, 9 deputy presidents, 11 senior members, one of whom is part-time, and 23 full-time members, 3 permanent part-time members and 102 sessional members, that is, a total of 149 members. In the lead up to the commencement of VCAT, there was some considerable anxiety amongst members of the legal, planning and other professions associated with tribunals as well as consumer and like groups of various types. Some of these concerns were agitated by reason of copies of draft bills which came into existence for discussion purposes and which suffered substantial change in the course of the consultation process. Other concerns were that there would be sudden and dramatic change to procedures. There were concerns about rights to representation. There were concerns that suddenly members of guardianship would be hearing planning cases and vice versa. Accordingly, it was necessary to assure the various prospective professional groups and others associated with VCAT that there would be no sudden and substantial change without consultation. That has been the case and generally most procedures adopted by Lists are comparable with previous procedures of their precursor tribunals. However, there have been a number of changes which have taken place or are in the process of taking place. It is hoped that these changes will result in improved service to the community and better conditions and more work satisfaction for members of the tribunals.

First, some members of the VCAT have had the opportunity to sit in jurisdictions other than and in addition to those to which they were previously assigned. Although some care needs

to be taken in this regard, taking into account the fact that a tribunal has as one of its advantages over a court, specialised knowledge on the part of its members, there are, in my view, many advantages to a continuing practice of having members who are able to sit across the boundaries of various Lists. As has already been observed, and I might say from comments made to me by users of VCAT observed most favourably, there is a cultural and organisational benefit in skilled members of VCAT bringing their skills in the hearing of cases and in administration of case management to share with other Lists. Furthermore, it is now possible to use the skills of a particular person in one List for a particular case in another List. By way of example, the Occupational and Business Regulation List heard an appeal from the Medical Board with a panel member who was a psychiatrist transferred from the previous Guardianship Board. There are a wide variety of skills within VCAT. Engineers, surveyors, specialist physicians, planners and the like can no doubt lend their skills to Lists other than those in which they normally sit. That of course will be of benefit to the litigant and in my view it will also have a professional benefit for such members.

There is underway a business process re-engineering project. This is the modern tag for what I think used to be called systems analysis. We are hopeful that this very substantial project which will take some six months to complete will result in real benefits both for users of VCAT and for the registry staff and membership of VCAT.

The Attorney-General's Department has engaged consultants who are examining the present basis of remuneration of members of VCAT and they have had extensive

consultation with each of the Deputy Presidents of VCAT and others. Although obviously there will be very real difficulty in obtaining any increase in budget in the near future. I expect that the report of this consultancy will provide a fresh look at the relevant remuneration considerations for members of VCAT.

Many of you were present at the Tribunal Conference associated with the Australian Institute of Judicial Administration Annual Conference a week or two ago. The fact that 82 of the 160 registrants at that conference were from VCAT is a clear demonstration of the interest of the members of VCAT in further professional development. The VCAT Act places an obligation upon those responsible for the administration of VCAT to ensure that professional development and training is undertaken. Deputy President Cremean has undertaken the task of directing this aspect and has made substantial progress with a view to implementing formal training and professional development programs. There are numerous other initiatives on foot in the separate Lists. The Planning List, by way of example, is considering the operation of a pilot mediation scheme and a pilot commercial list arrangement. Most Lists have set up user groups which will enable direct input from the professions and other users.

Conclusion

The first days of VCAT have been exciting ones. None of the dire concerns which were expressed before the commencement of VCAT seem to have taken place. Indeed, the feedback which I and others have received from attending a variety of professional meetings and conferences has been positive indeed. I believe that the morale of members

is good at present and should only improve. The fact that there is now a more substantial basis for saying that tribunal members are more independent from executive government than in the past, in my view, can only enhance morale. A transparent appointment process is, I believe, capable of being achieved and as far as I can ascertain, there is considerable goodwill on the part of the Office of the Attorney-General to the establishment of such a process. Over a period of time all members of VCAT will have five year terms. That process is already substantially underway.

I believe that with the goodwill of its members and staff, VCAT can demonstrate conclusively to Government that the tribunal system is a major force in an independent judiciary. This has been recognised already by having VCAT invited to be represented on the Courts Consultative Committee, a committee previously composed of the Attorney-General, the Chief Justice, the President of the Court of Appeal, the Chief Judge of the County Court and the Chief Magistrate and their respective chief executive officers. The more VCAT demonstrates its capacity to play a major part as an independent part of the judiciary, the more independence its members will achieve.

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