

# CREATURE OF STATUTE, BEAST OF BURDEN: THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL AND THE HEAVY LIFTING OF HUMAN RIGHTS

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## VCAT in an age of rights

Competition is a healthy phenomenon. It steels the mind; prompts the individual to maximise performance. It drives the individual to excel, to be the best. Obviously this is recognised at statutory and policy levels in commerce. Yet, it cannot be any different where litigation is concerned. Litigants and their legal advisers will 'vote with their feet'. They will choose the litigation forum that is speedy, economical and effective.<sup>1</sup>

In the late 1980s and early 1990s the Supreme Court of Victoria witnessed a 'seismic shift in jurisdiction'.<sup>2</sup> As new institutions were established and acquired powers in relation to civil litigation, the Supreme Court's primacy as the only superior court of the State, a status enjoyed by virtue of its unique constitutional position, began to erode.<sup>3</sup>

The first challenge came following the establishment of the Federal Court of Australia in 1976.<sup>4</sup> While much of its jurisdiction was devoted to matters of national concern, the Federal Court's jurisdiction in relation to the *Trade Practices Act 1995* (Cth) enabled civil claimants, such as those bringing actions in contract and negligence, to avoid the delays and complexities of Supreme Court litigation by framing their claims in the alternative.<sup>5</sup> So too did the Court's preeminence in the field of personal injury recede, with amendments to the *County Court Act 1958* (Vic) removing the monetary limit on personal injuries claims that could be heard within that jurisdiction.<sup>6</sup> Then came the "phenomenon of tribunalisation" – a rapid proliferation of court substitute tribunals intended to alleviate the pressures on, and enhance the efficiency of, the civil justice system.<sup>7</sup>

Surrounded by reform, the Supreme Court was forced to streamline its internal processes to respond to the efficiency and economic appeal of these new institutional competitors. For the most part the endeavour was successful, with many commentators proclaiming the benefits of institutional competition for the efficiency of the justice system as a whole.<sup>8</sup>

So, when the operative provisions of Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') came into effect in January 2008, there was little cause for immediate concern over what appeared to be a second wave of institutional competition. Indeed, while the *Charter* conferred broad powers and duties on courts and tribunals in relation to human rights, the Supreme Court was conferred with special powers that it alone could exercise as Victoria's only court of supervisory jurisdiction.<sup>9</sup> No one expected then, that in the first three years of the *Charter's* operation, it would be the Victorian Civil and Administrative Tribunal ('VCAT'), not the Supreme Court, that would do much of the heavy lifting of human rights, taking the lead in attempts to discern the meaning and implications of the *Charter's* rights protection regime for administrative decision-making in Victoria.

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### ***Transforming VCAT***

The Tribunal was, in many ways, better positioned than the Supreme Court to tackle the difficult conceptual and interpretation issues that arose from the *Charter's* broad statutory regime. Firstly, VCAT's processes created a forum that was ripe for test case litigation. Unencumbered by the rules of evidence<sup>10</sup> and rarely subject to an award of costs,<sup>11</sup> parties to VCAT proceedings were free to raise *Charter* arguments without concern for the usual risks of civil litigation. Secondly, and perhaps more critically, the Tribunal was blessed with a rights-amenable leadership in its President, Justice Kevin Bell.

Throughout the *Charter's* initial stages, Justice Bell was vocal about the Tribunal being a rights-respecting institution, and about its Members having an important role to play in the development of human rights jurisprudence.<sup>12</sup> Leading the way, Justice Bell himself handed down a number of decisions addressing key questions concerning the *Charter's* operation. From defining the entities upon which the *Charter* imposes obligations,<sup>13</sup> to setting out the interpretative approach to be taken when construing legislation compatibly with human rights,<sup>14</sup> Justice Bell's decisions carved out a role for VCAT as a central player within Victoria's new system of rights protection. Perhaps the most significant question to arise was the extent to which the Tribunal could consider the lawfulness of a decision-maker's actions in bringing an application to VCAT, when that application was being heard in the Tribunal's original jurisdiction. This question, which came before His Honour in *Director of Housing v Sudi*,<sup>15</sup> highlighted the unique place of VCAT within Victoria's system of judicial review, as well as the uncertain scope of the Tribunal's capacity to engage in review of government action.

Before these questions can be considered in detail, the far-reaching impact of the *Charter* on the processes of VCAT must first be appreciated.

Three provisions of the *Charter* are central to the work of the Tribunal: s 4 prescribes the types of bodies upon which the *Charter* imposes duties in relation to human rights; s 38(1) prescribes the conduct required of those bodies in order to ensure that their decision-making is lawful; and s 32(1) requires that all statutory provisions be interpreted compatibly with human rights, to the extent that this can be achieved consistently with their purpose. Because s 32(1) operates in relation to all statutory provisions, the *Charter's* interpretative mandate applies equally to provisions within the *Charter* as it does to those external to it. Hand in hand with s 32(1), s 7(2) contains the *Charter's* proportionality test, and lists a range of non-exhaustive factors that may be taken into consideration when determining whether a limit imposed on a human right is reasonable and demonstrably justified. Finally, in addition to the operative provisions contained in ss 38(1) and 32, the *Charter* imposes substantive duties on the Tribunal in relation to procedural fairness.<sup>16</sup>

The proportionality test contained in s 7(2) and the new principles of construction engendered by s 32 represent a fundamental change to the way in which tribunals must approach statutory construction. For VCAT in particular, this more complex approach to decision-making is in many ways at odds with the priority placed by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*') on ensuring that the institution operates as an efficient, technicality-free jurisdiction.

### ***Reconceptualising VCAT***

Much of the commentary devoted to assessing the *Charter's* first three years of operation has focused on the complex interpretation issues that arise in relation to the meaning of the *Charter's* operative provisions, as well as on the content of specific rights and their interaction with various regulatory regimes.<sup>17</sup>

This paper does not purport to retrace well-travelled ground but, instead, takes an institutional approach to critically analysing the *Charter's* impact on Victoria's system of administrative justice generally, and on VCAT in particular. The claim implicit in the adoption of this analytical lens is that alongside the fundamental procedural transformations taking place as a consequence of the *Charter's* interpretative and conduct mandates, there are more subtle conceptual transformations.

This discussion will assess these transformations as they relate to three stages of VCAT's decision-making: ascertaining the power exercised by the Tribunal; characterising the Tribunal's jurisdiction to consider *Charter* matters; and determining content of the obligation to which the Tribunal must hold public authorities. Taken together, these stages represent the lifecycle of a VCAT decision.

To this end, the first section of this paper will consider the nature of VCAT's power. This is significant in light of s 4(1)(j) of the *Charter*, which excludes courts and tribunals from the *Charter's* conduct mandate only when these bodies are not acting in an administrative capacity. Determining when and to what extent VCAT will be a public authority for the purposes of s 4(1)(j) requires the Tribunal to delineate those instance in which it exercises judicial power from those in which it acts in an administrative capacity. This is by no means a straight-forward endeavour, as the various instruments that confer powers and functions on the Tribunal rarely signpost when the Tribunal, in exercising its powers, will cross from administrative into judicial terrain.

Another conceptual challenge, considered in the second section, is the extent to which VCAT has jurisdiction to consider the unlawfulness of a public authority's conduct in respect of the *Charter*, when that public authority is a party to a proceeding in the Tribunal's original jurisdiction. The Tribunal, as a creature of statute, may only exercise the powers conferred on it by enabling enactments. The *VCAT Act* and various other enabling enactments confer either powers on the Tribunal in relation to statutory causes of action (that is, original jurisdiction), or powers to review decisions made under various statutory regimes (that is, merits review). The central controversy in respect of the *Charter* is whether consideration of unlawfulness under s 38(1) of the *Charter* impermissibly transforms the nature of the Tribunal's function in its original jurisdiction to one of merits review. That is, does conferral on the Tribunal of a supervisory role in relation to human rights in any way usurp the functioning of the State's Supreme Court?

A third conceptual difficulty, the subject of the final section, is the content of the obligation to give "proper consideration" to human rights. If the Tribunal does have broad powers to consider the human rights compliance of public authorities in bringing applications before it, then what is the standard of decision-making to which these authorities should be held? Of specific concern is the role that departmental policies should be permitted to play in human rights decision-making, and the extent to which the Tribunal may assess these policies within its original jurisdiction.

Ultimately, consideration of these conceptual challenges is both necessary and timely; just as Justice Bell has returned to the Supreme Court (and arguably taken the jurisprudential momentum he brought to VCAT with him), the *Charter* faces a period of statutory review led by a government which is neither responsible for its enactment, nor supportive of its continued existence.<sup>18</sup> Indeed, in such a hostile environment, reform proposals will no doubt seek to clarify the position of the *Charter*, as well as VCAT, within Victoria's system of administrative justice.

### **The powers of VCAT: reconceptualising the Tribunal as a public authority**

The task of defining those entities that are public authorities for the purposes of the *Charter's* conduct mandate is central to the work of VCAT, given that a plethora of government entities ("core public authorities")<sup>19</sup> and entities exercising functions on behalf of government ("functional public authorities")<sup>20</sup> regularly appear in each of the Tribunal's 14 lists.<sup>21</sup>

For the most part, the Tribunal has had little difficulty identifying, as matters are brought before it, those parties that will be public authorities within the meaning of s 4(1)(a), (b) and (c).<sup>22</sup> A more challenging question arises, however, in relation to when the Tribunal itself will be a public authority and thus obliged to act compatibly with, and give proper consideration to, human rights. To this end, s 4 of the *Charter* only excludes courts and tribunals from the *Charter's* conduct mandate where those bodies are not acting in an administrative capacity.

The Tribunal has struggled with the meaning of "acting in an administrative capacity" for the past three years.

#### ***The Tribunal's consideration of "acting in an administrative capacity"***

There is little doubt that the phrase "acting in an administrative capacity" captures the various procedural and clerical functions undertaken by the Tribunal and its registry staff.<sup>23</sup> A greater degree of uncertainty exists as to when the Tribunal will be a public authority in performing an *adjudicative* function.

In *Kracke v Mental Health Review Board* ('*Kracke*'), the first VCAT decision to substantively approach the question, Bell J found that the Tribunal was acting in an administrative capacity in conducting merits review of a decision made by an original decision-maker - the Mental Health Review Board. In this sense, both the Tribunal and the Mental Health Review Board were bound by s 38(1).<sup>24</sup> But a question that did not arise for determination was whether the Tribunal could ever be a public authority in hearing a matter in its original jurisdiction where the powers it exercises bear a distinctly "judicial character".<sup>25</sup> This question goes to the very heart of the role played by VCAT within Victoria's system of administrative justice, as it mirrors the distinction between administrative and judicial power found at the centre of the Tribunal's hybrid structure. Indeed, if s 4(1)(j) is to be read as excluding the tribunal when it is "acting in a judicial capacity", then it would appear that the Tribunal could never be bound by s 38(1) when determining proceedings in its original jurisdiction. For reasons shortly to be discussed, however, such a construction of s 4(1)(j) would be inappropriately narrow.

In *Director of Housing v Sudi* ('*Sudi*'), Bell J finally had an opportunity to consider the operation of s 4(1)(j) in relation to the Tribunal's original jurisdiction. In that matter, an occupant of a property owned by a public authority landlord sought an order under s 233 of the *Residential Tenancies Act 1997* ('*RTA*') compelling the landlord to enter into a tenancy agreement with him. The application was heard in the Residential Tenancies list of VCAT, a list in which the Tribunal, in its original jurisdiction, is required to make a decision at first instance. In determining the proceeding, Bell J considered, as a preliminary question, whether s 233 of the *RTA* conferred "administrative power" on the Tribunal.

In this respect, the *RTA* enabled the Tribunal to make an order under s 233 only if satisfied that:

- The applicant could reasonably be expected to comply with the duties of a tenant: s 233(1)(a);
- The applicant would be likely to suffer severe hardship if compelled to leave the premises: s 233(1)(b); and

- The hardship suffered by the applicant would be greater than any hardship that the landlord would suffer if the order were made: s 233(1)(c).

The preliminary question was ultimately answered in the affirmative; however, Bell J's judgment on this point consists of no more than a declaratory statement concerning the Tribunal's status as a public authority. The judgment fails to elucidate any indicia of administrative power, the presence of which in s 233 were sufficient to bring the Tribunal within the scope of the *Charter's* conduct mandate. As a result, the *Sudi* decision provides little guidance for Tribunal members confronted with the task of determining whether the Tribunal is "acting in an administrative capacity" in other proceedings.

In *BAE Systems Australia Ltd ('BAE')*, while the question ultimately did not arise for determination, Mackenzie DP went marginally further than Bell J, suggesting factors that may be relevant to determining the Tribunal's status as a public authority in the context of an exemption application under s 83 of the *Equal Opportunity Act 1995 (Vic)* (a matter also heard in the Tribunal's original jurisdiction).<sup>26</sup>

Deputy President Mackenzie noted:

An exemption proceeding is a proceeding of an unusual kind. It can commence on application or on the Tribunal's own initiative. Generally, there is no 'dispute' or 'respondent'. An exemption, if granted, has future application and operates by notice published in the Government Gazette. It may relate to a class of people, activities or circumstances. But all these are matters for another day.<sup>27</sup>

This brief obiter and its allusion to the prospective nature of an exemption order, owes a debt to a line of federal public law decisions that deal with the nature and consequences of an act of administrative power.<sup>28</sup> The Tribunal, however, cited no authority to support its conjecture and, like Bell J's judgment in *Sudi*, ultimately leaves undefined the difficult conceptual issues that arise out of the interaction of s 4(1)(j) with the Tribunal's complex multi-jurisdictional structure.

These decisions demonstrate the way in which reconceptualising the nature of the power exercised by the Tribunal in its original jurisdiction can go some way towards enhancing the institution's ability efficiently to identify when it will be obliged to give effect to human rights. Accordingly, the remainder of this discussion will attempt to outline a conceptualisation of VCAT's power that better accords with a traditional constitutional law understanding of the nature of judicial - and, inversely, administrative - function.

### ***Interpreting the phrase "acting in an administrative capacity"***

Section 4 (1)(j) of the *Charter* is a provision that, like any other Victorian statutory provision, is subject to the *Charter's* interpretive mandate. Any attempt to construe the phrase "acting in an administrative capacity" must therefore begin with consideration of s 32(1).

In *R v Momcilovic ('Momcilovic')*, a case decided after both *Kracke* and *BAE*, the Court of Appeal held that the correct interpretive approach to be taken under s 32(1) is to explore all possible interpretations of a provision before adopting the one that least infringes human rights.<sup>29</sup> The Court held that the interpretative mandate does not create a new test of statutory construction, but rather requires a decision-maker to apply ordinary principles of interpretation in attempting to arrive at a human rights-compatible construction. Only if such a construction is not possible will s 7(2) (the proportionality test) be relevant.

In respect of s 4(1)(j), the Court's decision in *Momcilovic* supports a broad interpretation of the phrase "acting in an administrative capacity", which equates an action in an administrative capacity with an exercise of administrative power.<sup>30</sup>

Firstly, the ordinary meaning of these words focuses on the nature of a power being exercised by a decision-maker, not on the manner in which this exercise takes place. To this end, the *New Shorter Oxford English Dictionary* defines the word “capacity” as: “*capacity... n & a... 5 An ability, power, or propensity for some specified purpose, activity, or experience...*”. The Tribunal, therefore, should not necessarily be excluded from the operation of s 38(1) when it is exercising administrative power in an adjudicative setting.

Secondly, the Note to s 4(1)(j) also supports a broad view of the phrase, focusing on the inherent character of the power being exercised.<sup>31</sup> This is because the Note provides the examples of issuing warrants and hearing committal proceedings as instances in which a court or tribunal will be acting in an administrative capacity. In respect of both of these functions, a decision-maker will be required to exercise administrative power in a judicial manner.<sup>32</sup>

Finally, the purpose and context of s 4 supports a broad construction of the phrase. During the Charter Bill’s Second Reading Speech, the Attorney-General remarked:

the definition of ‘public authority’ in clause 4 is an important provision that determines the limits of the duty in clause 38. The intention is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature.<sup>33</sup>

As s 39(1) and (2) of the *Charter* indicate that a ground of unlawfulness arising from s 38(1) should be available to supplement a traditional ground of judicial review, adopting a broad construction of “acting in an administrative capacity” would ensure that the meaning of s 4(1)(j) of the *Charter* accords with the broad definition of “tribunal” contained in s 2 of the *Administrative Law Act 1978*.

The *Momcilovic* approach to interpretation indicates that a broad construction of “acting in an administrative capacity”, which focuses on the nature of the power being exercised, is a construction that is both available to the Tribunal and one that least infringes human rights. Once such a construction is adopted, it becomes necessary to consider what precisely it means to exercise “administrative power”.

### ***Indicia of administrative power***

There is a rich and extensive line of authority in the federal sphere concerning the distinction between judicial and administrative power. While this line of authority is predicated on the separation of powers contained in Chapter III of the Constitution, and the principle that federal tribunals cannot exercise the judicial power of the Commonwealth, these authorities are nevertheless relevant to characterising the powers exercised by a state tribunal.<sup>34</sup>

In *Love v Attorney-General (NSW)*, the High Court noted:

the decisions of this Court relating to the exercise of judicial power in the particular context of Ch III give expression to the settled principles governing the exercise of judicial power.<sup>35</sup>

Considering the federal line of authority, the Court, in *Precision Data v Wills*<sup>36</sup>, noted the difficulty involved in attempting to formulate a precise definition for these concepts, and adopted an approach that looked to the effect of the powers purportedly exercised as a means of identifying the relevant indicia of administrative or judicial power.

In arriving at its decision, the Court surmised:

[W]here, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important role to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal ... is entrusted with the exercise of judicial power.<sup>37</sup>

The indicia identified in this passage – the creation of new rights and obligations, the body in question not being a court, and the consideration given to matters such as a policy (that is, matters not specified by Parliament) – were approved by the High Court in *Visnic v Australian Securities and Investment Commission*.<sup>38</sup>

Yet these factors are by no means conclusive, and the High Court in *Attorney General (Cth) v Alinta* cautioned against the application of precise formulas to complex adjudicative functions.<sup>39</sup> While such considerations are not wholly antithetical to an exercise of judicial power,<sup>40</sup> in the words of Kitto J in *Tasmanian Breweries*, an administrative power ultimately “refers the Tribunal ... to its own idiosyncratic conceptions and modes of thought”.<sup>41</sup> In other words, the Tribunal will inevitably be exercising administrative power where it is empowered by an enabling enactment to make a determination as to what is “right and fair” between parties.<sup>42</sup>

However, for VCAT’s purposes, the three indicia of administrative power identified in the federal authorities provide an effective conceptual framework within which to assess the Tribunal’s status in relation to s 38(1) of the *Charter*. Indeed, turning back to consider *Sudi* and *BAE*, the findings in both these matters could have been supported by reasoning akin to that of the High Court in the Ch III cases.

To this end, the resolution of a dispute concerning the existing rights and obligations of parties has been held to be an inescapably judicial act.<sup>43</sup> Where, as in *Sudi*, the effect of the Tribunal’s order is to *create* a right or a duty, the power exercised may properly be characterised as administrative, despite the fact that the determination may have been made within the Tribunal’s original jurisdiction. Moreover, the fact that a power has been conferred on a tribunal and not a court is a strong indicator that the power is of an administrative character.<sup>44</sup> Finally, where a decision-maker is given a broad discretion to act without reference to any objective test or ascertainable criteria, the power so exercised is not judicial in nature.<sup>45</sup> This is because such a power enables the Tribunal to make a determination by reference to matters other than those set out in legislation, such as policy considerations and subjective value judgments.<sup>46</sup>

Ultimately, the taking of this kind of conceptual approach would provide VCAT’s members with stronger guidance as to the application of s 4(1)(j) to other matters within the Tribunal’s original jurisdiction.

### **The jurisdiction of VCAT: in search of a conceptual anchor**

The previous section sought to reconceptualise the nature of VCAT’s power so as to identify when the Tribunal will be exercising administrative power and thus bound to comply with the *Charter’s* conduct mandate. This section considers the entirely separate question of whether the Tribunal, in exercising judicial power, has jurisdiction to consider whether a public authority who is a party to a proceeding has complied with s 38(1).

#### ***Sudi* and the jurisdictional question**

The jurisdictional question arises as a consequence of the *Sudi* decision,<sup>47</sup> in which Bell J held that the Tribunal could consider human rights matters in its original jurisdiction.

Certainly, the Tribunal could always consider some *Charter* issues within its original jurisdiction; indeed, this was a natural consequence of s 32(1). But the particular issue arising from *Sudi* was what the Tribunal was to make of proceedings commenced in breach of s 38(1).<sup>48</sup> In essence, Bell J found that the effect of a public authority's non-compliance with s 38(1) in making an application to VCAT was to invalidate the application and deprive the Tribunal of jurisdiction to determine the substantive proceeding.<sup>49</sup> Justice Bell's approach effectively viewed *Charter* compliance as a jurisdictional pre-condition in proceedings to which a public authority is a party.

In relation to the source of the Tribunal's power to express this finding, Bell J stated (at [117]):

... the tribunal has both the jurisdiction and the obligation to determine whether it has jurisdiction in a proceeding, including the validity of provisions which impact on that jurisdiction. It also has jurisdiction to determine legal issues which legitimately arise in a proceeding within its jurisdiction.

While acknowledging that VCAT has only those powers conferred on it by statute,<sup>50</sup> Bell J's *jurisdictional pre-condition* approach greatly understates the breadth of the Tribunal's jurisdiction and fails to appreciate the nuances of the powers conferred on it by various enabling enactments. Indeed, the second reading of the VCAT Bill expressed Parliament's intention that the Tribunal would be a "one-stop-shop" for administrative justice and that it should have broad powers to enable the institution to perform this role.<sup>51</sup> To this end, several provisions of the *VCAT Act*, when read together, suggest that, if the Tribunal does have the power to consider *Charter* compliance, an assessment of this nature may be more properly characterised as taking place within – not as a pre-condition to – jurisdiction.

Firstly, Part 1 of the *VCAT Act* deals with preliminary matters relevant to jurisdiction, both merits review and original. Within this Part, s 4 provides that the ability of the Tribunal to consider a decision is not affected by the fact that the decision-maker acted outside power in making it. This provision purports to confer on the Tribunal a fulsome jurisdiction to consider the lawfulness of decisions, notwithstanding that the outcome of such consideration may be to declare a decision invalid. Indeed, s 97 is put in almost precisely these terms, conferring on VCAT the power to "consider any matter it sees fit". As to the Tribunal's substantive powers to provide remedies in relation to the unlawful conduct of public authorities, s 75 provides a power to dismiss proceedings that constitute an abuse of process (such as, undoubtedly, making an application that failed to comply with s 38(1)), while ss 123 and 124 embody the statutory equivalents of a court's equitable power to grant injunctions and issue declarations.

In this way, there were broad remedial powers available to Bell J in dealing with the *Sudi* matter, such that a finding of no jurisdiction was not the only – or even most appropriate – means of providing an effective remedy for the public authority's breach of s 38(1). Indeed, the terms of the *VCAT Act* itself, as well as Parliament's intention that VCAT be a "one-stop-shop" for administrative justice, suggest that the powers of the Tribunal should not be construed so narrowly as to deprive it of jurisdiction to consider legal questions that may arise in a proceeding.

Given the deficiencies of the *jurisdictional pre-condition* approach, as well as the fact that an appeal in *Sudi* is currently before the Court of Appeal, consideration of some alternative approaches to conceptualising VCAT's jurisdiction may go some way to providing a more complete picture of the position in which the institution finds itself in relation to s 38(1).



### *Intra-jurisdictional approaches*

Two approaches to conceptualising how the Tribunal may have jurisdiction to consider the *Charter* compliance of a public authority can be referred to as the *collateral attack approach* and the *nullity approach*. While both are predicated on the proposition that *Charter* compliance is an assessment that should properly be characterised as taking place *within* jurisdiction, the former focuses on the ability of a person whose human rights have been affected to raise a *Charter* argument, while the latter focuses on the legal effect of a purported decision that breaches the conduct mandate.

#### *The collateral attack approach*

A person whose rights or interests have been affected by an administrative decision purportedly made outside power may assert his/her rights in two ways: by bringing an action in judicial review (as a sword); or by raising the decision-maker's unlawful conduct as a defence in proceedings brought by that decision-maker to enforce the impugned decision (as a shield).<sup>52</sup> In traditional administrative law, the latter approach is referred to as a collateral attack. In considering VCAT's jurisdiction to provide a remedy in respect of a breach of s 38(1), a question arises as to whether collateral attack is permitted by s 39(1) of the *Charter*.

Section 39(1) provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

The Explanatory Memorandum to the Charter Bill indicates that s 39(1) is designed to preclude a relief or remedy being sought where the only breach that has been committed is one arising under the *Charter*.<sup>53</sup> It is unclear, however, whether a non-*Charter* ground of unlawfulness must be a cause of action, or whether "relief" in s 39(1) could be read broadly as encompassing both causes of actions and defences.<sup>54</sup> In this respect, Bell J's judgment in *Sudi* perhaps understated the relevance of s 39(1) to the jurisdictional question when, at [134], he finds that it is not necessary to rely on this provision in order to find that VCAT has jurisdiction to consider the conduct constituting a breach of s 38(1). The collateral attack approach to conceptualising the source of VCAT's *Charter* jurisdiction would seem to be supported by s 32(1) and a *Momcilovic* approach to interpretation of s 39(1).

In the context of VCAT, however, aside from negotiating the ambiguities of s 39(1), a further question arises as to whether enabling a collateral attack to be mounted on the basis of s 38(1) would effectively amount to conferring a supervisory role on a body that lacks any inherent supervisory jurisdiction.

Recently, the Court of Appeal, in the context of the Magistrates' Court, considered this question in *Maswyck v DPP ('Mastwyck')*.<sup>55</sup> *Mastwyck* concerned s 55(1) of the *Road Safety Act Act 1986* (Vic) ('*RSA*'), a provision that conferred on police the power to require any individual producing a blood alcohol reading in excess of the legal limit to accompany law enforcement officers to a police station. A refusal to comply with a request by officers under s 55(1) would constitute an offence under the *RSA*. The question in *Mastwyck* was whether a failure to exercise the power in s 55(1) reasonably would invalidate the decision by police, such that it could not be used as a basis for prosecuting an offence under that Act. It is worth restating the Court's discussion in relation to collateral attack in some detail.

At [70] Redlich JA notes:

As is recognised in *Aronson and Dyer*, the assertion of legal validity via collateral attack can ‘arise in a manner not designed specifically for handling it nor necessarily focusing on that issue... and in a court or tribunal which may not have much administrative law experience’. The summary prosecution of offences under the RSA in the Magistrates’ Court is not a jurisdiction readily amenable to such an administrative review of police powers. Questions of ‘policy’ including arguments about the availability of resources may arise [citation omitted]. The parties’ representatives are unlikely to have any particular familiarity with such potentially complex issues, proof or disproof of which may require a significant body of evidentiary material and necessitating multiple hearings.

It is a little conceptual stretch to draw an analogy between the Redlich JA’s characterisation of the Magistrates’ Court’s jurisdiction and the position in which VCAT finds itself in relation to the *Charter*. Despite being the largest administrative tribunal in the state, the Members sitting in VCAT’s original jurisdiction have very little practical administrative law experience. Furthermore, the goals of efficiency and expediency enshrined in the *VCAT Act* sit uneasily with the task of adducing evidence relevant to the substance of a collateral challenge.

Indeed, the issues discussed above were used by the majority in *Mastwyck* as justification for taking an alternative approach to finding that the Magistrates’ Court had jurisdiction to entertain questions of reasonableness. The majority construed the statutory power conferred by s 55(1) of the RSA as containing an *implicit* requirement that an unreasonable exercise of the power would render the decision invalid. This alternative method of conceptualising jurisdiction is essentially what is at issue in the *nullity approach*.

#### *The nullity approach*

This *nullity approach* to conceptualising VCAT’s *Charter* jurisdiction focuses on the nature of the power purportedly exercised by an original decision-maker (that is, a public authority) and the statutory terms by which the power is conferred. At the centre of this approach is the proposition that the legal effect of a decision depends not on the nature of the Tribunal’s jurisdiction, but on the context and purpose of the public authority’s statutory power.<sup>56</sup>

That the legal effect of a decision can be contingent on the nature of the power purportedly exercised, was discussed by the majority in *Project Blue Sky*,<sup>57</sup> where they said:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

The question for the tribunal therefore, is whether a statutory limitation imposed on a decision-maker’s power is ‘*inviolable*’, such that breaching it will render a decision purportedly made within that power a nullity that is incapable of affecting legal rights.<sup>58</sup> The process is one of statutory construction to ascertain whether Parliament has, by the terms, context and purpose of the statute, prescribed conditions on a power that are essential to its valid exercise.<sup>59</sup>

In this way, the validity of a decision is closely tied to the notion of jurisdictional error. In *Craig v South Australia*<sup>60</sup> the court stated that an administrative decision-maker (as all public authorities will be) makes a decision attended by jurisdictional error when it:

... falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.

Where jurisdictional error occurs, it is incumbent upon a court that becomes aware of such an error to take action to prevent an *ultra vires* decision affecting the legal rights of the parties, provided that the institution has some power to do so.

Where the institution reviewing the purported decision is a tribunal lacking supervisory jurisdiction, a broader policy question exists as to whether permitting that body to undertake such an inquiry undermines the “institutional integrity” of the Supreme Court by enabling a litigant to circumvent statutory appeal and judicial review processes.<sup>61</sup> This concept was discussed in *Forge*, in which the joint judgment refers to “the defining characteristics of a state Supreme Court” as requiring protection from erosion.<sup>62</sup>

But is it really apt to say that the Supreme Court’s institutional integrity is undermined by VCAT having jurisdiction to consider *Charter* matters? Certainly, the authorities dealing with the need to protect the supervisory role of the state Supreme Courts are ultimately concerned with attempts to limit the Supreme Court’s own supervisory role, not with attempts to enable other bodies to perform a similar function.<sup>63</sup> Moreover, the Victorian Parliament is not precluded from conferring supervisory jurisdiction on a non-court entity such as VCAT, as the Federal Parliament would be under Ch III of the Constitution.

Whether a decision attended by jurisdictional error can be set aside even where it has not been appealed to a superior court was considered by the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj*.<sup>64</sup> In that case, the High Court, by majority, determined that the Immigration Review Tribunal had authority to determine that a jurisdictional error had been made and to revoke a decision attended by the error, notwithstanding that the decision had not been appealed to a court.

At [51], Gaudron and Gummow JJ stated:

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all ... there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.<sup>65</sup>

Justice Bell considered the *Bhardwaj* line of authority at [135]-[137] of *Sudi*, but ultimately stopped short of considering the legal consequences of jurisdictional error, for the same reasons that he felt it unnecessary to consider s 39(1).<sup>66</sup> If, however, the Court of Appeal determines that the *jurisdictional pre-condition* approach is insufficient to ground Bell J’s findings in relation to s 38(1), then the authorities concerning collateral attack, nullity and jurisdictional error may provide apt alternative bases for conceptualising VCAT’s *Charter* jurisdiction.

### ***Towards a new role for the Tribunal in its original jurisdiction***

As the early decisions of the Tribunal in relation to the jurisdictional question demonstrate, the *Charter*’s operative provisions demand that the Tribunal engage with a broader body of administrative and constitutional law principles, the complexity of which is in many ways antithetical to its traditional technicality-free, expedient mode of decision-making. Nevertheless, answering the jurisdictional question with a high degree of conceptual clarity would assist the Tribunal’s Members to readily ascertain what precisely is required of the Tribunal in relation to s 38(1), and to gradually clarify the nature of VCAT’s new role within Victoria’s administrative law system.

## **The decision-making of VCAT: considerations and policy in giving effect to human rights**

If *Sudi* survives appeal, VCAT will be charged with performing a function different to those with which it is currently familiar. In proceedings to which a public authority is a party, the Tribunal will be required to undertake something akin to judicial review in assessing the lawfulness and legal effect of a decision that purports to limit human rights. In proceedings in which the Tribunal itself is a public authority in hearing the matter, the Tribunal will be required to hold itself to the same standard in relation to the obligation contained in s 38(1).

Certainly, there would be similarities between this new function, and some aspects of the Tribunal's role upon merits review. However, in conducting a *Sudi*-type analysis, the Tribunal would have a much broader capacity to consider those matters that inform administrative decision-making but which have traditionally been considered matters for the assessment of the executive alone.

In continuing to appraise the institutional significance of the *Charter*, this final section considers the substantive stage of the decision-making process and purports to situate the Tribunal's new role within two bodies of authority found in traditional administrative law: the cases concerning considerations in administrative decision-making; and the cases concerning departmental policy and the fettering of discretions.

### ***Considerations in administrative decision-making***

In assessing the standard of conduct required by s 38(1), the Tribunal has grappled with the task of appreciating the difference between the obligation to take account of "relevant considerations", and the heightened requirement of "proper consideration" found in s 38(1) of the *Charter*.<sup>67</sup>

The Tribunal recently considered this tension in *Director of Housing v Turcan* ("*Turcan*"),<sup>68</sup> a matter in which a public authority landlord sought to justify evicting a tenant from public housing (a decision that prima facie infringed the respondent's right to a home) by reference to a departmental policy that required human rights to be taken into account in deciding whether to carry out an eviction. The questions for the Tribunal in that matter were: firstly, whether merely turning one's mind to the existence of human rights issues was sufficient to satisfy the public authority's obligation to give "proper consideration"; and, secondly, whether a policy - in the absence of any other evidence - could itself be evidence of the process of justification embarked upon by a public authority in relation to s 7(2) of the *Charter*. While both questions were decided in the public authority's favour, this and other decisions that have considered the obligation contained in s 38(1) have done little to elucidate fully the role of considerations in administrative decision-making.<sup>69</sup>

At a minimum, s 38(1) requires a public authority to "give real and genuine consideration to human rights".<sup>70</sup> As Emerton J explained in *Castles v Secretary to the Department of Justice*:<sup>71</sup>

Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made ... there is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

While there may be no formula for the Tribunal to adopt in assessing whether a public authority has complied with s 38(1),<sup>72</sup> there is a line of authority arising out of traditional administrative law that may guide the Tribunal in arriving at an understanding of the degree of consideration required by the second limb of the conduct mandate.

In *Weal*,<sup>73</sup> *Khan*<sup>74</sup> and *Hindi*,<sup>75</sup> courts have found that the content of the obligation to consider is that “proper, genuine and realistic consideration” be given to the merits of a particular case, and that a decision-maker be ready, in an appropriate case, to depart from any applicable policy.<sup>76</sup>

As to the minimum level of consideration required, in *Weal*, a matter concerning review of a development project, Giles JA noted at [80]:

Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance to the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration.

While courts undertaking judicial review have since departed from the “proper, genuine and realistic consideration” test in relation to the relevant considerations ground,<sup>77</sup> the *Charter’s* specific use of the term “proper consideration” in s 38(1) arguably provides scope for this line of authority to be revived.

Certainly, the “proper consideration” test would only require that consideration be given to the human rights engaged by a particular case, not to the merits of the case as a whole, but the test would nevertheless greatly expand the Tribunal’s role in the oversight of public sector decision-making.

At a minimum, the Tribunal would be required to ensure that a public authority do more than merely “invoke the Charter like a mantra”.<sup>78</sup> However, the extent to which the tendering of a departmental policy, as in *Turcan*, would be capable of satisfying this minimum threshold, is also an issue with which traditional administrative law can assist.

### ***Departmental policy and the fettering of discretions***

As *Turcan* highlights, the application of departmental policies has the potential to prevent a public authority from giving substantive consideration to human rights. While the tension between departmental policy and the s 38(1) obligation has not yet been properly confronted by the Tribunal, the role that departmental policies should be permitted to play in administrative decision-making has been extensively dealt with by courts in the context of judicial review.

To this end, an administrative decision-maker applying a policy may fall short of fulfilling the “proper consideration” obligation, where a policy that regulates the exercise of power is either inconsistent with the legislation that confers the power<sup>79</sup>, or where the policy is inflexibly applied so as to cause the decision-maker to shut his/her eyes to the merits of a particular case.<sup>80</sup>

Decisions of the Administrative Appeals Tribunal (‘AAT’) that have considered the application of policy in an administrative decision-making setting have resoundingly noted that a decision-maker should never allow departmental policy to displace the pre-eminence of legislation.

As the AAT noted in *Re MT, KM, NT and JT and Secretary, Department of Social Security*:

It is obvious that ... guidelines are necessary in the administration of a large Department with widespread responsibilities, even if sometimes there might be a danger of the guidelines supplanting the legislation itself. The Tribunal itself must, however, adopt a guarded approach to such guidelines. In a discretionary area, as here, it is equally true that the Tribunal should not exercise that discretion in a vacuum, ignoring the nature and extent of any problem dealt with in administrative guidelines if it is plain that the problem goes beyond the particular case or cases in hand.<sup>81</sup>

Where, as in *Turcan*, a departmental policy purports to prescribe a *process*, the result of which is a decision that meets the minimum requirement of s 38(1) of the *Charter*, the Tribunal will be required to critically assess whether that policy sufficiently outlines the factors relevant to substantive consideration of the merits of each case.

This would be an unfamiliar assessment for Tribunal Members sitting within VCAT's original jurisdiction. Nevertheless, a more nuanced appreciation of the areas of administrative law dealing with considerations and policy will enable VCAT to better receive evidence from public authorities as to their *Charter* compliance, as well as ultimately to better assess the adequacy of their decision-making in accordance with s 38(1).

### **Conclusion: the uncertain future of the *Charter* at VCAT**

At the beginning of the *Charter's* fourth year, great uncertainty remains as to the extent to which the transformations taking place within VCAT will have a lasting effect on the institution. Not only is the *Momcilovic* approach to interpretation in many ways antithetical to VCAT's traditional *modus operandi*, but many of the most significant *Charter* decisions to affect the Tribunal to date – *Momcilovic*, *Sudi* and *Turcan* among them - are currently on appeal.

Compounding this problem, the meaning of s 39(1) is still unsettled and no significant VCAT or superior court authority has sought properly to consider this provision. Depending on the outcome in the *Sudi* appeal, the only effective solution may be law reform. Amendments to s 39(1) of the *Charter* modelled on s 40C of the *Human Rights Act 2004* (ACT), for example, could clarify the *Charter's* uses as both a shield and a sword in legal proceedings.

The need for VCAT to remain active as a rights-respecting institution in the wake of Justice Bell's departure is significant.

As Bell J himself noted in *Kracke*:

It is very important for all courts and tribunals to consider human rights arguments as part of the case if that is at all possible. It is the responsibility of courts and tribunals to do so, for thereby they uphold the rule of law and carry out their functions under the Charter. People should be able to raise all issues in the one institution at the one time. Splitting cases costs time and money and puts justice beyond the reach of many people.<sup>82</sup>

Ultimately, until the key conceptual issues arising out of the *Charter's* operation are resolved, the highly unsettled nature of these principles will provide a strong disincentive for members to develop the law within VCAT, and for tribunal users to bring *Charter* claims. While the Tribunal has done an admirable job in seeking to carve out a new role for itself under the *Charter*, it will continue to be held back in this endeavour if its new role is not built on solid administrative law foundations.

### **Endnotes**

- 1 The Hon. Chief Justice Marilyn Warren A.C, 'The Growth in Tribunal Power' (speech to the Supreme Court of Victoria and the Council of Administrative Tribunals, 7 June 2004).
- 2 *Ibid.*
- 3 *Australian Constitution s 77; Judiciary Act 1903* (Cth) ss 38 and 39.
- 4 *Federal Court of Australia Act 1976* (Cth).
- 5 Hon. the Chief Justice Marilyn Warren AC, "The Growth in Tribunal Power", above n 1.
- 6 Section 3, *County Court Act 1958* (Vic), definition of 'jurisdictional limit', inserted by No. 16/1986.
- 7 Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41, 43-44; The Hon. Justice Murray Kellam, 'Developments in Administrative Tribunals In the Last Two Years'

- (2001) *Federal Law Review* 427; Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393.
- 8 The Hon. Chief Justice Marilyn Warren A.C, 'The Growth in Tribunal Power', above n 1.
- 9 Under s 36 of the *Charter*, only the Supreme Court can declare that a statutory provision cannot be interpreted consistently with human rights.
- 10 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98 ('*VCAT Act*') empowers the Tribunal to consider any matter it sees fit, unencumbered by the rules of evidences, and obliges its members to conduct each proceeding with as little formality and technicality as possible.
- 11 *VCAT Act* s 109(1) establishes the general rule that parties to a Tribunal proceeding are to pay their own costs.
- 12 Justice Bell, "The Role of VCAT in a Changing World" (VCAT) [2008] VicJSchol 13, 17.
- 13 See the extensive discussion in *Metro West v Sudi* [2009] VCAT 2025 as to when a private entity will be a "functional public authority"; and *Director of Housing v Sudi* [2010] VCAT 328 (in relation to the occupant's application – R2009/3264) in which it was held that the Tribunal itself was a public authority when hearing an application in its Residential Tenancies List.
- 14 *Kracke v Mental Health Review Board* [2009] VCAT 646 (the approach expounded by Bell J in this case was eventually overruled by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50).
- 15 *Director of Housing v Sudi* [2010] VCAT 328 ('*Sudi*') (in relation to the landlord's application – R2009/1177 and R2009/33454).
- 16 *Charter* ss 6(2)(b), 8, 24.
- 17 See for example Jeremy Gans, 'The Charter's Irremediable Remedies Provision' [2009] MULR 4; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson/Lawbook Co, 2008); Kristina Stern, 'The Victorian Charter of Human Rights: What is Left Unsaid?' (Paper to Australian Institute of Administrative Law, 3 May 2007); Simon Beckett, 'Interpreting Legislation Consistently with Human Rights' (Paper to the National Administrative Law Forum, 14-15 June 2007); Simon Evans and Carolyn Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *PLR* 264.
- 18 Inquiry into the Charter of Rights and Responsibilities Act 2006, *Terms of Reference* (2011) <http://premier.vic.gov.au/2011/04/inquiry-into-charter-of-human-rights-and-responsibilities-act-2006/>.
- 19 *Metro West v Sudi* (Residential Tenancies) [2009] VCAT 2025 at [88]; *Charter* s 4(1)(a) and (b); see also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 2824.
- 20 *Charter* s 4(1)(c).
- 21 *Metro West v Sudi* (Residential Tenancies) [2009] VCAT 2025at [88]; *Charter* s 4(1)(a) and (b); see also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 2824.
- 22 *Metro West v Sudi*; *BAE Systems Australia Ltd* (Anti-Discrimination) [2008] VCAT 1799 at [71]; *Hobsons Bay City Council & Anor* (Anti-Discrimination Exemption) [2009] VCAT 1198; *Homeground Services v Mohamed* (Residential Tenancies) [2009] VCAT 1131; *McAdam v Victoria University & Ors* (Anti-Discrimination) [2010] VCAT 1429.
- 23 The note to s 4(1)(j) gives the example of various internal procedures, while the Explanatory Memorandum (at 4) indicates that hiring staff will also be an administrative function.
- 24 *Kracke v Mental Health Review Board*, above n 14, at [232]; see also *Rogers v Chief Commissioner of Police* (General) [2009] VCAT 2526; and *XYZ v Victoria Police* (General) [2010] VCAT 255.
- 25 Justice Bell's obiter at [332] of *Kracke*.
- 26 [2008] VCAT 1799.
- 27 *BAE Systems Australia Ltd* at [71]; see also *Hobsons Bay City Council & Anor* at [35].
- 28 *Thomas v Mowbray* (2007) 233 CLR 307 at 464 per Hayne J; *Precision Data Holdings* at 173; *Waterside Workers Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 per Isaacs and Rich JJ at 462-3; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Worker's Union of Australia* (1987) 163 CLR 656 at 666; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360; *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330 at 357 per Griffiths CJ.
- 29 [2010] VSCA 50.
- 30 This was the construction preferred by Hollingworth J in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, relying on *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 50. However, ultimately the parties were in agreement on this point.
- 31 A Note at the foot of a provision forms part of the Act: *Interpretation of Legislation Act 1984* (Vic), s36 (3A) and see *One Tel Ltd (in liq) v Rich* (2005) 53 ACSR 623 at 635-638 in relation to s 13 of the *Acts Interpretation Act 1901* (Cth).
- 32 In respect of the issuing of warrants see *Love v Attorney-General (NSW)* (1990) 169 CLR 307 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ at 321; *Grollo v Palmer* (1995) 184 CLR 348 per Brennan CJ, Deane, Dawson and Toohey JJ at 359-360; *Ousley v The Queen* (1997) 197 CLR 69 per McHugh J at 100; and *Lamb v Moss* (1983) 49 ALR 533 at 558-559. In respect of committal proceedings see *Amman v Wegener* (1972) 129 CLR 415 per Gibbs J at 435-436; *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at 15; and *Potter v Tural* (2000) 2 VR 612 per Batt JA at 617.
- 33 Victoria, Legislative Assembly, *Debates*, 4 May 2006, p 1293.
- 34 see *Barbcraft Pty Ltd v Goebel Pty Ltd* [2003] VCAT 1700 at [80]-[85]; and *Sabet* at [125].
- 35 at 319.
- 36 (1991) 173 CLR 167.



- 37 Ibid, at 190-191.
- 38 (2007) 231 CLR 381.
- 39 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1.
- 40 *Thomas v Mowbray* at 350 per Gummow and Crennan JJ; *R v Spicer* at 317 per Dixon CJ, Williams, Kitto and Taylor JJ.
- 41 *Tasmanian Breweries* at 376.
- 42 *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 154 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
- 43 *Thomas v Mowbray* at 464 per Hayne J; *Precision Data Holdings* at 173; *Waterside Workers Federation of Australia v JW Alexander Ltd* at 462-3 per Isaacs and Rich JJ; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Worker's Union of Australia* at 666; *Re Dingjan; Ex parte Wagner* at 360; *Huddart Parker & Co Pty Ltd v Moorehead* at 357 per Griffiths CJ.
- 44 *Re Dingjan* at 360.
- 45 *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317.
- 46 *Tasmanian Breweries* (1970) 123 CLR 361; *Alinta* at 553-554 per Crennan and Kiefel JJ and at 598 per Gleeson CJ; and *Precision Data* at 191.
- 47 The earlier matters of *Director of Housing v IF* [2008] VCAT 2413 and *Homeground Services v Mohamed* [2009] VCAT 1131 both considered the question, although not in great depth. In *IF*, Member Nihill found that s 39(1) precluded the Tribunal from hearing Charter arguments as a defence to an application by a public authority, while in *Mohamed*, Member Perlman found that this kind of collateral attack could be permitted.
- 48 *Sudi* has been followed by other non-judicial members in *Director of Housing v Turcan* [2010] VCAT Ref No R201011922 (Unpublished, 4 May 2010) and *Director of Housing v TK* [2010] VCAT Application 201011921 (Unreported, 22 July 2010).
- 49 *Sudi* at [121].
- 50 *Sudi* at [121]; see also *R v Perkins* [2002] VSCA 132 at [16]; *Herald and Weekly Times Pty Ltd v VCAT* [2006] VSCA 7 at [27]; and *Roads Corporation v Maclaw No 469 Pty Ltd* (2001) 19 VAR 169.
- 51 VCAT Act Second Reading Speech, *Parliamentary Debates* (LA): 1998 Autumn Session [250].
- 52 *Craig v South Australia* (1995) 184 CLR 163, 176–180; M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [1.90].
- 53 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.
- 54 See generally Jeremy Gans 'The Charter's Irremediable Remedies Provisions', above n 17.
- 55 *Mastwyck v Department of Public Prosecutions* [2010] VSCA 111.
- 56 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, *Jadwan v Department of Health* (2003) 204 ALR 55 at [42] and [64]; *Ma v Minister for Immigration and Citizenship* [2007] FCAFC 69, and *Garde-Wilson v Legal Services Board* [2008] VSCA 43.
- 57 (1998) 194 CLR 355 at 390.
- 58 *Plaintiff S157/2002 v Commonwealth* at [26].
- 59 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [390]; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 [166] per Hayne J; *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476 at 490 [25]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 604-605, [11]-[14]; *Garde-Wilson*.
- 60 (1995) 184 CLR 163 at 179.
- 61 For a discussion of the concept of "institutional integrity" see *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45.
- 62 Ibid at [63]; also discussed in *Kirk* [2010] HCA 1.
- 63 See generally *Kirk*.
- 64 *Bhardwaj*, above n 56.
- 65 See also *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476.
- 66 *Sudi* at [135]-[137].
- 67 Pound and Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities*, above n 17.
- 68 *Turcan*, above n 48.
- 69 *Rogers v Chief Commissioner of Police (General)* [2009] VCAT 2526; *Kracke*, above n 14; *Homeground Services v Mohamed*, above n 22; *Director of Housing v TK* [2010] VCAT Application 2010/11921 (Unreported, 22 July 2010); *Smith v Hobsons Bay CC* [2010] VCAT 668; *Dawson v Transport Accident Commission (General)* [2010] VCAT 644; *Magee v Boroondara CC & Anor* [2010] VCAT 1323.
- 70 *R (Daly) v Home Secretary* [2001] 2 AC 532; cited in *Rogers v Chief Commissioner of Police (General)* [2009] VCAT 2526
- 71 [2010] VSC 310 at [185]-[186].
- 72 Ibid.
- 73 *Weal v Bathurst City Council* [2000] NSWCA 88.
- 74 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.
- 75 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586 at 599; see also *Surinokova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 96, per Hill J; *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169 at 178-179, per Burchett J.



- 76 *Khan*, above n 73.
- 77 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at [36]-[66]; cf *Hendy v Repatriation Commission* [2002] FCA 602 at [61]-[62] in which Madgwick J held that *Anthonypillai* was only relevant to immigration decisions, given the limited means of review under the *Migration Act 1958* (Cth).
- 78 *Castles* at [185]; see also *Perez v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 454 at 486.
- 79 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696 at 700.
- 80 *British Oxygen Co Limited v Minister of Technology* [1971] AC 610 per Lord Reid at 625.
- 81 (1986) 9 ALD 146 at 150; see also *Re Kandasamy and Secretary, Department of Social Security* (1987) 11 ALD 440 at 445.
- 82 *Kracke*, above n 14, at [857].