"The role of VCAT in a changing world: the President's review of VCAT"

Speech delivered to the Law Institute of Victoria

4 September 2008

Justice Kevin Bell – President, VCAT

VCAT's FIRST TEN YEARS

Equal access to justice is of fundamental importance in a democracy. That is something I do not need to tell the members of the Law Institute of Victoria. Each of the four main institutions in the Victorian justice system – the Supreme Court, the County Court, the Magistrates' Court and VCAT – gives effect to that principle, as the community is entitled to expect. VCAT does so in a way that is different. As the Court of Appeal recently highlighted in *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd*,[1] VCAT is not a court. It is a tribunal. That, I say with conviction, is its fundamental value.

What do I mean by a tribunal? Typically, a tribunal is legally constituted and operates with flexibility and informality, with efficiency and expedition, and with the least possible expense to the parties. Legal rules irrelevant to a tribunal, such as the onus of proof, do not apply. A tribunal cannot just do what it likes. It must apply the relevant laws, rules and principles and do so objectively, independently and impartially. The hearing may be conducted by a legally qualified member or judge, or by a non-lawyer with specialist expertise, such as a planner, doctor or accountant, or by a multi-disciplinary panel. A tribunal is likely to have developed alternative dispute resolution mechanisms, especially with respect to mediation. The procedures will vary across a spectrum, but in all cases must be fair. In some cases, a proceeding in a tribunal may look and feel more like a meeting than a hearing, while in others it may seem more like a hearing in a court. The rules of evidence usually do not apply, but may be used as a guide. Legal representation may be limited or excluded

[1] [2008] VSCA 45.

altogether. Self-representation will (or should) be both respected as a right and accepted as a practical necessity in many cases. Tribunals must give due assistance to self-represented parties. This is their legal duty and what the rights of the parties require. Subject to contrary statutory provisions, tribunals are bound to observe the rules of natural justice. In Victoria, depending on the nature of their jurisdiction, tribunals are bound to comply with the *Charter of Human Rights and Responsibilities Act 2006*.

The description I have just given applies equally to small claims tribunals, planning appeals boards, guardianship tribunals and many other cognate bodies having similar functions and methods of operation. In their own way and within their own sphere, each of them gives the community access to a just mechanism for resolving a dispute, be it between a consumer and a trader, a resident or developer and a council, a professional and their designated regulatory agency or an infirm elderly person and their family. For these kinds of disputes, which usually arise in a consumer protection, social welfare or regulatory context, tribunals have increasingly been seen by governments to be the best way for giving the community equal access to justice.

This phenomena of tribunalisation, which we have seen occur all over the world, reached a high point in Australia, and specifically in Victoria, in 1998. With the passing of the *Victorian Civil and Administrative Tribunal Act 1998*, the main tribunals in this State were consolidated jurisdictionally into one institution – a super-tribunal. VCAT was established to provide a new structure for Victoria's tribunals and to streamline their operation; to improve access to justice; to facilitate the use of technology and alternative dispute resolution; and to develop flexible and cost-effective practices for hearing and determining disputes in its original and review jurisdictions. In 1998 it was the biggest tribunal in Australia, as it is now, and has grown to be perhaps the biggest of its kind in the world.

In its realisation and execution, this was a visionary legislative act. For present and future generations of Victorians, the parliament added a new pillar to our system of justice, enhancing both its strength and its capacity. In doing so, it recognised as legitimate the different methods of dispute resolution by which tribunals operate and

brought them into the mainstream, subject to the important supervisory jurisdiction of the Supreme Court.

On that foundation, successive governments have built VCAT into a substantial edifice. Measured in terms of the number and scope of its multifarious jurisdictions, the growth of VCAT has been impressive. Each year since 1998 has seen new jurisdictions added. Following the government's policy that a party should have the freedom to choose where to seek justice, VCAT was even given unlimited monetary jurisdiction in civil claims and in disputes involving domestic buildings (the latter exclusively in certain cases), which began an interesting and, for some, controversial competitive tension between the Tribunal and the courts. This process of accretion is very much still under way. The government has announced its intention to confer some new jurisdictions on VCAT, and more seem likely to follow.

Given the history of growth in the past ten years I have briefly recounted, and the natural opportunity for reflection that the ten year milestone brings, the government has decided it is now timely to review VCAT. It has asked me, as the new President, to audit VCAT's performance and broadly focus on a range of access, operational and jurisdictional issues. In summary, I will consider whether VCAT is achieving its objectives, is taking advantage of its opportunities and is equipped to face the challenges of a changing world. I embrace the task of carrying out the review. The Attorney-General's actual terms of reference are in the appendix.

I have been conducting the review since I was appointed five months ago, focussing in this period on the internal organisation and management of VCAT as an institution. This has enabled me to identify – in a preliminary way – some of the critical issues. These have informed my decision about the broad approach I should adopt in conducting the review. Let me first say something about those issues, under the review headings I mentioned, and then return to that approach, in which the Law Institute of Victoria has an important role to play.

ACHIEVING VCAT'S OBJECTIVES

Equal access to justice is an expression I use to encapsulate one of VCAT's most important objectives. "Equal" means open to, reaching and applying to everybody,

regardless of any distinction whatsoever. It has a procedural and sometimes a substantive connotation. By "access" I mean the capacity of members of the community to come to the Tribunal for resolution of their disputes as quickly, effectively and cheaply as possible, and by fair and appropriate means, whether by adjudication, mediation or otherwise. "Justice" means the Tribunal must be objective and impartial, operate by fair and transparent procedures and make competent decisions based on applicable law and principle.

That VCAT has, since 1998, resolved over half a million disputes, by adjudication or alternative dispute resolution, is proved by the statistics. The presents numbers exceed 90,000 applications a year. It has thereby touched the lives of millions of Victorians, whether as parties, family members, witnesses or otherwise. The high need for what VCAT does is demonstrated by the sheer number of the mediations, compulsory conferences and hearings published in the daily law list.

However justifiably proud we may feel of VCAT's achievements, this is a time for mature reflection, not complacence and self-congratulation. I think important questions can and should be asked about how well VCAT is meeting its objectives, and I would offer these as a beginning:

- is access to VCAT equal: are there areas of unmet need for dispute resolution in our existing jurisdictions; are all sides to a dispute able to come to the Tribunal to present their case; do people in the outer suburbs of Melbourne and in regional and country Victoria have the same ready access as people in urban Melbourne; does the Tribunal make itself open to people with disabilities and other access barriers; are we doing enough to expand knowledge about and access to VCAT by engaging appropriately with the community and by other means, such as use of new technology?
- is the access as quick, efficient and cheap as possible, and the method of resolution fair and appropriate: once application is made, are there delays in getting a mediation, compulsory conference or hearing listed; are decisions given on the spot or in a timely way; is the listing and administration system operating well for users and the community generally; are the procedures of

the Tribunal transparent, appropriate and flexible; does it respect and give due assistance to self-represented parties; does the Tribunal guard against being perceived as a club; does it guard against creeping legalism?

- does the Tribunal deliver justice: are the decisions of the Tribunal generally seen to be fair, competent and principled; do parties come away thinking they have had a fair go; is decision-making in the Tribunal seen to be reasonably consistent and predictable (in all of these respects, we are definitely not talking about particular decisions, which are the responsibility of individual members exercising their independent statutory function)?

Other important questions can be asked about these issues in their application to specific kinds of cases and lists. It may be VCAT is handling the smaller kind of case well, but not the larger and more complex cases. For example, how well are we handling large civil claims and domestic building cases for which we have unlimited jurisdiction? Should all large cases be assigned to a docketed judge or deputy president, even though the cases are in different lists? It may be that the special needs of particulars lists have become too subsumed under the general needs of the entire institution. It may be the Tribunal is generally operating well, but particular lists need added capacity to lift their performance. My predecessor, Justice Stuart Morris, saw this problem in the planning and environment list, in which he implemented the highly successful Operation Jaguar, which significantly reduced delays in listing hearings and producing decisions. Perhaps this idea needs to be revisited both in that and other lists.

The process of examining these questions within VCAT itself has already begun; indeed it was underway before my arrival. That is a credit to the membership and administration of the organisation. A significant restructure of the VCAT registry is being implemented. It will bring overdue improvements to the administrative operation of VCAT and the working conditions of its staff. The members of VCAT, led by the vice-presidents and deputy-presidents, have given me a great deal of feedback about the performance of the institution and how it can be improved. This has accelerated the process of my own learning about VCAT and given me many ideas for improvement. At VCAT, there is a feeling and a willingness to move forward into a new era. The organisation is ready for positive change. To express

this sense of energy and bring consistency to VCAT's visual communications, we will be refreshing our logo, signage, forms, stationery and other visual images.

As you can see, I am anxious to ensure the need to identify and implement obvious necessary improvements is not unnecessarily delayed by the review.

However ready VCAT is to embrace change, and however obvious some of those changes may be, the time has come for the introspective examination I have just described to be matched by a transparent, meaningful and legitimate process of external examination, one in which the large number of VCAT's stakeholders and the community generally can participate. VCAT belongs to the community, not its members and staff. More of that later. First I ask, has VCAT taken advantage of the opportunities presented by the 1998 consolidation?

TAKING ADVANTAGE OF VCAT'S OPPORTUNITIES

Perhaps once in a generation the opportunity arises to make a really substantial institutional change to the system of justice. Consolidation of the principal Victorian tribunals into VCAT presented one such opportunity. The various jurisdictions and administrations were brought together under the one roof. The legislation implemented a judicial leadership model which conferred on the president (a judge of the Supreme Court) and vice-presidents (judges of the County Court) responsibility for directing the business of the Tribunal, the management and administration of the Tribunal and the professional development and training of members. The legislation gave the president the power to direct the vice-presidents in carrying out these responsibilities, so it conferred on the president ultimate authority for the governance of the organisation in all respects.

Broadly speaking, this creation of a one-stop shop for civil and administrative review has brought efficiencies of which VCAT has taken definite advantage. The administration is carried out by a body of staff whose size has attained critical mass. The members and mediators are sufficient in number to enable the broad jurisdictions of the Tribunal to be properly exercised. The case-load of the Tribunal is so high that a large number of sessional members can be engaged to conduct many cases, which is vital to the efficient operation of the system. The Tribunal conducts a large

proportion of cases by mediation and compulsory conference, in a range of jurisdictions, which is due to the efficiencies obtained from dealing with a large list of cases. The modest leased building in which it operates in the central business district is extremely well utilised, many of the spaces being multi-purpose. All in all, I don't think anyone would dispute that the government gets a high return for its funding of VCAT, which in large measure is due to the efficiencies that have flowed from the 1998 consolidation.

However, there is some way to go before it can be said that full advantage has been taken of the administrative, management and organisational opportunities offered by the consolidation. Generally speaking, each individual jurisdiction has been maintained as an individual list. In many cases the same people perform the same administrative or adjudicative work at VCAT as they did before. Many of the administrative systems that were inherited have been maintained, so we do not yet have one common system. In some respects this is a strength, for each list and administrative sphere has its own unique demands that must competently be met by staff and members who possess the necessary specialist knowledge and expertise. But the process has, I think, gone on too long. VCAT should be a unified institution, not an archipelago.

ONE VCAT is a term I use – and italicize for emphasis - to describe a VCAT policy priority of fundamental importance: the unification of VCAT behind the objective of bringing modern governance and management practices to bear on the institution, so as to fully realise its bold mission of unifying Victoria's previously disparate tribunals into an efficient, flexible, accountable and engaged institution, one that is dedicated to delivering reasonably consistent and predictable procedures, standards and outcomes to the whole of the Victorian community. Thereby VCAT will fully realise the opportunities of the 1998 consolidation.

Implementation of *ONE VCAT* has already begun. The registry review involves a substantial collective change process on the part of the entire organisation. The president, vice-presidents and deputy-presidents have undertaken a very valuable leadership program, provided by the Judicial College of Victoria and facilitated by an expert independent consultant. The senior management have undertaken similar

programs. The presidential members and the senior management have met together in a one-day conference. There will be more of such engagements. The role of the vice-presidents and deputy-presidents has been enhanced in a strong heads of lists committee, chaired by the president, which is beginning to function more like a board of directors. The committee uses a range of tools to enhance its collective oversight of the lists, including quarterly reporting. There is a strong focus on both VCAT-wide and list-specific professional development, which is a fundamentally important priority for the organisation.

This process, I can announce, will ultimately feed into the preparation of a five-year strategic plan for VCAT. My view is that such a plan, quite independently of the review, is vital if we are to equip VCAT to face the challenges of a changing world. The preparation of the VCAT strategic plan and the implementation of *ONE VCAT* will be strongly influenced by and need to go hand-in-hand with the review. I would like to conduct an external consultation as part of the review, about which I will be talking to the government in the near future. To the extent possible and appropriate, I intend to make this consultation perform the dual purpose of being the first diagnostic stage of the preparation of the five-year strategic plan. In this way, and to the extent appropriate, I hope to combine a consideration of the issues that immediately confront VCAT with a consideration of the longer term issues likely to be exposed by the review.

VCAT is strongly committed to the optimum use of new technology. It has introduced many initiatives in this area, including remote electronic filing of applications in the residential tenancies list. Others are about to be implemented, including (I can announce) an SMS hearing reminder system in that list. But there is much more we can do. An organisation like VCAT should have a world's best practice website. Ours is good, but not to that standard. VCAT should have educative videos on that website, and in the environs of the building, to encourage self-help and break down the fear and apprehension often felt in a tribunal hearing. There is some such material available, but not nearly enough. We should be maximising the use of new technology to improve access to VCAT in country Victoria and even in outer suburban Melbourne, and to make it as easy as possible for users, witnesses and the legal profession to engage with VCAT at minimal cost.

VCAT does send members to the suburbs of Melbourne and to country Victoria for hearings and mediations. Doing so allows us not just to resolve disputes, but to obtain some understanding of the needs of people in these local and remote areas. Our co-location at the Neighbourhood Justice Centre in Collingwood is perhaps the best example of this kind of engagement, but there are many others. VCAT can use the relationships established with the profession, the courts and community agencies to build its capacity to improve its operation in these localities. In the review, I will be interested to examine how well we are doing this at the present and how much better we can do so in the future. For example, Victoria's Aboriginal community are particularly under-represented in their use of the Tribunal, and it may be this kind of engagement with that section of the community is a necessary part of increasing their access.

Linked to this subject is the issue of VCAT's city location. As I have said, VCAT well utilises its current building in the CBD, which is an example of taking advantage of an opportunity presented by the 1998 consolidation. But I have never heard anyone say it is in an ideal location for an institution of justice. We will physically outgrow the building in a few years. The government's Legal Precinct Master Plan contemplates VCAT moving to a new location and a better building, which VCAT will definitely need. It will be necessary to think carefully about maximising the opportunities that our eventual relocation will bring.

Thinking broadly, there is a question in my mind about how decentralised VCAT should be. A properly functioning central building is undoubtedly indispensable, even to support any decentralised satellites. I think it probably needs to be in the CBD, because the community's access to VCAT and VCAT's links with the courts are of fundamental importance. But if improving equal access to justice also means fitting out and staffing shopfronts, or large mobile vehicles like the libraries you see in country areas, or co-locating with appropriate community organisations, we should at least contemplate it.

Let me now turn to equipping VCAT to face the challenges of a changing world.

EQUIPPING VCAT TO FACE THE CHALLENGES OF A CHANGING WORLD

Consider the following five important issues. All over the world governments, courts and justice institutions are appreciating that judicial officers (which includes tribunal members and mediators) need proper induction, education and support. This is linked to an increasing understanding of the need for such institutions to have modern and appropriate internal governance arrangements. Institutions large in size – like VCAT – present challenges and opportunities for that reason alone. There is a trend towards alternative dispute resolution in the system of justice generally, which I endorse. The experience of justice that the community has is a function not just of participation in hearings but also the contact between the community and the institution as a whole. Human rights are now of fundamental importance in the conduct of government and the exercise of statutory power. These are just five areas – professional development and governance, size, the trend towards alternative dispute resolution, the community's experience of justice and human rights – in which VCAT must face challenges in the changing world. Each of them are vitally linked to VCAT's future in various ways, as I will now explain.

Professional development and internal governance

In Victoria, VCAT was included as a full partner in the Judicial College of Victoria. Thus the president, with the heads of the other three jurisdictions, is a member of the JCV board. This was an inspired legislative move. It recognised VCAT as the fourth main partner in Victoria's justice system and brought VCAT into that independent institution which, in Victoria, is responsible for considering such important questions as professional development and judicial leadership. My acting predecessor, Judge John Bowman, was a co-signatory to the endorsement by the JCV of the National Standard for Professional Development, which recommended that each judicial officer spend at least five days each year maintaining and enhancing the skills, knowledge and abilities required to execute their role.

Back in 1998 when VCAT was established, there was little discussion in Australia about these matters. The first president of VCAT, Justice Murray Kellam, himself played an important role in helping to start the process of considering these questions, which I want to continue.

A fundamental challenge facing VCAT in a changing world is the proper induction, education and support of members and mediators under a unified VCAT, one that takes itself seriously as a principal partner in Victoria's justice system. Facing that challenge will require, among other things, the creation of a significantly enhanced professional development capacity at VCAT, one that both respects the statutory independence of members (including sessionals) in their individual decision-making but also gives them the necessary support for carrying that responsibility out.

With such a large number of members, there is a natural turnover at VCAT. With new jurisdictions being conferred, there are new members being appointed quite often. Induction is a major undertaking at VCAT, which we struggle to do well because we have not yet devoted sufficient time and resources to delivering the necessary programs. Yet it is the first point at which the institution has the opportunity – I would say the obligation – of setting members upon the path of growth into mature judicial officers, exhibiting the qualities specified in the JCV endorsed framework to which I now turn.

Accepting that every judicial officer with specialised knowledge brings something important to their role, there is a core set of skills and attributes that every such officer must possess and maintain. The courts are somewhat advanced in identifying those skills and attributes and in establishing appropriate structures for their maintenance. The Judicial Studies Board of the United Kingdom has produced a Framework of Judicial Abilities and Qualities which is of world's best practice standard. This week, the JCV board endorsed that framework. Tribunals have much to learn from the courts in this regard, although we will need to adapt the learning to meet our own needs. I think it is vital to the maintenance of the quality and consistency of VCAT's performance, in both adjudications and mediations, and also to the provision of adequate support to its members and mediators, both personally and professionally, that VCAT focus strongly on this area. Doing so will build on an existing strength: we already have a very active professional development committee. But I am talking about an institutional commitment of a higher order, backed by resources, one that extends to sessional members and mediators, who have special professional development needs. Doing so will also enhance VCAT's capacity to use its members

and mediators flexibly, for example by deploying them in different lists, which will improve our efficiency. For this reason, I have developed the concept of a joint VCAT-JCV Learning Centre located at VCAT, which will design and deliver appropriate induction and professional development programs for its members. I am in discussions with the other heads of jurisdiction about this proposal and hope to take it to the government soon.

The challenge of size

VCAT is not just a big tribunal. It is much more than the sum of its parts. Adding a jurisdiction to VCAT means that jurisdiction and VCAT itself is a little changed. Little by little that change adds up to something significant, although the process may be so gradual as to be almost imperceptible.

Governing and administering a large tribunal, with many disparate jurisdictions, requires the creation of appropriate systems. These are different in kind to the systems required for small boards and tribunals. VCAT is not the same now as it was in 1998, as to which the same comment applies with added force. While valuing specialised knowledge, and respecting statutory independence, the tribunal can and should operate on a unified basis towards a high standard of excellence. What that standard means in concrete terms should be identified, stated and appropriately applied. This requires the perfection of those appropriate systems. Doing so will take time, commitment and sensitivity, but it must be done, whether or not VCAT grows further.

The government has asked me to consider whether new jurisdictions have been appropriately assigned to VCAT, and by appropriate processes and principles. This is an important question. The rapid development of VCAT raises the issue whether there is any reason to put a break on VCAT's growth, and whether there is some natural limit to VCAT's size which should not be exceeded. I have no view on that subject, and encourage a vigorous debate. Quite apart from that, it may be argued there should be a prior examination of the fit between a proposed new jurisdiction with VCAT. This raises immediately the fundamental question of what VCAT is. What are the attributes of its dispute resolution processes and administrative arrangements against which that judgment of fit can be made? I have an open mind

about these questions, but I am conscious there are various models from which to choose.

Whatever be the resolution of that issue, I think new jurisdictions should be assigned to VCAT according to a process that is principled. It should be possible to identify the attributes and advantages of the VCAT model (the plural would be more apt) of dispute resolution, as compared with other models. It should also be possible to calculate, using appropriate formulae, the cost of setting up (which includes induction) a new jurisdiction, and delivering (which includes professional development and overhead costs) the kind of dispute resolution which its exercise requires. Then the government could make a principled decision about whether to confer that jurisdiction on VCAT. The beginnings of this kind of principled consideration already exist in the current arrangements but can, I think, be significantly enhanced. I look forward to seeing how that can be done.

When a new jurisdiction is conferred, it is not enough for VCAT simply to accept a new jurisdiction without preparing for its proper exercise. We do prepare now, but this process too can be enhanced. VCAT should be able to guarantee that it will assign to such jurisdictions members and mediators who possess the necessary generic skills, plus the additional specialised knowledge that is required, and that the administrative support will be appropriate for the task. As I have said, there needs to be proper induction processes for new members and staff, which is a significant task. That is VCAT's minimum responsibility with respect to new jurisdictions, as it is with respect to its existing ones.

Alternative dispute resolution (and convergence)

Of the four principal institutions in Victoria's justice system, alternative dispute resolution, including mediation, has been most practised – I would say pioneered - at VCAT. Here VCAT has been the lighthouse, showing the way, for the tide is now turning in favour of the courts accepting ADR as a legitimate mechanism in appropriate cases. Thus we are starting to see some convergence in the methods of operation of courts and tribunals, with the former beginning to add some of the mechanisms of the latter to their procedural options. The courts have obtained from government substantial additional capacity to engage in alternative dispute resolution,

which I personally endorse. The community can only benefit from this commitment to and investment in exploring new and better ways of doing things. VCAT will be very much a continuing part of this process. We look forward to an effective collaboration with the courts, to working with ADR practitioners and to participating in NADRAC and other similar institutions towards developing alternative dispute resolution as one important way of ensuring the community has equal access to justice.

This convergence between courts and tribunals is evident in other areas. Some of the flexible procedures practised by tribunals are being adopted by courts. The Civil Justice Review recently published by the Victorian Law Reform Commission called for more flexibility and efficiency in court procedures, which the government seems likely to embrace.

As alternative dispute resolution, especially mediation, becomes more mainstream, as the courts adopt enhanced case-management practices and as court procedures become more flexible, governments and policy makers will begin to think carefully about VCAT's place in the system, and about the choices they make regarding the location of existing and new jurisdictions. There may come a time when VCAT is trying to retain existing jurisdictions, not being given new ones This is a healthy process, which we would be foolish to ignore. I would add that the convergence is not all one way. VCAT conducts court-like proceedings, with full legal representation, in many cases, especially in the more adversarial and complex ones. It should always have that capacity.

VCAT is part of the National Alternative Dispute Resolution Advisory Council. Under the arrangements which have been put in place by the National Mediator Accreditation Committee, VCAT can accredit its own mediators. Again, Justice Kellam has done much to promote and implement these arrangements. VCAT has a Principal Mediator whose leadership role I see as very important. I would like to see the position up-graded to a deputy-president having special responsibility for alternative dispute resolution. You can see, therefore, we are well advanced down the path of implementing alternative dispute resolution. This area is, I think, a strength

on which we can build. It is my hope that VCAT will become a centre of excellence in alternative dispute resolution in Victoria.

The human experience of justice

The quality of justice is not defined by reference entirely to a person's experience at a hearing in a court or tribunal or the actual result that is ordered. For example, justice delayed is justice denied, in which case injustice is experienced because justice is not. This idea of how justice is experienced is, to me, an important one and has current relevance.

The party to a proceeding, or a witness or a family member, experiences justice when they can access the tribunal at a location convenient to them or via the website. When our administrative staff answer enquiries in a timely and appropriate way, when correspondence and listing advice is dealt with correctly and on time, the message conveyed to the public is that the institution of justice is working for them. That observation may be made about virtually all facets of VCAT's administration which involve interaction with the community.

I think we have a lot to learn from the world of business in this regard. There are firms of solicitors, for example, who think carefully and strategically about their communications with clients, witnesses and other persons. They understand that, at the point of every engagement, an important interaction is taking place, one that has consequences for how the business is perceived. These perceptions influence decision-making and behaviour on the part of the client, witness or other person, so the creation of a positive perception is something the firm takes seriously.

VCAT is a justice institution, not a profit-making business. Nevertheless, the perceptions created by the way we interact with the public are important. These interactions can create or impair confidence in VCAT, build or cut down a person's capacity for self-help, heighten or reduce the fear of the unknown and worsen or alleviate stress arising from the dispute in question. These human responses make up a person's experience of justice over and beyond what happens in the hearing or in consequence of an order being made. That is why I think we should care about it. A business cares about these matters, which it calls customer service standards, because

they ultimately affect the bottom line. We should care about these matters, which we call respecting and understanding the human experience of justice, because that is our business – justice.

The larger the justice institution, the more likely it is to be remote from this broad human experience of justice, but the more resources it possesses to ensure that experience is positive. A challenge for VCAT in a changing world is to make that experience positive. We could pioneer this concept and enhance the community's respect for the rule of law by enhancing their experience of justice in their interactions with VCAT. The community is entitled to expect that from a tribunal, which is a human face of justice. Imagine the powerful educative and confidence-building effect of videos on the VCAT website and in the environs of the building showing how hearings are conducted and giving advice and assistance to parties, witnesses and others who may be affected.

Two other initiatives deserve consideration. The first is the development of a communications policy at VCAT. We have already appointed a communications officer, whose job will be a busy one. The second is more relevant to the conduct of the review. It is carrying out survey analysis of the experience of the public, advocates and other users of the tribunal. I was recently the chair of the Department of Justice advisory committee on a similar project concerned with mediation processes in the Supreme Court and County Court. It set a very useful precedent in this regard.

Human rights

The last challenge confronting VCAT I want to mention is human rights.

The enactment of the Charter in 2006 was an historic milestone in the evolution of Victorian democracy. It requires every public authority to act consistently with fundamental human rights, to which the Charter gives explicit legislative recognition.

In the exercise of its substantial administrative and registry functions, VCAT is undoubtedly bound by the Charter. In the exercise of its adjudicative functions by members, there is a legal question, not yet determined, about how bound by the

Charter VCAT is. It seems prudent, however, to assume that substantial aspects of VCAT's functioning in this regard will come under the Charter. Even if, in formal legal terms, some aspects of VCAT's adjudicative functioning do not come under the Charter, human rights will still be relevant, for they can be taken into account in the exercise of VCAT's ordinary adjudicative powers and responsibilities.

Thus I say, in its administrative and adjudicative functioning, VCAT is a human rights respecting institution. One of its divisions is the human rights division. We take seriously our role as the principal tribunal in the first state in Australia with a Charter.

The challenge we face in this area is two-fold. First, to the extent we are bound to do so, in both our administrative and our adjudicative functioning, we must comply with the Charter. To the extent that respect for human rights requires the same action, whether we are Charter-bound or not, we should so act. VCAT has done much educative and preparatory work in this regard, but more needs to be done. For us, human rights needs to be part of the wallpaper. Second, the members of VCAT, especially those in senior positions, need to contribute to the development of a human rights jurisprudence. This is an interesting prospect, but will require professional development and careful thought. The role of the profession in contributing to this process is, of course, inestimable.

One important object of the Charter is to enhance the sense of engagement and belonging of members of the community to their society, as represented by their institutions of government. By enhancing the government's obligation to respect the human rights of the community, people will be more empowered in their own lives and more likely themselves to behave as responsible members of a democracy. Respecting rights inculcates respect for rights.

This sense of being empowered, of believing your fundamental rights will be respected and of being able to participate in the processes that affect your life is an important one for the Tribunal. It is very easy for specialist administrative tribunals to present to the uninitiated the appearance of being a club. The tribunal member (whether legally qualified or not), the advocates (whether lawyers of not) and the

witnesses (who are often experts well known in the field) all seem to know the rules and procedures, and may even demonstrate personal familiarity with each other. But the new advocate in the Tribunal, the self-represented party, and the family and community members looking on may experience only anxiety, uncertainty, a sense of exclusion and even, in some cases, humiliation.

Presentation by a tribunal to the uninitiated of being a club is entirely unintended but has very negative consequences. One consequence is to induce a profound sense of disempowerment in the minds of people who are unfamiliar with the rules and procedures of the tribunals. This is felt at the personal level and experienced as disrespect for the dignity of the individual. The Tribunal should guard against this perception of being a club. Each division and list of the Tribunal should guard against the perception of being a club. I think the Charter serves to emphasise the importance of doing so.

Meeting all of these challenges has practical importance but also serves to protect and enhance the legitimacy of the tribunal in the mind of the public and the confidence of the community in the tribunal as an institution of justice. Thus, a justice institution with responsibility for contributing to the development of a human rights jurisprudence should itself comply fully with its Charter obligations, and be seen to be a tribunal that respects the rights of everybody affected by its decisions, including those who are not familiar with its rules and procedures. Its decisions will have more legitimacy, and the community will have more confidence in them, if it does. In the review, I will be wanting to examine VCAT's responsibilities in this regard. To the review I can now turn.

PRESIDENT'S REVIEW OF VCAT

As a recently appointed president of VCAT, I hope I possess two qualities which are useful from the point of view of the review. Being recently appointed, I am independent and objective, and am prepared to ask the hard questions about the performance of the organisation. Being the President, and having ultimate responsibility for VCAT's governance, I am in a position to implement appropriate change, by due internal process, and subject to government approval and funding where necessary. The review, therefore, must reflect these strengths. It must be

conducted independently by the President, and it must feed into the process of making positive improvements at VCAT.

Reflecting these considerations, I can announce the review will have these broad components (with the indicative time lines specified):

- an internal examination conducted by the President with the members and senior management at VCAT, to discover the main issues as they relate to the organisation, administration and management of VCAT, from the point of view of VCAT itself (part completed and ongoing)
- collecting and organising, at VCAT, necessary statistics, data and historical information for use in assessing the issues specified in the terms of reference (ongoing, but especially October 2008 – March 2009)
- an external consultation, carried out be the President and by an independent consultant reporting to the President, to discover how VCAT's key stakeholders and the community assess VCAT in terms of the access, operational and jurisdictional issues specified in the terms of reference (October 2008 – March 2009)
- a research project carried out by the President and a consultant reporting to the President, in which the important policy, jurisdictional and framework issues will be identified and analysed (October 2008 – April 2009)
- the preparation, by the President with assistance as required, of a draft report (April – July 2009)
- consultation, directed by the President as appropriate, by the President and an independent consultant reporting to the President, with VCAT's key stakeholders on the contents of the draft report (August – September 2009)
- preparation of the final report by the President, with assistance as required (October – November 2009)
- delivery of the review by the President to the Attorney-General (30 November 2009)

I am pleased also to announce that I will be forming a reference group to provide me with independent and expert advise in relation to the review. I am in the process of formulating its terms of reference and membership. I will be writing to the President

in the near future to extend an invitation to the LIV to join the reference group. I would very much welcome the LIV's participation.

CONCLUSION

If you look back at the members and mediators of the Tribunal over the years, if you look at them now, if you consider who they might be in the future, you will find just a few key groups. One of the most important are the members of the Law Institute of Victoria, an organisation of which I am proud to say I was once a member.

It is therefore with great pleasure that I have been able to take the opportunity tonight to give this keynote address on the role of VCAT in a changing world and the President's review of the organisation.

APPENDIX
PRESIDENT'S REVIEW OF VCAT
ATTORNEY-GENERAL'S TERMS OF REFERENCE

INTRODUCTION

VCAT was established in July 1998 to:

- provide a new structure for Victoria's tribunals and to streamline their administration;
- improve access to justice;
- facilitate the use of technology and alternative dispute resolution (ADR); and
- develop flexible and cost-effective practices for hearing and determining disputes in its original and review jurisdictions.

VCAT's workload has increased steadily over the past ten years. It has acquired many new jurisdictions (such as health professionals, Working With Children Checks and disability issues) and has added the Human Rights Division and the Legal Practice List to its original structure.

REVIEW SCOPE

The review will audit VCAT's performance over the past 10 years and broadly focus on the following key issues:

Access issues:

- Whether VCAT has succeeded in improving access to justice and in delivering equitable outcomes for all Victorians; and
- Whether steps could be taken to further improve such access.

Operational issues:

- Whether VCAT has been cost-effective in delivering services to Victorians, and whether there is scope for achieving greater administrative efficiencies; and
- Whether VCAT's use of technology and ADR has assisted parties to resolve disputes fairly and more speedily, and whether existing services could be enhanced.

Jurisdictional issues:

- Whether the additional jurisdiction assigned to VCAT since 1998 has been appropriate, and whether the process and principles under which VCAT acquires new jurisdictions could be enhanced; and
- Whether the exercise of concurrent jurisdiction with Victoria's courts has enhanced the administration of justice in Victoria.

Further issues identified in the course of the review may also be considered.

TIMING

The review report should be delivered on or before 30 November 2009.

3 March 2008