Environment Defenders Office

# Submission

in response to

# ‘The role of VCAT in a changing world’

**Consultation Paper**

prepared by

**Environment Defenders Office (Victoria) Ltd**

**12 June 2009**

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## About the Environment Defenders Office (Victoria) Ltd

The Environment Defenders Office (Victoria) Ltd ('EDO') is a Community Legal Centre specialising in public interest environmental law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice. In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working to protect Australia's environment through environmental law.

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Victorian Civil and Administrative Tribunal

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## Our comments

The EDO welcomes the president's review of VCAT and the opportunity to respond to the discussion paper, 'The role of VCAT in a changing world'.

We are a member of the Federation of Community Legal Centres and we have contributed to the development of their comprehensive submission and endorse the Federation's recommendations. This submission focuses on a limited number of priority matters that we have identified from our experience with the Planning and Environment List.

As a community legal centre specialising in public interest environmental law, our comments are primarily from the perspective of public interest litigants undertaking proceedings to protect the environment through objections to development planning permits.

It is our view that VCAT's Planning and Environment List is generally operating well. In particular VCAT's relative informality and 'no costs' jurisdiction have enabled numerous individuals and community groups who are clients of our service to pursue litigation to protect the environment.

Below we have proposed a number of recommendations to maintain and improve access to justice and the operation of VCAT's Planning and Environment List. These relate to public accessibility, both in terms of cost and expert representation; information and support to self-represented parties; membership and expertise appropriate to VCAT subject matter; and a number of minor administrative reforms.

In summary, we recommend that VCAT:

1. retain the existing costs rules in section 109 of the *Victorian Civil and Administrative Tribunal Act 1998;*
2. consider appointing independent tribunal experts;
3. increase information and support to self-represented parties in the Planning and Environment List by providing a duty lawyer service;
4. broaden the membership of the Planning and Environment List to include greater environmental science or ecological expertise;
5. require that tribunal members participate in professional development initiatives designed to promote clear and concise writing of statements of reasons;
6. retain merits review jurisdiction for reviews under the Planning and Environment Act;
7. increase administrative efficiency and reduce paper waste by accepting electronic filing of documents;
8. address delays in hearing applications in the Planning and Environment List, particularly delays in resolving appeals;
9. permit, in certain circumstances, Responsible Authorities and objectors to make brief closing submissions in order to provide clarification and to maintain overall balance in hearings;
10. improve the audibility of hearings for those not seated at the bar table;
11. develop an on-line video of a mock VCAT hearing to assist first time VCAT users; and
12. provide an imaging service free of charge for parties wishing to access documents on the tribunal's files.

## VCAT's 'no costs' jurisdiction

The EDO is aware that some members of the legal profession have called for costs to be more frequently awarded to successful parties in VCAT proceedings. We strongly oppose such proposals.

Cost is a critical element of access to justice. Litigation costs rules and costs orders are particularly important factors influencing access to courts and tribunals, and can represent a fundamental barrier to those wishing to pursue litigation, including public interest proceedings.

The risk, if unsuccessful, of having to pay the costs of the other party, is a major deterrent to individual citizens and environment groups accessing courts and tribunals, even where the prospects of success are very strong.

With respect to public interest litigation the Australian Law Reform Commission (ALRC) has specifically noted that:

> "the significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules."[1]

We therefore strongly support the current costs allocation rules contained in section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) which require each party to bear its own costs. We consider the tribunal's power to award costs against a party in exceptional circumstances, such as where the proceedings are vexatious or there has been a failure to comply with an order of the tribunal, to work well. The nature and complexity of proceedings in the Planning and Environment List in particular would make the determination as to who should pay costs, and in what proportion, excessively complicated.

The absence of routine costs orders is a very important element in ensuring that VCAT continues to be accessible to the greater community and serves the public interest. We therefore stress that the existing rules should be retained. VCAT's cost provisions have enabled the EDO to bring numerous proceedings before the tribunal on behalf of public interest litigants protecting the environment in a wide variety of vitally important public interest cases.

## Access to experts

Expert evidence is frequently required in planning and environment matters to assist in understanding various technical issues necessary to reach a decision. This can include the specialist opinions of ecologists, traffic engineers, architects, hydrologists, town planners, landscape and visual amenity experts, environmental scientists, acoustic engineers and cultural heritage experts, who provide reports or give oral evidence before the tribunal.

Equal access to experts, however, is a significant issue for individual citizens and community groups appearing before the Planning and Environment list. Individuals and community groups are often unable to meet the significant costs involved in engaging experts.

Further, in our experience, even where community groups have raised funds in order to pay experts, experts are often unwilling to appear on behalf of objectors opposing developments for fear of jeopardising future consulting opportunities. Unfortunately it is also our experience that in some cases where experts are engaged at reduced or pro-bono rates, they are often seen to be

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[1] Australian Law Reform Commission Report No.75 at para 13.11.

sympathetic to the cause of objectors and thus the evidence presented by such witnesses is seen to be partial and of lesser reliability and weight. In contrast, developers and public authorities often have extensive resources and ready access to experts and can afford to 'shop around' for expert evidence to support their case.

Low-income individuals and community groups are placed at a significant disadvantage in hearings before the tribunal both by inadequate financial resources and by their inability to obtain expert representation to counter material relied upon by developers. Their frequent inability to counter evidence with alternative opinions means that the Tribunal is often less well informed about technical issues than it might otherwise be which affects the quality of decision making.

In order to ensure that parties can participate effectively in tribunal hearings and improve access to justice it is necessary for VCAT to increase the accessibility of experts for low-income individuals and community groups. One suggestion is that VCAT give consideration to the appointment of tribunal experts. Court appointed experts have long been used in other jurisdictions. For example, in order to reduce costs and to ensure that the court has the benefit of evidence from a person who is not engaged by only one party, the Land and Environment Court of NSW has successfully adopted procedures which provide for the court to appoint experts to inquire into and report on any question in the proceedings.[2]

The EDO considers this to be a useful model which could be successfully implemented by VCAT. We suggest that VCAT approve and maintain a list of persons suitable to be appointed as tribunal-appointed experts in various fields of knowledge and make a selection from this pool of experts on the application of a party or on its own initiative. The role of the independent expert appointed by VCAT could be to present independent evidence on behalf of disadvantaged individuals or community groups, or to peer review reports already presented. Alternatively, similar to the NSW Land and Environment Court, a single expert could be appointed by the tribunal to give evidence with respect to any issue or issues in the proceedings, thus reducing the need for expert evidence to be adduced by both of the parties.

This would overcome the prohibitive cost of retaining experts and avoid the criticism that is often made that expert witnesses lack impartiality, or have biased their evidence in favour of the party calling them.

Another option to redress the imbalance between permit applicants and objectors is for VCAT to use expert advisers who are accessible for consultation with tribunal members on technical questions within his or her field of knowledge or experience. This is of particular relevance where the members themselves do not have the required expertise, an issue which itself requires attention (see below). It may be the case that an adviser sits through some but not necessarily all of the hearing. It may also be desirable for the advice to be provided to the parties in writing so that they can comment on the advice.

Consideration of reform options in this area also raises questions about the desirable membership of VCAT. Another option to overcome this inequity between objectors and developers is for VCAT to give consideration to greater use of tribunal experts with specialist knowledge, qualifications and

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[2] Practice Direction No. 1 of 2005 at paras 2 and 3. The types of proceedings subject to the Practice Note include: Class 1 (environment and planning appeals), Class 2 (local government and miscellaneous appeals) & Class 3 (land tenure, valuation and compensation mattes) proceedings. See also para 12: Although the Court decides on whether an expert or experts should be appointed, the Court expects the parties to agree on the particular person or persons to be appointed. Failing agreement the Court will make the appointment. Where there is no agreement the parties shall provide a list of up to three experts acceptable to that party and the fee arrangement which each expert requires.

expertise in various disciplines in the Planning and Environment List. The presiding member would then be better able to provide assistance where disadvantaged parties can point to deficiencies in the material likely to be relied upon by a developer but cannot afford to retain their own experts. However we stress that simply appointing members with the necessary expertise is no substitute for expert evidence, especially where fieldwork or other investigations are required. Tribunal membership is discussed further below.

## Access to Assistance

Self-represented applicants can face significant difficulties in the VCAT environment. These difficulties can hamper and prolong court proceedings and impede access to justice.

In one example a recent client of the EDO reported that he had been informed by VCAT counter staff to lodge an enforcement action, only for the lawyers for the Responsible Authority to subsequently threaten to strike out his application because they had correctly identified that he had lodged his application under the wrong section of the Act. The application should have been an application for cancellation or amendment. The matter had to go to a directions hearing twice to be resolved, ultimately by the client withdrawing his application and starting again after he approached us for advice about his application.

Access to high-quality legal services is an important aspect of access to justice. It is therefore critical that VCAT ensures that there is adequate information and support so that self-represented persons can effectively use and participate in tribunal hearings and deal with any necessary preliminary technicalities. Indeed, as Justice Kevin Bell has noted, "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."[3] Section 67(4) of the VCAT Act in fact requires the registrar to give reasonable assistance on request to a person in formulating an application.

While the Court Network Service provides valuable general assistance and support to parties (primarily in the Residential Tenancies List, the Guardianship List and the Civil Claims List), and we understand there to be some general self-help material available at VCAT and on VCAT's website, it is our experience that support needs to be available to assist self-represented parties to navigate their way through technical issues that sometimes arise in particular areas, including planning and environment matters, as highlighted in the above example.

One way to improve the capacity of individuals and community groups to be able to represent their interests effectively in matters before VCAT is to ensure that low-income parties and community groups have access to free legal information, advice and representation. EDO submits that VCAT should provide a 'duty lawyer' service for particular lists, with specifically trained staff to offer self-represented parties information and advice on technical issues.

[3] Justice Kevin Bell, "The Role of VCAT in a changing world: the President's review of VCAT", Speech delivered to the Law Institute of Victoria, 2 September 2008, p 2.

## Membership

One of the main benefits of tribunals is their specialist knowledge in particular areas. It is therefore imperative that VCAT members possess in-depth and up-to-date knowledge in the subject matter of their jurisdiction.

A frequent complaint we hear from conservation groups involved in VCAT proceedings and a concern which we share is the lack of appropriate environmental science or ecological expertise amongst VCAT members. The list primarily comprises of experienced town planners, lawyers, engineers and architects. Only 1 of the 9 full time members[4] and 4 of the 28 sessional members[5] sitting in the Environment and Planning List have expertise relating to environmental science or ecological matters.

Broader environmental science or ecological expertise is imperative in a list that commonly hears matters relating to the likely impacts of a proposed development on threatened species or loss of critical habitat. Tribunal members must fully understand these implications to better adjudicate the matters before it and to enhance the tribunal's capacity to make the correct and preferable decision, particularly in circumstances where individual citizens or community groups cannot afford to engage an ecological expert. However as stressed above, appointing members with the necessary expertise is no substitute for expert evidence.

We therefore submit that the membership of the Planning and Environment List should be expanded to included greater environmental science or ecological expertise.

## VCAT's Merits Review Jurisdiction

Although it may be outside the scope of the present review, we feel that it is worthwhile to defend the principle that reviews of decisions under the *Planning & Environment Act 1987* should be merits reviews rather than judicial review. There are occasionally calls from a range of interests to restrict appeals to issues as to the legality of the original decision.

We think that any such move would be highly detrimental. It would greatly limit the scope of the review of Responsible Authority decisions and make the appeal process much more technical, effectively requiring legal representation in all appeals.

Rather than limiting the current jurisdiction of VCAT under current enactments, we believe it would be timely to review all environmental and natural resource management legislation with a view to increasing the range of administrative decisions that can be the subject of merits review and establishing a common standing test for each of these that facilitates public scrutiny of decision making.

[4] Potts, Ian - Environmental Scientist.
[5] David, Graeme - Environmental Science; Mainwaring, Sylvia - Industrial Chemist; Pizzey, Geoffrey - Heritage & Tourism; Harty, Christopher - Town Planner & Environmental Science.

## Other issues

There are a number of other minor reforms which the EDO suggests could improve access to justice in VCAT.

### *Statement of Reasons*

Although the VCAT Act itself imposes no duty on the tribunal to give a statement of reasons unless requested, reasons for decisions appear to be routinely provided in planning and environment matters. In our experience, however, there is great variation in the adequacy of the reasons provided.

The requirement to provide reasons is an important aspect of fairness. Reasons should provide parties with the assurance that their representations have been considered. They also provide a basis for an assessment of possible grounds of appeal or review. Therefore it is important that the reasons show "that the tribunal addressed itself to the parties' arguments on any significant question of law relevant to the case, and should indicate the basis on which it resolved the dispute" as set out in section 46(2) of the VCAT Act.[6]

In order to overcome deficiencies in the statement of reasons provided we suggest that tribunal members participate in professional development initiatives designed to promote clear and concise statements in accordance with the statutory criteria in section 46(2) of the Act.

### *Electronic filing of documents*

The EDO commends VCAT's recent efforts to maximise use of technology to facilitate access to the tribunal, including initiatives such as remote electronic filing of applications in the Residential Tenancies List and the upcoming implementation of SMS hearing reminder system.

In addition to expanding electronic filing of applications to other lists, EDO submits that it would be useful if VCAT and other parties accepted electronic copies of documents. This would ensure that users, witnesses and the legal profession could engage with VCAT quickly, efficiently and at minimal cost, and would also reduce paper waste.

### *Delays*

We are concerned that the time frame for hearing applications in the Planning and Environment List appears to be lengthening. While initiatives in recent years to hear cases quickly occasionally causes some hardship in terms of the time available to prepare for a hearing, on balance our view is that the speedy hearing of cases is good for all parties. A particular concern for us is that delays in resolving appeals seem to inevitably lead to calls for restrictions on or removal of third party rights.

### *Conduct of hearings*

The EDO is concerned that the current manner of hearings in the Planning and Environment list sometimes puts Responsible Authorities and objectors at a disadvantage. Since the common practice is for the Responsible Authority and the objector(s) to present their submissions to the member before the proponent does, they are not given the opportunity to address any issues raised in the proponent's submissions.

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[6] Mullan, D.J., Evans, J.M., and Janisch, H.N., and Risk, R.C.B., Administrative Law: Cases, Text and Materials, 5th edition, 2003, p 470.

While the EDO values the informal nature of hearings in the Planning and Environment List, we believe that VCAT could improve access to justice by permitting, in certain circumstances, Responsible Authorities and objectors to make brief closing submissions in order to provide clarification and to maintain overall balance in hearings.

***Audibility of hearings***

Some of our clients have reported concerns regarding the audibility of hearings for those not seated at the bar table in the hearing room. This especially presents difficulties for many older people and people with disabilities. Maintaining high standards of audibility is important to ensuring that VCAT is accessible and should be addressed.

***Video of a typical hearing***

First-time users frequently find the prospect of appearing before VCAT extremely intimidating. The EDO often recommends that clients of our service attend the tribunal to observe a hearing prior to their own hearing, and many find this a very useful and valuable experience. However this is not always feasible, especially for parties in rural, regional and other suburban areas. VCAT would operate more efficiently and users would be less intimidated and better able to prepare for their hearing if they were given the opportunity to become familiar with the conduct of a typical hearing prior to their own. In this regard, we suggest that VCAT consider developing a short video clip of a mock hearing, talking first-time users through a typical hearing, and make this available on-line.

***Copying charges***

A frequent complaint reported by community groups wishing to access documents on the tribunal's files is the significant charges of photocopying. Community groups often spend significant amounts of time copying documents by hand. In order to improve access to justice it is important that VCAT users are able to access information with ease and at low cost. The EDO suggests that VCAT should provide a free imaging service which enables parties to a proceeding to scan and save documents to electronic devices. This would reduce the cost of the exercise for all parties, and would also result in a reduction in the volume of paper used, reducing waste.