



ONE VCAT

PRESIDENT'S REVIEW OF VCAT

ONE VCAT

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Hon. Justice Kevin Bell

30 November 2009

**Victorian Civil and
Administrative Tribunal (VCAT)**

Level 1, 55 King Street

Melbourne VIC 3000

Email: vcat@vcat.vic.gov.au

www.vcat.vic.gov.au

www.vcatreview.com.au

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EXECUTIVE SUMMARY

PART ONE: EVALUATING THE FIRST DECADE

A REVIEW

1. The president of the Victorian Civil and Administrative Tribunal, the Hon. Justice Kevin Bell, carried out the review in 2008-2009 at the request of the Attorney-General, the Hon. Rob Hulls MP. The terms of reference focus on access, operational and jurisdictional issues.
2. The context of the review was the 10th anniversary of the establishment of the tribunal in 1998, the gradual expansion of its jurisdiction and certain criticisms of the performance of the tribunal, especially that of 'creeping legalism'.
3. Here are the major themes of Justice Bell's report:
 - the tribunal has generally succeeded in its mission, but needs to change, and can
 - one community, one justice, *ONE VCAT*
 - society has become more demanding, is more complex and has higher expectations of its public institutions, including the tribunal
 - getting back to the tribunal's roots as the face of civil and administrative justice for the general community
 - improving access to justice for people in outer-suburban Melbourne and country Victoria, especially by regionalising the tribunal
 - establishing the tribunal as a centre of excellence for ADR (appropriate dispute resolution) in the Victorian justice system
 - overhauling the tribunal's 'first-generation' legislation into 'second-generation' legislation
 - increasing the tribunal's institutional unity, coherence and organisational effectiveness to optimise the positive outcomes of amalgamation
 - the importance of effective management by the president and administration of the tribunal, and enhancing the president's statutory powers in this respect
 - enhancing the hearing skills ('courtcraft'), expertise, performance and quality of professional life of members, including by competency-based performance appraisal and support, and a stronger focus on continuing legal education and training
 - improving the quality, consistency and accountability of tribunal decision-making, including with an internal appeals tribunal
 - assisting self-represented persons in the tribunal, including a positive statutory duty on the part of members and staff to assist all parties
 - a culture of respect
4. Justice Bell makes 78 recommendations for the consideration of government in the formulation of policy about the operation of the tribunal.

B VCAT

5. Established by the *Victorian Civil and Administrative Tribunal 1998*, VCAT was the first amalgamated civil and administrative tribunal in the world. It was to be a 'super tribunal' and a 'one-stop shop' for the community. Its purpose is to provide fast, cheap, efficient and fair access to justice. Now there are amalgamated tribunals in Western Australia (WASAT), the Australian Capital Territory (ACAT) and Queensland (QCAT), as well as in overseas jurisdictions.

6. The main jurisdictions of the tribunal are residential tenancies, civil claims, guardianship and planning. It also resolves a significant number of disputes in literally scores of other jurisdictions, including freedom of information, domestic building, professional and industry regulation and liquor licensing. Since 1998, in a process that is still ongoing, many new jurisdictions have been added.
7. In 2008-2009, the tribunal finalised 81,000 cases, on a budget of \$35 million and at a low average cost of \$430 per case. It had 227 members (44 full-time and 180 sessional) and 200 staff. The president is a Supreme Court judge and its two vice-presidents are County Court judges.
8. In respect of most of its activities, the tribunal is a public authority under, and bound to act compatibly with, the *Charter of Human Rights and Responsibilities Act 2006*. Human rights are a fundamental organising principle in the management and administration of the tribunal. It should play a leadership role and apply best practice in Victoria's justice system in this regard.

C CONSULTATION

9. As part of the review, Justice Bell gave a keynote speech, issued a discussion paper and held discussions with a wide range of community, industry and professional stakeholders. The review website published the speech, the paper and most of the 331 submissions.
10. The community consultation was the largest ever conducted by a judicial officer in Victoria. Justice Bell held well attended town-hall meetings in six country and seven metropolitan locations.
11. The report lists the criticisms identified in the consultation. They include:
 - getting back to the tribunal's roots and avoiding 'creeping legalism'
 - too little assistance for self-represented persons and non-lawyer advocates
 - the dominant role of lawyers
 - excessive cost
 - excessive delay in being listed and getting a decision
 - inappropriate behaviour by some members
 - clubby atmosphere in some hearings
 - inconsistency in procedure and result
 - lack of access for outer-suburban and country communities
 - lack of internal appeal
 - lack of public education
12. Despite these criticisms, there was virtual unanimity about the tribunal being a necessary feature of Victoria's justice system. If the tribunal did not exist, someone would have to invent it.

D FINDINGS

(1) Access issues

13. Justice Bell finds the tribunal has generally improved access to justice and equitable outcomes for the community. The tribunal has soundly proved the worth of the amalgamated model, which the parliament uniquely established in 1998.
14. However, there are serious deficiencies in the accessibility of justice to the Victorian community. These are the main problems:
 - unequal access by people in outer-suburban Melbourne and country Victoria
 - lack of utilisation of the tribunal by residential tenants

- poor utilisation of the tribunal by CALD and Koori communities
- difficulties experienced by self-represented persons
- perception of ‘creeping legalism’ undermining public confidence in the tribunal
- insufficient community legal education about the role of the tribunal

(2) Operational issues

15. The operational issues fall into two categories: cost-effectiveness, and new technology and ADR.
16. The report finds the tribunal is generally cost-effective. In the first decade of its operation, it finalised about 872,000 civil and administrative disputes, an average of 87,200 per year, and at an average cost of \$274 per case.
17. However, a number of significant operational issues require attention. These include:
 - greater priority for improved CBD head office accommodation
 - improved member support
 - administrative and operating systems should be more integrated, coherent and unified
 - need to innovate with integrated case officer management
 - modernising VCAT’s image
 - upgrading the hearing recording system
18. The report finds the tribunal is innovative in the use of new technology. It emphasised these initiatives:
 - VCAT Online (commencing applications on the internet)
 - SMS reminders to tenants
 - educational videos (especially the self-help video ‘Taking it to VCAT’)
 - VCAT Learning Centre (a fully equipped training and development facility for members and staff – an international first for a justice institution)
 - video and teleconferencing
19. The tribunal has pioneered ADR in Victoria. The report gives the full details, emphasising these initiatives:
 - a principal mediator
 - an ADR judge
 - an ADR strategy
 - a mediation centre
 - a mediation accreditation scheme
 - an aspiration to become a centre of excellence for ADR in Victoria’s justice system

(3) Jurisdictional issues

20. Justice Bell examined whether the new jurisdictions assigned to the tribunal since 1998 have been appropriate and whether the processes and principles by which it acquires new jurisdictions need enhancement.
21. The report identifies the existing acquisition principles and finds them to be appropriate. The new civil and administrative jurisdictions conferred on the tribunal since 1998 have been appropriate.
22. The process for conferring new jurisdictions on the tribunal should be systematic and follow sound principles and procedures, as follows:

- the tribunal must implement and exercise such new jurisdictions as may be conferred on it by the parliament
 - the new jurisdiction should come within the acquisition principles identified in the report
 - each participant in the new jurisdiction must know and understand their role
 - the demands of the new jurisdiction must be properly costed and the tribunal must be adequately resourced to meet those demands
 - any special rules or procedures which are necessary for the new jurisdiction, including provisions governing the composition of the tribunal in particular cases, must be identified and introduced in a timely way
23. The report discusses the tribunal's way of deciding cases in the merit-based administrative review jurisdictions, such as those involving the regulation of a trade, industry or profession. The effectiveness of the tribunal's decision-making in these areas depends on three key factors:
- the facts and circumstances giving rise to the regulatory issues must be established, for the tribunal cannot identify those itself
 - the parties must state clearly, from their position, what the relevant issues are and what the tribunal should decide in those facts and circumstances, and they must assist the tribunal with their submissions on those subjects
 - a legislative or regulatory framework which specifies the applicable rules and principles with clarity, either explicitly or implicitly

PART TWO: ENVISIONING THE NEXT DECADE

E VISION

24. The report articulates Justice Bell's suggested vision of the tribunal for the next decade:
- A modern, flexible and unified tribunal of justice which is accessible to the whole Victorian community and resolves civil and administrative disputes respectfully, fairly and cost-effectively, by appropriate means and in a timely way.
25. The report examines each of the elements of this vision. It puts forward a package of recommendations for implementing it, beginning with 'modern'.

F MODERN

26. The tribunal's legislation provides an excellent foundation, but it is 'first-generation' legislation. If the tribunal is to meet the access, operational and jurisdictional demands of the modern age, its legislation must be thoroughly overhauled. 'Second-generation' legislation is now needed.
27. Here are the main areas of suggested amendment:
- an objects and functions provision
 - enhancing the powers of the president
 - competency-based support and performance management of members
 - expanding internal reconsideration of decisions
 - establishing an internal appeals tribunal
 - allowing the referral of questions of law to the president
 - introducing guideline judgments
 - a code of conduct for members and mediators

- a customer service charter
 - a complaints system for members and mediators
 - expanding the circumstances for reconstituting the tribunal
 - introducing an oath of office for members
28. The report contains an extensive examination of each of these areas.
29. The amendments would allow the president to implement a system of competency-based support and performance management for the members of the tribunal. The professionalism, independence, performance and security of members would be a focus during their whole life cycle in the tribunal, including appointment, induction, mentoring, continuing legal education and training, performance-based management and appraisal and (when sought) re-appointment.
30. The recommendations for expanding internal reconsideration of decisions, referring questions of law to the president and guideline judgements would allow errors in decisions to be corrected, and avoided, more cost-effectively, quickly and cheaply for the parties, as well as improve consistency in decision-making. These measures may need to be subject to sensible limits in the interests of finality and containing costs.
31. Consideration should be given to establishing an appeal tribunal within VCAT. The machinery in the current legislation is deficient in this respect. The current appeal to the Supreme Court of Victoria is too expensive and formal. The court applies different procedures and cost rules to those in the tribunal. The provisions in comparable jurisdictions, which incorporate internal appeal structures, have overtaken the tribunal's legislation. Without removing the right of appeal to the Supreme Court, the tribunal should have its own appeal division. Again, if the government were to accept this recommendation, there may need to be sensible limits on access to the internal appeal tribunal to ensure the finality and cost-effectiveness of the tribunal's decision-making process.
32. This is the rationale for the internal appeal tribunal:
- giving parties a more accessible and affordable right of appeal
 - increasing the consistency, predictability and quality of tribunal decision-making
 - encouraging the tribunal to build a bank of jurisprudence
33. The report examines the various models of internal appeal that are available and recommends criteria for assessing their relative merits.

G FLEXIBLE

34. The report examines the importance of the principle of flexibility, and the different ways for implementing it. It makes recommendations with respect to education and training for the tribunal's non-lawyer and sessional members.

H UNIFIED

35. In Justice Bell's view, the amalgamation of the pre-1998 tribunals was successful, but there is now a need to achieve greater institutional unity and coherence of process and outcome. This is a fundamental priority for the tribunal, which explains why the title of the review report is 'ONE VCAT'.
36. The statutory functions of the tribunal should include 'maintaining a cohesive organisational structure'. It should be the president's responsibility to carry out that function.

I TRIBUNAL OF JUSTICE

37. VCAT is a tribunal, not a court, but it is also an independent part of the system of justice, not a government department. VCAT operates within a paradigm of justice that is appropriate for a tribunal, but justice is still its objective. This is a fundamental feature of its operating model.

38. Justice in the tribunal should apply these principles:
- impartial, authoritative and principled decision-making and resolution of disputes according to law
 - ADR by qualified practitioners operating within accountable systems and according to appropriate and consistent processes
 - institutional independence with no outside interference
 - an emphasis on resolving cases quickly and cheaply, at an accessible location for the parties
 - fair, transparent and respectful processes, but flexible and adaptive to the needs of the case
 - decision-making by reference to objective, ascertainable and universally applicable standards
 - deciding like cases alike, as required by the principle of equality before the law
 - reasonable consistency and predictability in decision-making
 - respect for human rights, subject to relevant legislation
 - binding and enforceable decisions
39. Recommendations in the report reflect the centrality of these principles of justice to the tribunal's reason for being.

J ACCESSIBLE TO THE WHOLE COMMUNITY

40. Equal access to justice is a fundamental human right recognised in international law and the Victorian Charter. The principle is central to our democratic system of government and underpins the operation of, and public confidence in, our public institutions, especially the courts and VCAT. Improving equal access to justice is a major theme of the report.
41. People in outer-suburban Melbourne and country Victoria have relatively poor access to the tribunal. This was a very strong criticism revealed by the community consultation.
42. Justice Bell strongly recommends the regionalisation of the tribunal. Regionalisation should be part of a systematic access to justice strategy, having these components:
- overcoming the cost, distance and inconvenience barriers to accessing the tribunal
 - allowing the tribunal to develop and implement outreach strategies to overcome systemic access barriers
 - embedding the tribunal in local communities (including business communities) so it can be an engaged and visible presence
 - enabling the tribunal (over time) to employ staff from local communities, thus increasing its connection with them, as well as local employment
 - enabling the tribunal to build partnerships with local councils, community organisations and business groups, increasing knowledge of and access to its services
 - enabling the tribunal to address the systemic barriers to access which confront CALD and Koori communities
 - enabling the tribunal to innovate with service delivery which is attuned to local community and business needs, including opening times, venues and the use of new technology to reach outlying areas
43. A branch office pilot in a Melbourne outer-suburban and Victorian country location should be established as soon as possible. A community education and liaison officer should be included in the pilot.
44. The report makes a number of specific recommendations for improving equal access to justice, including:
- 'VCAT mobile' (a mobile facility, such as a truck or caravan, for delivering dispute resolution and community education services to the outer-suburbs and regions)

- 'VCAT in a box' (a portable resource for use in shopping centres and similar locations)
- upgrade of website
- universal electronic commencement of applications
- self-represented persons strategy:
 - positive statutory duty to assist all parties
 - litigants in person co-ordinator
 - enhancing powers and duties of the principal registrar
 - expand pro bono legal services
 - establish a self-representation civil law service

45. The self-represented persons strategy is particularly important. Most parties represent themselves in hearings at the tribunal. Courts and tribunals have a general duty to assist such parties to present their case. The proper discharge of this duty by the tribunal is vital to the achievement of its object and purpose. The legislation should recognise this by giving the tribunal a positive duty to assist all parties. The administrative staff of the tribunal should have a similar responsibility, hence the recommendation for enhancing the powers and duties of the principal registrar.

46. Further restrictions on legal representation, and changes to the tribunal's cost rules, are not warranted. The balances in the present provisions are generally appropriate. Restrictions and changes would not increase, and may decrease, equal access to justice.

K RESOLVING CIVIL AND ADMINISTRATIVE DISPUTES

47. Civil disputes are 'party-party' and private in nature. A civil claim is a good example. Administrative disputes are usually 'citizen-state' and public in nature. A planning application is a good example.

48. The report emphasises the equal capacity of the tribunal to resolve both civil and administrative disputes. It supports retention of the amalgamated model.

L RESPECT

49. The tribunal is for its users and the community, not the other way around.

50. The consultation revealed that many users – especially self-represented parties – feel disempowered by their experience in the tribunal. Some users experience this sense of disempowerment as a deeply felt loss of personal dignity, autonomy and respect. This is behind the intense criticism of 'creeping legalism', which is often expressed in emotional terms.

51. This problem should be recognised and acted on. The report makes many recommendations for doing so, including the self-represented persons strategy. It also recommends that the tribunal have a statutory object and function of applying therapeutic approaches to the administration of justice, which will enhance the value of respect in the operation of the tribunal generally.

M FAIRLY AND COST-EFFECTIVELY

52. Fairness and cost-effectiveness are fundamental objectives of the tribunal.

53. The tribunal must operate fairly, which has both a procedural and substantive connotation. Equally, the tribunal must provide affordable access to justice for the Victorian community. The report stresses the need to balance both objectives: cost-effectiveness should not defeat fairness, and fairness should not defeat cost-effectiveness.

54. Recommendations are made for improving fairness and cost-effectiveness in the tribunal.

N APPROPRIATE MEANS

55. This is a major focus of the report. Justice Bell promotes the tribunal as a centre of excellence for ADR in the Victorian justice system.
56. Adjudication and ADR (such as mediation) are the twin means of dispute resolution, each worthy of equal support and consideration.
57. Access to adjudication is a human right and the function of the justice system to provide. It must not be limited. In the velvet glove of the concept of 'dispute resolution' is the hard fist of the unequivocal statutory responsibility of the tribunal, as a justice institution, to vindicate legal rights when called on to do so. Equally, access to ADR is an important new method, and often a better method, for resolving disputes by fair and cost-effective means.
58. The report hails the tribunal's pioneering work in ADR, including the sessional mediator system and the appointment of a principal mediator. It considers ways the tribunal can go much further in this direction and argues the tribunal can make a major contribution to the development of innovative dispute resolution services.
59. Here are recommendations for establishing the tribunal as a centre of excellence for ADR:
 - recognising the principal mediator in the tribunal's legislation
 - appointing an ADR judge to provide judicial leadership in this important area and, for the first time in an Australian justice institution, recognising this position in the tribunal's legislation
 - a substantial legislative upgrade of ADR in the tribunal's legislation
 - a number of specific ADR initiatives, including:
 - early intervention ('swat') mediation
 - telephone mediation
 - assisting people with self-help negotiation
 - 'roving mediation' – offering mediation on the day of the hearing to parties in the waiting area

O TIMELINESS

60. The report acknowledges the problem of delay and its individual, social and economic consequences. It makes a number of recommendations aimed at this problem, including competency-based performance management of members and greater continuing legal education and training.
61. To improve and maintain its timeliness, the tribunal should participate in performance bench marking with other tribunals and courts.

P CONCLUSION

62. After first conducting an extensive consultation, then analysing the access, operational and jurisdictional issues specified in the terms of reference and finally evaluating the performance of the tribunal in its first decade, Justice Bell concludes that VCAT has soundly proved the worth of the amalgamated tribunal model uniquely established by the parliament in 1998. However, the tribunal's legislation and operations need a thorough overhaul if it is to face the demands of the modern age. The report provides a suggested vision of the tribunal to guide that overhaul.

PART ONE: EVALUATING THE FIRST DECADE

A REVIEW

When in March 2008 I was appointed to be the president of the Victorian Civil and Administrative Tribunal for two years, the Attorney-General, the Hon. Rob Hulls MP, asked me to carry out a review of the institution by 30 November 2009. After considering the terms of reference¹ set by the Attorney-General, I agreed to do so. This is my review report.

The terms of reference focus on access, operational and jurisdictional issues. They enable me to consider the tribunal's performance over the past ten years and advise the Attorney-General about the key issues. The focus of the terms of reference is on the tribunal, not on the numerous statutes which confer jurisdiction on it.

The context of the review is the 10th anniversary of the establishment of the tribunal in 1998, the gradual expansion of its jurisdiction and certain criticisms in the community about its performance, especially that of 'creeping legalism'. It was an ideal time to reflect on this innovative justice institution and consider whether it has accomplished its mission.

I have been allowed to carry out the review exactly as I have seen fit and have not been directed by anyone in any way.

I will begin by giving a description of VCAT and its place in the Victorian justice system.

B VCAT

(1) Tribunal as a co-equal partner in the justice system

Australia is a constitutional federation and Victoria is a state in that federation. The main courts in Victoria are the Magistrates' Court, the County Court and the Supreme Court, in that ascending order of hierarchy. I am a judge of the Supreme Court as well as the president of the tribunal. The vice-presidents of the tribunal are judges of the County Court. Some members of the tribunal are magistrates. While there are tribunals in Victoria which are not part of VCAT, the great majority of the former free-standing tribunals were amalgamated into this 'super tribunal' in 1998.

When established, VCAT was internationally unique as being a tribunal with both civil (party and party) and administrative (citizen and government) jurisdiction of substantial size. It has jurisdiction to resolve many disputes of a judicial nature, such as disputes in trade and commerce or concerning domestic building. It also has jurisdiction to resolve many disputes of an administrative nature, such as disputes between individuals and the government in freedom of information cases, and businesses and the government in licensing cases. I say more about the extensive jurisdiction of the tribunal later.

The tribunal does not have a criminal jurisdiction as such, although its powers to punish for contempt, including by imprisonment, are criminal in nature. They can only be exercised by judicial members.

VCAT is a tribunal, not a court. It exercises limited civil and administrative jurisdiction, all of it statutory. Some of its civil jurisdiction is judicial in character. Under the Australian constitutional arrangements, federal judicial power must be exercised by courts.² That rule does not apply to state judicial power, which can be conferred by statute on tribunals.³

Each of the courts and the tribunal has their own place in the Victorian justice system, with the Supreme Court at the apex. Operating within its sphere of statutory authority, the tribunal is a co-equal partner with

1 The terms of reference are in appendix 1.

2 The authorities and principles are discussed in *Kracke v Mental Health Review Board* [2009] VCAT 646, [295].

3 *Ibid* [275] and [295].

the courts in that system. Thus the head of the tribunal and the three courts are included on the board of directors of the Judicial College of Victoria, which is chaired by the chief justice.⁴ The college is responsible for promoting the professional development and education of judicial officers (judges, magistrates and tribunal members) in the courts and the tribunal.

At present, appeals from the tribunal are heard by the Supreme Court, permissible on grounds of error of law and only by leave.⁵ There is no internal appeals system, although there are provisions which, on application, require the rehearing of certain cases⁶ and which, at the tribunal's discretion, permit orders to be reopened in cases where a party did not attend the hearing.⁷ On questions of statutory interpretation, the standard of review on appeal is correctness. The trial division of the Supreme Court has a judicial review and appeals list in which specialist public law judges preside.

Unlike a superior court of record, such as the Supreme Court, the tribunal has no general or inherent jurisdiction. Its jurisdiction is entirely statutory (although it can be implied from legislation). That jurisdiction can be original,⁸ which essentially means determining a case for the first time. An application for compensation or other relief in respect of a civil claim or discriminatory conduct are good examples. At least the first of these is an example of the tribunal having a jurisdiction of a judicial character. The tribunal also has a merits review jurisdiction,⁹ which essentially means re-deciding an administrative case on the merits. Application for review of a decision to refuse access to information or a planning permit are good examples.

In outline, the Victorian pattern of jurisdiction is that the Magistrates' Court mostly deals with large numbers of summary criminal matters at the local level, the County Court is the busiest trial court in criminal, commercial and personal injury cases and the Supreme Court conducts major criminal and civil trials and judicial review and appeal cases, and is the final court of appeal (subject to appeal by way of special leave to the High Court of Australia).

The tribunal and the courts have concurrent jurisdiction in some areas, for example, with respect to disputes in trade and commerce (including disputes between trader and consumer and trader and trader) coming within the *Fair Trading Act 1999*. In practice, most small-medium disputes of that kind are brought to the tribunal. Exercising that and some other jurisdictions, the tribunal resolves most of the small-medium civil disputes in trade and commerce in Victoria. In this respect, it represents the face of civil justice for the ordinary person and small businesses in Victoria, subject to the legal supervision of the Supreme Court.

There is virtually no overlap between the administrative review jurisdiction of the tribunal and the jurisdiction of the courts. The tribunal therefore represents the face of administrative justice at first instance for the Victorian community, subject to the same legal supervision.

(2) Establishment

VCAT was established by the *Victorian Civil and Administrative Tribunal Act 1998*.

The pre-amalgamation position was that Victoria had numerous tribunals exercising civil and administrative jurisdictions. They had become well-accepted by government and the community and were an integral part of the justice system. But they were disparate and many were too small to be viable. In 1996 the Attorney-General, the Honourable Jan Wade MP, issued a landmark discussion paper advocating the amalgamation of most of these tribunals into a 'super tribunal'.¹⁰

4 *Judicial College of Victoria Act 2001*, s 8(1).

5 *Victorian Civil and Administrative Tribunal Act 1998*, s 148. Appeals from decisions of the president or a vice-president go to the Court of Appeal. Appeals from decisions of other members go to the Trial Division.

6 *Guardianship and Administration Act 1986*, s 60A.

7 *Victorian Civil and Administrative Tribunal Act 1998*, s 120.

8 Section 40(a).

9 Section 40(b).

10 Victoria, *Tribunals in the Department of Justice: A Principled Approach*, The Hon. Jan Wade MP, Attorney-General (1996).

The discussion paper listed these perceived deficiencies in the structure and operation of Victoria's tribunal system:¹¹

- absence of a logical structure to accommodate numerous and disparate tribunals
- inappropriate conferral of administration or policy functions on tribunals
- lack of independence of tribunal members from the executive government
- absence of uniform or harmonised rules of procedure applicable to tribunals
- inappropriate merits review of decisions requiring specialist knowledge
- inappropriate exclusion of judicial review of tribunal decisions

Of these deficiencies, the first was clearly very important. This is the discussion paper elaborating on that deficiency:¹²

Critics of Victoria's system of tribunals argue that the exponential growth in the number of tribunals over the past 30 years has resulted in the creation of a perplexing mosaic of tribunal jurisdictions, which are confusing to lawyers, lay people and public servants alike. It is suggested that the boundaries between jurisdictions of particular tribunals are often arbitrary.

This undisciplined proliferation of tribunals arguably has a number of undesirable consequences, including:

- duplication of administrative infrastructure to support the tribunals;
- potential 'capture' of tribunals by particular interest groups;
- unnecessary differences in procedure;
- inconsistent approach as to similar legal issues;
- unduly narrow specialisation by tribunal members;
- poor service delivery to people living in rural Victoria

The discussion paper went on to suggest how an amalgamated tribunal could alleviate the identified deficiencies. It said:¹³

Alleviating the problems created by the undisciplined proliferation of tribunals in Victoria requires a reduction in the number of tribunals by consolidating existing tribunals. The degree to which such consolidation is desirable is a matter on which minds will differ. Nevertheless, legal and procedural consistency, administrative efficiencies and the scope for sittings in rural Victoria would all be maximised by consolidation into a single advisory body. It would share the same membership, registry, administrative staff and facilities. The same procedures would be followed for all tribunal appointments.

These views prevailed. The *Victorian Civil and Administrative Tribunal Act* was the result. In the second reading speech, the Attorney-General explained its rationale thus:¹⁴

A high priority for this government has been to provide Victorians with access to a civil justice system which is modern, accessible, efficient and cost-effective. The increasing complexity and volume of cases require continued improvements to court and tribunal processes to ensure that the civil justice system meets community expectations. This package of reforms will ensure that both the public and business community, including people living and working in rural Victoria, will benefit from improved access to civil justice services which are relevant, responsive and efficient. The key proposal to amalgamate a number of tribunals within the Victorian Civil and Administrative Tribunal is aimed at meeting these objectives.

11 Ibid 5-7.

12 Ibid 8.

13 Ibid.

14 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 April 1998, 972 (Jan Wade).

Mrs Wade went on to say that VCAT would:¹⁵

- improve access to justice for all Victorians including the business community;
- facilitate the use of technology (such as video link-up and interactive terminals), consequently improving access to justice for Victorians living in both metropolitan and rural areas;
- complement measures to increase alternative dispute resolution programs by providing a range of procedures including mediation and compulsory conferences to help parties reach agreement quickly;
- streamline the administrative structures of tribunals, thereby improving their efficiency;
- develop and maintain flexible, cost-effective practices;
- introduce common procedures for all matters, yet retain the flexibility to recognise the needs of parties in specialised jurisdictions; and
- achieve administrative efficiencies through the centralisation of registry functions, improvement of information technology systems and more efficient use of tribunal resources.

The Attorney-General said the tribunal was intended to be a 'one-stop shop':¹⁶

VCAT will be a judicially assisted tribunal in order to provide litigants with a 'one-stop shop'. The president – a Supreme Court judge – and the vice-presidents – County Court judges – will, while full-time members of VCAT, be able to exercise the powers of the Supreme and County courts respectively. This will reduce delays for parties who wish to appeal to the Supreme Court against a tribunal decision. This will reduce the level of interruption to business and in turn promote greater certainty and consistency in business arrangements. These arrangements equally enhance hearing and dispute resolution mechanisms involving citizens' individual rights such as those people who may be subject to guardianship orders.

Linking the themes of consistency, access to appeal and the one-stop shop, Mrs Wade referred to the role of the president as a judge of the Supreme Court:¹⁷

With greater judicial involvement in first instance decision making, Victorians should see greater consistency of decision making, enhancing their confidence in the civil justice system. It will also enhance the notion of the 'one-stop shop'. This will reduce delays for parties who appeal to the Supreme Court as the president of VCAT will be able exercise the powers of a Supreme Court judge. This is a cost-effective measure for Victorians using the tribunal system.

The hope that the president would hear appeals has not been realised. To my knowledge, no president has ever heard an appeal.

Notable inclusions in the tribunal's powers were methods of alternative dispute resolution, specifically compulsory conferences and mediation.

When established, the tribunal had a civil and an administrative division. The lists in the civil division encompassed the jurisdictions of the former anti-discrimination tribunal, domestic building tribunal, guardianship and administration board, small claims tribunal and the residential tenancies tribunal, and a newly created retail tenancies jurisdiction. The administrative division encompassed the jurisdiction of the former administrative appeals tribunal, credit authority, estate agents disciplinary and licensing appeals tribunal, motor car traders licensing authority, prostitution control board and the travel agents licensing authority, and a new jurisdiction to review decisions made by the business licensing authority.

The governance, organisation and administrative framework of the legislation have remained largely unchanged to the present day. I will give a description later.

15 Ibid 973.

16 Ibid.

17 Ibid 974.

Thus was implemented an unprecedented amalgamation of civil and administrative functions into a single tribunal in order to enhance the capacity of the community to obtain equal access to justice.

(3) Growth

On establishment in 1998, the tribunal possessed the jurisdiction specified in the legislation listed in appendix 2. It had 172 members, 45 full-time (including the president, two vice-presidents and 11 deputy presidents) and 130 part-time.¹⁸ It had 141 administrative staff.¹⁹ It had a budget of \$18 million.²⁰ It resolved about 75,000 cases (\$240 per case average cost).²¹ Its first president was the Honourable Justice Murray Kellam. Its first chief executive officer was Mr John Ardlie.

The tribunal has grown substantially since that time. New jurisdictions have been added year by year, as specified in appendix 2.

In 2009, the tribunal possessed the jurisdiction specified in appendix 2. It had 227 members, 44 full-time (including the three judicial members and eight deputy presidents) and 180 sessional members.²² It had 196 staff.²³ It resolved about 81,000 cases (\$430 per case average cost).²⁴ It had a budget of \$35 million.²⁵

Since being established, the core jurisdictions of the tribunal in which the main work is done have remained steady or grown. These are residential tenancies, civil claims, guardianship and planning and environment. However, a large number of smaller jurisdictions have been added, some of which have generated a modest number of complex cases. The tribunal has always had a large spread of cases from many of those in large numbers in the high-volume lists requiring only minutes or hours of hearing time to many of those in small numbers in low-volume lists requiring days or even weeks of hearing time. It is the latter kind of cases that has grown over the past ten years.

Parties appear mainly self-represented in the high-volume lists. In the low-volume lists of complex cases, legal representation is usual, but self-representation is common.

(4) Divisions and lists

The tribunal is presently organised into three divisions and fourteen lists.

These are the divisions:

- human rights division
- civil division
- administrative division

Each division is headed by a judicial member.

Here are the lists:

- anti-discrimination list of the human rights division
- guardianship list of the human rights division
- civil claims of the civil division
- credit list of the civil division

18 VCAT Annual Report 1998-1999, 17.

19 Ibid 19.

20 Ibid 39.

21 Ibid 5.

22 VCAT Annual Report 2008-2009, 7.

23 Ibid.

24 Ibid.

25 Ibid.

- domestic building list of the civil division
- legal practice list of the civil division
- real property list of the civil division
- retail tenancies list of the civil division
- residential tenancies list of the civil division
- general list of the administrative division
- taxation list of the administrative division
- land valuation list of the administrative division
- occupational and business regulation list of the administrative division
- planning and environment list of the administrative division

Each list is (usually) headed by a deputy president.

The cases initiated across the divisions and lists in 2007-2008 and 2008-2009 are set out in this table.

	2007-08	2008-09	%change
HUMAN RIGHTS DIVISION			
Guardianship	9,698	10,778	11%
Anti-discrimination	340	303	-11%
CIVIL DIVISION			
Civil claims	8,975	11,545	29%
Credit	379	552	46%
Residential tenancies	61,089	56,010	-8%
Domestic building	756	898	19%
Legal practice	329	200	-39%
Retail tenancies	205	264	29%
Real property	173	154	-11%
ADMINISTRATIVE DIVISION			
Planning and environment	3,640	3,643	0%
Land valuation	99	289	192%
General	921	1,047	14%
Occupation & business regulation	341	302	-11%
Taxation	26	8	-69%

Table 1: cases initiated 2007-2008 and 2008-2009 by division and list

As you can see, in the past two years significant increases have occurred in two high-volume lists, guardianship (11%) and civil claims (29%). Retail tenancies initiations have declined somewhat (8%) and those in the planning and environment list have remained steady. Domestic building cases went up significantly (19%). Typically, these are complex cases, as are those in the land valuation list (increase of 192%). The overall position was steady between 2007-2008 (87,000 initiations) and 2008-2009 (86,000).²⁶ Finalisations declined from 87,000 to 81,000.²⁷

The tribunal has regular sittings on circuit in Magistrates' Courts in the suburbs and in country Victoria. It has no branch offices.

²⁶ Ibid.

²⁷ Ibid.

(5) Role of deputy presidents who head the lists

The legislation creates a rules committee which it gives power, among other things, to create divisions and lists.²⁸ This reflects the principle of specialist expertise which is taken into account in arranging the work of the tribunal.

In practice, deputy presidents usually head the lists and are responsible for their day-to-day operation, subject to the overall authority of the president. The president and vice-presidents head the divisions. In operational terms, the lists are the more important functional unit.

With such a structure, the natural tendency is towards separation. Therefore, not working towards unity leads to disunity. To date, there has not been sufficient institutional drive towards the centre. As much as possible, lists should be working as part of a unified organisation. Without lists losing their specialised expertise, this should and can occur more than it currently does. I represent these ideas in the policy of *ONE VCAT*, which I have used in the title of this report. I explore the benefits of unity in detail below.

Part of the problem is that there is no statutory council of the presidents, vice-presidents and deputy presidents. Successive presidents have established an informal advisory committee called the heads of lists committee to play this role. I have tried to enhance the role and function of the heads of lists committee in various ways. I think this has improved institutional unity. It needs to be taken a step further.

Therefore the heads of lists committee should be given a statutory advisory role. The president must retain the ultimate power of management and administration and chair that committee. He or she is not the first among equals, but actually in charge. However, having regard to the size of the tribunal and the role of the (full-time) vice-presidents and deputy presidents in the functioning of the organisation, the important advisory role of heads of lists should receive this statutory recognition. I so recommend.

Recommendation 1 **The heads of lists committee should be given statutory recognition as an advisory committee of the president.**

(6) Funding model

The funding model of the tribunal is partly direct appropriation funding by the government (\$17.64 million of \$34.92 million in 2008-2009, or 50%)²⁹ and partly funding from industry trust funds. Funding from such funds (for example, the residential tenancies, domestic building, and guardianship and administration funds) must only be spent on cases in those areas. This produces a degree of complexity in the tribunal's funding arrangements. There is some fee collection (\$1.92 million in 2008-2009).³⁰

While the tribunal has appropriate transactional/operational financial management capacity, its executive/strategic financial management capacity does not match the strong demands placed on the organisation in this regard. To ensure the community gets the maximum benefit from the funding made available to the tribunal, and to ensure the tribunal can fully access and utilise all the funds available to it to carry out its functions, I recommend the tribunal have executive/strategic financial management capacity, while retaining its transactional/operational financial capacity.

Recommendation 2 **The tribunal should have executive/strategic financial management capacity, while retaining its transactional/operational financial capacity.**

28 *Victorian Civil and Administrative Tribunal Act*, ss 150 and 157(2) and schedule 2.

29 VCAT Annual Report 2008-2009, 7.

30 *Ibid* 69.

(7) Governance

The administrative and governance model of the tribunal is that the legislation confers on the president the ultimate responsibility for the management and administration of the tribunal.³¹ The president is assisted by the vice-presidents, but they are directable by the president in respect of this function.³² Thus the president has ultimate authority for the operation of the tribunal in every respect.

The employment model of the tribunal is that staff are employed by the Secretary of the Department of Justice under the public service legislation.³³ They are made available to the president in the discharge of his or her statutory responsibility for the institution.

The statutory judicial leadership of the tribunal is fundamentally important to the proper and independent governance and operation of the tribunal as an institution of justice. The demands of managing, administering and realising the potential of the tribunal in the modern world, maintaining confidence in the tribunal within the community, industry and government and applying the highest standards of adjudication and appropriate dispute resolution depend on the leadership and authority of the president as a judge of the Supreme Court. I therefore recommend that there be no change to the judicial leadership governance model of the tribunal and no change to the president being a Supreme Court judge. Indeed, in this report I recommend that the responsibilities of the president be enhanced.

Recommendation 3 **The judicial leadership governance model of the tribunal and the president's responsibility for managing the tribunal in every respect should not be changed.**

Recommendation 4 **There should be no change to the president being a Supreme Court judge.**

(8) Human rights

While the Supreme Court has not yet dealt with the subject, I have held the tribunal is a public authority under the *Charter of Human Rights and Responsibilities Act 2006*, entirely with respect to its administration,³⁴ entirely with respect to its administrative jurisdiction³⁵ and partly with respect to its judicial powers.³⁶

The tribunal's status as a public authority under the Charter has important implications for the conduct of its administration and the discharge of its adjudicative responsibilities. In short, subject only to contrary law, the tribunal must act consistently with the human rights in the Charter, for it is unlawful to do otherwise.³⁷ Therefore, human rights must be a fundamental organising principle in the management and administration of the tribunal and be applied, so far as the Charter requires, in the tribunal's adjudicative work. As the tribunal is a co-equal partner in Victoria's justice system, and as its numerous jurisdictions engage human rights to a greater extent than the courts, the tribunal should play a leadership role, and apply best practice principles, in this regard.

(9) Representation

There are statutory limitations on parties being represented in hearings at the tribunal, subject to exceptions. The purpose of the provisions is to balance the right to representation with the need to operate quickly and cheaply.

31 *Victorian Civil and Administrative Tribunal Act*, s 30(1) and (2).

32 Section 30(4).

33 *Public Administration Act 2004*.

34 *Kracke v Mental Health Review Board* [2009] VCAT 646, [263]; *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [39].

35 *Kracke v Mental Health Review Board* [2009] VCAT 646, [281]-[282].

36 *Ibid* [282]; *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [142].

37 *Charter of Human Rights and Responsibilities Act*, s 38(1) and (2).

The general rule is that parties may only be represented by a professional advocate³⁸ if they are a child, a local council, the government, a credit provider or a home building insurer, if the other party is a professional advocate or is so represented or, finally, if all the parties agree.³⁹ Further, the tribunal may, in its discretion, allow a party in any case to be represented by anyone, including a professional advocate.⁴⁰ Companies and other bodies corporate may be represented by their officers.

There are a number of specified statutory exceptions to this general rule. Some operate in favour of representation. For example, natural persons who are parties to proceedings under a credit enactment may be represented as of right by a professional advocate,⁴¹ in legal profession regulatory cases the practice may be represented as of right by a principal,⁴² in civil claims concerning owner drivers the parties may be represented as of right by professional advocates or negotiating agents or (for the contractor) a trade union⁴³ and a party to a proceeding for possession of residential premises (usually that means for eviction of the tenant) may be represented as of right by a professional advocate.⁴⁴ Other exceptions further limit representation. For example, in small civil claims cases, a party may only be represented by a professional advocate if no other party would be unfairly disadvantaged and either the other parties agree or the tribunal directs it.⁴⁵

In complex cases, both civil (not small civil claims) and administrative, the tribunal often grants permission for parties to be represented by a professional advocate, such as a lawyer in large civil claims or domestic building cases or a lawyer or planner in planning and environment cases. Representation in ordinary civil claims, residential tenancies or guardianship cases is not usual. In the result, the great majority of parties in cases in the tribunal are not represented.

(10) Power to award costs

As with representation, there is a general rule with respect to costs, subject to exceptions.

The general rule is that each party must bear their own costs.⁴⁶ The exception is that the tribunal has a discretionary power to award costs, in whole or in part, if it is satisfied it is fair to do so.⁴⁷ That judgment is to be made having regard to whether the party conducted the proceeding in a way that caused unnecessary disadvantage to another party, was responsible for unreasonably prolonging the time taken to complete the proceeding or made a legally untenable claim.⁴⁸ The nature and complexity of the proceeding and other matters may be considered.⁴⁹ If the representative of a party is responsible for causing another party unnecessary disadvantage or unreasonably prolonging the proceeding, the tribunal may order the representative to pay the costs.⁵⁰

The exceptions include that the tribunal cannot make an order for costs in a small civil claim proceeding (except a reopening application),⁵¹ the costs of legal professional disciplinary matters are at the discretion of

38 A professional advocate may be a legal practitioner or some other person suitably qualified by substantial experience: *Victorian Civil and Administrative Tribunal Act 1998*, s 62(8).

39 Section 62(1) and (2).

40 Section 62(1)(c).

41 Clause 8(1) of schedule 1.

42 Clause 46B(1) of schedule 1.

43 Clause 51AA of schedule 1.

44 Clause 67 of schedule 1.

45 Clause 28BB of schedule 1.

46 Section 109(1).

47 Section 109(2) and (3).

48 Section 109(3)(a)-(c).

49 Section 109(3)(d)-(e).

50 Section 109(4).

51 Clause 28GG(1) of schedule 1.

the tribunal, subject to an exceptional circumstances standard for costs orders against practitioners found guilty of unsatisfactory conduct or misconduct,⁵² in making costs orders in owner driver cases the tribunal may take into account the lack of participation of the party in ADR,⁵³ bringing or maintaining proceedings primarily for commercial advantage may be taken into account in planning and environment cases,⁵⁴ each party must bear their own costs in proceedings under a taxing statute⁵⁵ and there is a modified power to award costs in land valuation cases.⁵⁶

Again, the purpose of the costs rules are to ensure the tribunal is a no-costs tribunal, except in cases where there is a demonstrable justification for awarding costs, especially where that is necessary to protect other parties from unreasonable disadvantage and delay and to protect the tribunal's processes from being abused.

(11) Civil justice reforms

Account must be taken of the reforms being carried out in the broader civil justice system in Victoria. In 2008, the Victorian Law Reform Commission published its landmark report into civil justice in the courts.⁵⁷ The government has announced its commitment to implementing appropriate reforms in this regard. These reforms are likely to allow the mainstream judicial process to operate more flexibly, with added emphasis on appropriate dispute resolution techniques. The tribunal has been strongly supportive of these developments and may be able to adopt some of the new initiatives in its own processes.

(12) Amalgamated tribunals elsewhere

The VCAT amalgamated model has been influential elsewhere in Australia and also overseas.

Amalgamated tribunals have been established in Western Australia (the State Administrative Tribunal),⁵⁸ the Australian Capital Territory (the ACT Civil and Administrative Tribunal)⁵⁹ and Queensland (the Queensland Civil and Administrative Tribunal).⁶⁰ So there is now VCAT, WASAT, ACAT and QCAT.

The Queensland legislation is a step up in terms of sophistication when compared with the Victorian legislation. The establishment of the tribunal in Queensland gave the authorities in that State the opportunity to improve upon the model which we started here. I think we have much to learn from what has been done in Queensland. I will be recommending that we modernise our legislation along similar lines.

An amalgamated tribunal has also been established in the United Kingdom (the First-tier Tribunal and Upper Tribunal).⁶¹ Canada, is pursuing the 'cluster' model.⁶² The developments in these countries took the VCAT model into account.

This review may therefore be of interest beyond Victoria. Nonetheless, the function of the tribunal is to serve the community in Victoria. It is to my consultation with that community that I now turn.

52 Clause 46D(1) and (2) of schedule 1.

53 Clause 51AB(1) of schedule 1.

54 Clause 63(1) of schedule 1.

55 Clause 91(1) of schedule 1.

56 Clause 99 of schedule 1; s 26 of the *Valuation of Land Act 1960*.

57 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008).

58 *State Administrative Tribunal Act 2004* (WA).

59 *ACT Civil and Administrative Tribunal Act 2008* (ACT).

60 *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

61 *Tribunals, Courts and Enforcement Act 2007* (UK).

62 See the *Adjudicative Tribunals Accountability, Governance and Appointments Act 2009* (Ont).

C CONSULTATION

(1) Objectives

VCAT engages with different sections of the community in different ways. The consultation strategy was designed with this in mind.

Certain sections of the community are competent and conspicuous participants in the tribunal's system. I put in this category a range of stakeholders, from professional organisations to business groups and NGOs of various kinds. People and organisations in this category would be enfranchised by traditional consultation mechanisms.

Other sections of the community do not participate in the system in the same way. I include in this category the general public, especially those in the outer-suburban areas of Melbourne, in country communities and in CALD (culturally and linguistically diverse) and Koori (Aboriginal) communities. These people would be disenfranchised by traditional consultation mechanisms. Innovative means had to be adopted. One means I chose was the public meeting. Another was on-site meetings with outer-suburban and country-based advocacy groups.

While the justice system is fundamental to democracy, the community has little contact with judges outside the court system. This is a pity, because judges and the community have much to say to each other. Public confidence in the justice system and the rule of law, and in our institutions of justice, as well as the judiciary's understanding of the views of the community, are improved by appropriate engagement. As president of the tribunal, and a judge of the Supreme Court, I thought it was important to take the opportunity which the review presented to move in that direction, especially because the tribunal touches the lives of so many Victorians. It will be for others to decide whether this endeavour was successful in increasing community understanding about the role of justice (particularly VCAT) in society. But I feel I obtained a much greater appreciation of the views and expectations of the community by doing so. To that extent, a broad objective I set for the consultation process was achieved.

The more specific and functional objective of the consultation was to give everybody a reasonable opportunity to contribute to the review. To the process by which that was done I now turn.

(2) Process

The methodology I adopted for carrying out the review had five main elements. First, I engaged in a process of internal consultation, implementing changes with the cooperation of the staff and members of the tribunal when this was appropriate. This process has been ongoing. Second, in early spring 2008 I gave a keynote address in which I set out the issues as I saw them and invited public comment.⁶³ That speech was published prominently on the tribunal's website. Third, I issued a discussion paper, established a review website to facilitate community involvement⁶⁴ and called for submissions in writing. Fourth, I engaged in a very extensive series of consultations with the general community, non-governmental organisations, local councils, professional associations and other stakeholders. Fifth, I visited tribunals in comparable jurisdictions in Australia and overseas.

Appendix 5 sets out the extensive community and stakeholder meetings which I held.

Reports of the community and stakeholder consultations were prepared and have been published on the review website, where they may still be seen.⁶⁵ I will give a summary of the main issues later, as they bear on the review.

63 Justice Kevin Bell, 'The role of VCAT in a changing world: the President's review of VCAT' (Speech delivered at the Law Institute of Victoria, Melbourne, 4 September 2008).

64 www.vcatreview.com.au.

65 www.vcatreview.com.au/review-documents.

Some 331 written submissions were made by individuals and organisations and by the staff and members of the tribunal. Most of these have also been published on the review website and may still be viewed.⁶⁶ Again, I will later summarise the main issues. I did not publish some submissions which contained personal information, identified people, members or (in too much detail) individual cases and for which confidentiality was requested.

I have personally read and considered every submission, including those not published.

The response of the community and stakeholder organisations, and tribunal's members and staff, to the review process has been very positive. A large number of people have taken the opportunity to attend meetings and make submissions, many of them very detailed. I express my sincere thanks for this level of participation in the review process.

(3) Summary of issues

(a) Overview

Of this substantial consultation it is possible to say that certain consistent major themes emerged. I will concentrate in this summary on those themes which have informed the recommendations I make for generic tribunal reform. Scores of helpful specific suggestions were made in the consultation which the limitations of space do not permit me to deal with here. The reforms I recommend are designed to enable many of those suggestions to be picked up or acted on.

The criticisms and suggestions may be grouped around these themes:

- tribunal is needed
- disappointed expectations
- getting back to the tribunal's roots and avoiding 'creeping legalism'
- too little assistance for self-represented parties and non-lawyer advocates
- opposition to legal representation
- excessive cost
- inappropriate behaviour by some members
- clubby atmosphere in some hearings
- inconsistency in procedure and result
- delay in being listed and getting a decision
- lack of access for outer-suburban and country communities
- deficiencies in the VCAT CBD building
- administrative inefficiency
- stronger focus on customer service
- case officer file management model
- support for ADR
- no formal complaints mechanism
- lack of recordings at hearings outside CBD and no automatic right to CDs
- lack of information about when to ask for written reasons in civil claims and credit cases
- lack of internal appeal tribunal
- need for plain English forms and correspondence

66 www.vcatreview.com.au/submissions.

- controlling expert evidence
- poor detail in VCAT data collection
- lack of public education
- fee waiver system too complex

I will explain each of these themes in turn.

(b) Tribunal is needed

There was virtual unanimity about the need for the tribunal. Few people argued the tribunal should be broken up. While there was some dissatisfaction with the nature of some of the jurisdictions conferred on the tribunal, the complaints in this regard were with the associated legislation, not with the tribunal. The role of the tribunal in reviewing, on the merits, the planning decisions of local councils (and other responsible authorities) is the most obvious example.

(c) Disappointed expectations

There were many criticisms which represented disappointed expectations about the tribunal's performance. The rationale for the establishment of the tribunal, as expressed so clearly in the 1996 discussion paper and the 1998 second reading speech of the Attorney-General, held out a lot to the Victorian community. People want the gap between the promise and reality to be bridged.

(d) Creeping legalism

Within the community sector, there was a sense that the tribunal needed to get back to its roots. It was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it had become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur.

(e) Not sufficiently assisting self-represented parties and non-lawyer advocates

Much of the community said the tribunal offered too little assistance to self-represented parties, and such assistance was offered inconsistently. Some government parties, local councils and community-based organisations who use non-lawyer advocates joined in this criticism.

(f) Opposition to legal representation

Some people felt there should be much stronger rules against legal representation in the tribunal. Others were not of this view. There was some criticism that a party would not know whether they would be allowed to be represented until they got to the hearing.

(g) Excessive cost

Many people and businesses complained about the cost of engaging in tribunal proceedings. In cases where legal representation and expert evidence was required, the cost could be prohibitive. Substantial documented cases were presented by a number of trade associations about the high cost of participation in VCAT proceedings in building and in planning cases.

(h) Inappropriate behaviour by some members

Inappropriate treatment of parties, witnesses and advocates (legal or otherwise) by a minority of members featured in many comments. The complaints here were that the member had behaved inappropriately in manner or language. In such cases the member was seen to be rude, uncaring, disrespectful or sexist.

(i) Clubby atmosphere in some hearings

Many members of the community complained about over-familiar communication between members and lawyers, experts and other frequent participants in hearings, especially (but not only) in planning and environment cases. It was said the hearings could be very 'clubby', with repeat players appearing to get favourable treatment.

(j) Inconsistency in procedure and result

Inconsistency in procedure and result was a point of strong criticism. The community, and professional participants also to some extent, spoke of the difference in approach between members about important aspects of the hearing process. Not knowing what procedure would be followed was a source of anxiety. As to outcome, a disturbing number of people – lay members of the community, organisational parties and legal and other advocates – said the results depended on what member you got on the day.

(k) Delay in being listed and getting a decision

Criticism of delays and lack of timely decision-making was strong across the board. The general public gave examples of small claims cases not being heard for months, with distressing human consequences. Businesses spoke of the crippling economic cost of delay in getting listed and getting a decision, especially where building projects were held up due to domestic building or planning cases. Home owners also spoke of the social and economic cost of such delays.

(l) Lack of access for outer-suburban and country communities

There was strong criticism that the tribunal was not accessible to people and businesses in outer-suburban Melbourne and country Victoria. The travel and other costs, and the inconvenience, of getting to the city, or waiting for a circuit, was emphasised. It was said that many people, including those in CALD and Koori communities, had no knowledge of VCAT at all. There was strong support for on-site views and hearings where appropriate, as in planning and other similar cases.

(m) Deficiencies in VCAT's CBD building

Many people spoke of the deficiencies in the tribunal's CBD premises – the lack of a proper reception facility, the stuffy waiting areas and small hearing rooms used for some cases, the unreliable lifts, the lack of a public photocopier etc. The adequacy of reception and hearing room facilities on the fifth floor was a target of strong criticism.

(n) Administrative inefficiency

Administrative inefficiency was referred to, especially that arising out of the implementation of the registry review in 2008-2009. Many instances were given of correspondence and notices being incorrectly sent or sent late. But this gradually improved.

(o) Stronger focus on customer service

There was a call for a much stronger focus on customer service, including the adoption of a statutory customer service charter and better reception and waiting facilities. Establishing a concierge service on the ground floor of the CBD premises was one suggestion.

(p) Case officer file management model

There was support for the concept of case officer management of files, especially where the dispute was large and complex or where the parties had special social or other needs.

(q) Support for ADR

There was widespread support for appropriate dispute resolution. This was expressed by a strong majority of individuals and organisations and in respect of all of the tribunal's jurisdictions. The processes and benefits of ADR were well understood and appreciated, but not at the expense of access to adjudication when called for and not in cases where ADR resulted in unjust outcomes by reason of unequal bargaining power.

(r) No formal complaints mechanism

Criticisms were made of the tribunal's lack of a formal complaints system. The principal criticism was the long delay in actioning complaints and the fact that most complaints were rejected because they concerned the outcome of the case.

(s) Lack of recordings at hearings outside CBD and no automatic right to CDs

That not all hearings were recorded, and that CDs of recorded hearings were not generally available, was a point of strong criticism. This was especially so in outer-suburban Melbourne and country areas, where hearings are not generally recorded. Access to a recording of the hearing as of right was emphasised. A linked concern was that it was common for members and a single party to be alone in hearing rooms, which was uncomfortable for some.

(t) Lack of information about when to ask for written reasons in civil claims and credit cases

Many people complained that they were not told of the statutory requirement in credit,⁶⁷ civil claims⁶⁸ and residential tenancy⁶⁹ cases for a request for written reasons to be made at the time the decision was made.

(u) Lack of internal appeal tribunal

There was widespread criticism of the tribunal's current limited capacity for internally rehearing and reopening cases and with the lack of an internal appeal tribunal. There was widespread support for such a system, although many were concerned about how added costs and delay could be minimised.

(v) Need for plain English forms and correspondence

The need to redesign forms and correspondence in plain English was frequently emphasised.

(w) Controlling expert evidence

Various suggestions were made for dealing with the proliferation of expert evidence in tribunal hearings and with unequal access to expert witnesses. The suggestions included a range of close management techniques, expert conclaves and tribunal-appointed single experts.

(x) Poor detail in VCAT data collection

The lack of detail in the tribunal's data collection system was criticised.

(y) Lack of public education

VCAT was criticised for not providing sufficient public education about its processes. The tribunal was seen to be in an ideal position to provide information and guidance about the conduct of cases, yet it did not do

67 *Victorian Civil and Administrative Tribunal Act*, cl 11 of schedule 1.

68 Clause 28 HH of schedule 1.

69 Clause 76 of schedule 1.

so systematically. It was suggested VCAT could help build the capacity of citizens to contribute to a culture of equality and human rights.

(z) Fee waiver system too complex

A number of people and community organisations said the fee waiver system needed to be simplified. Having to provide a formal affidavit was an access barrier for many. Presentation of a Centrelink benefit card should suffice.

Those were the main themes to emerge from the consultation process. I turn now to my main findings on the issues raised in the terms of reference.

D FINDINGS

(1) Access issues

(a) Tribunal has generally improved access and equitable outcomes

The general approach I will adopt in relation to my findings on the issues raised in the terms of reference is to present here in summary my main findings. These findings will inform my views about what action is needed. I will then move to explaining my suggested vision for the tribunal, which will lead to recommendations for that action.

Beginning with access issues, in the tribunal's first decade of operation it has resolved some 872,000 civil and administrative cases, an average of some 87,200 per year, at an average cost per case of \$274. Most of the cases were commenced by members of the general public and small businesses. In the great majority of those cases, the parties were self-represented and the resolution was quick, cheap and efficient, both for the parties and the community. A significant proportion of disputes were resolved by ADR, which the tribunal has pioneered.

This is a substantial achievement for the tribunal, in both its civil and administrative jurisdictions, which is widely recognised within the community.

On that basis, I find the tribunal has improved access to justice and the delivery of equal outcomes for all Victorians. However, there are still serious deficiencies in the accessibility of justice and the equality of the outcomes for the Victorian community. Further steps should be taken to improve that access and those outcomes.

In terms of the access issues specified in the terms of reference, these are the main problems:

- lack of equal access by people in outer-suburban Melbourne and country Victoria
- lack of utilisation of the tribunal by residential tenants
- poor utilisation of the tribunal by CALD and Koori communities
- difficulties experienced by self-represented parties
- perception of 'creeping legalism' undermining public confidence in the tribunal
- insufficient community legal education about the role of the tribunal

I will say something about each of these problems in turn.

(b) Problem areas

(i) *Lack of equal access in outer-suburban Melbourne and country Victoria*

Distance is an access barrier that operates to produce unequal access to justice. It is very difficult for people in outer-suburban Melbourne and country Victoria to access the tribunal. For people in these areas, every

step in commencing or defending, up to finalising and enforcing the outcome of a proceeding, involves potentially great and sometimes prohibitive cost and inconvenience. Even attending the tribunal for a short hearing may involve day-before departures and overnight accommodation costs, very early-morning rises, long travel times, childcare arrangements, taking time off work, driving and parking in the city and, generally, the unknown.

Coming to the city is not an easy experience for some people in the community. It may mean lifts, other people in suits, waiting rooms with large numbers of people, a different manner of speaking, not knowing how to behave and what is expected of you and, generally, feeling out of your depth. Some people who function perfectly well in their own locality do not function as well in the city. It is harder to find sources of advice in outer-suburban and country areas.

People living within easy access to the CBD do not have to overcome these problems, at least not to the same extent. I think it is very likely many people in outer-suburban Melbourne and country Victoria who are simply forgoing their rights – ‘lumping it’ – due to access difficulties of this kind. Circuit sittings in the country and regular sittings in suburban Magistrates’ Courts are welcome, and should be expanded as a temporary measure, but do and cannot sufficiently address this problem.

(ii) Lack of utilisation of the tribunal by residential tenants

In the residential tenancies jurisdiction, the tribunal has been very successful in delivering access to justice to landlords, but tenants are not exercising their rights to the same extent. About 95% of applications are initiated by landlords, most of them online. About 80% of those go ahead undefended without the tenant appearing at the hearing.

The tribunal is very aware of, and is not alone in experiencing, this problem. Internationally, it is known that residential tenancy tribunals have to work at ensuring that tenants access justice. In such tribunals, access barriers have been reduced by innovative delivery techniques, such as telephone mediation, advocacy services at hearing centres, community outreach partnerships and decentralisation of registries and hearing centres, all of which the tribunal should explore and adopt.

(iii) Poor utilisation of the tribunal by CALD and Koori communities

There is poor utilisation of the tribunal by CALD and Koori communities. A number of access barriers appear to stand between these communities and the tribunal. A major cause is disengagement between these communities and the institutions of government generally. Part of the solution involves greater engagement between the tribunal and such communities, which is hard to achieve with the present metro-centric model of the tribunal’s service delivery. The tribunal’s record of engagement with the Koori community is particularly disappointing, despite the conspicuous efforts of some members to do something about it. There should, at the least, be a Koori liaison officer at the tribunal, and there should be a feasibility study on establishing a Koori division of the tribunal. I so recommend.

I also recommend that the tribunal work with the Department of Justice to evaluate the feasibility of a Koori tribunal within VCAT, perhaps in association with a branch office in an area of high Koori population.

Recommendation 5 **There should be a Koori liaison officer at the tribunal.**

Recommendation 6 **There should be a feasibility study on establishing a ‘Koori tribunal’ within the tribunal.**

(iv) Difficulties experienced by self-represented parties

Many self-represented parties are experiencing excessive difficulty in presenting their cases in the tribunal. This presents a challenging equal access to justice problem. It is necessary to achieve more consistent and reliable results in this area. The problem goes beyond people with challenging behaviours or vexatious

litigants. It embraces self-represented parties as a general category. It is not only the tribunal which is confronting this problem. As costs in the legal system increase, justice institutions everywhere are seeing an increase in self-represented parties.

The members of the tribunal are willing to do what they can to address this problem. Improved performance will be a function of better pre-hearing assistance for parties by way of self-help education and other means, including the possibility of establishing a specialist self-represented person's legal service, which I later recommend. It will also be a function of better in-hearing assistance by way of enhancing member skills with targeted training.

There is a present focus in the tribunal on this problem, as evidenced by the heavy enrolments in training courses of this nature. There is, however, a need to design better training techniques and achieve greater understanding of the problem, which the tribunal's Learning Centre should assist in doing. An important side-benefit of mediation training for members is that it helps them acquire the communications skills which are required to deal effectively with self-represented parties. This too is being offered and taken up.

Consistently with the tribunal's role in the justice system, its human rights obligations and the reasonable expectations of the community, the tribunal should strive to apply best-practice standards in cases with self-represented parties. As I will later suggest, an integrated approach involving community education, enhancing the role of the staff and training and support of members is required. Succeeding will take institutional commitment, which I believe the tribunal has.

(v) Perception of 'creeping legalism' undermining public confidence in the tribunal

There is a troubling perception that the tribunal is not doing enough to prevent 'creeping legalism'. That perception is undermining confidence in the tribunal in some sections of the community. It is important that the tribunal engage with the community, industry and government about this issue and show itself to be capable of fulfilling its primary responsibilities. By the several means recommended below, I believe this problem can be successfully addressed.

(vi) Insufficient community legal education about the role of the tribunal

Community legal education is essential to achieving equal access to justice. The community has the need and the right to be informed about their legal rights and responsibilities. Basic knowledge about legal rights and responsibilities is an important aspect of the capacity of individuals, families and communities to live positive and fulfilling lives in a democracy. Having that capacity enhances individual, family and community wellbeing. Isn't individual, family and community wellbeing a fundamental objective of democratic society?

The premise of the human rights framework in the Charter is that respecting human rights begets respect for human rights, individually and collectively. This requires people to have knowledge and information, which it is the responsibility of government to provide.

The tribunal sits at the centre of this debate. Many of the most basic rights and responsibilities of the people are administered by the tribunal. Legal disputes consume the energy and resources of individuals, families and businesses. The resolution of the dispute ends the negative drain on their energy and resources, enhances their wellbeing and allows them to get on with the positive aspects of their lives.

Community legal education is directed at improving access to justice so that these outcomes can be achieved. Community legal education is not the primary responsibility of the tribunal. But it must play its part, especially because doing so enhances, and not doing so detracts from, its operational performance. In fact the tribunal has engaged in a lot of interesting, innovative and effective community education. It needs to go much further if the community is to have equal access to justice. That is why I recommend the tribunal should have a community education officer and a statutory community legal education objective. Further, as I later recommend, the tribunal's website is a very important community education tool which must be upgraded in line with that objective.

Recommendation 7 **The tribunal should have a community education officer.**

Recommendation 8 **The tribunal should have a statutory community legal education objective.**

(2) Operational issues

(a) Cost-effectiveness

(i) Tribunal generally cost-effective

The first issue raised in the terms of reference under this heading is whether the tribunal has been cost-effective in delivering services to Victoria.

I find the tribunal generally scores well against the standard of cost-effectiveness. No submission was made that the tribunal was less than cost-effective. The tribunal resolves a large number of cases in a wide variety of jurisdictions at a low cost per case. I have given the figures already. Cost-effectiveness is an important principle of the tribunal. I think the tribunal takes pride in delivering justice at minimal expense to the community. The community does understand that any system of dispute resolution involves some costs for the parties and the community.

However, further improvements could be made, and operational issues addressed, in the following areas.

(ii) Present CBD head office

The head office of the tribunal is in leased premises at 55 King Street, Melbourne, which is not in the legal precinct. The tribunal inherited the building from the main pre-amalgamation tribunals. It is widely accepted that the building is not in an ideal location. Nor is it ideally laid out or serviced for the tribunal's needs. It has been government policy for some time to transfer the tribunal to another building in the legal precinct. I want to draw attention here to reasons why it is important to afford greater priority to this objective, while acknowledging that it is for government to assess the competing claims on the limited funds available.

Over the years, the tribunal has, quite properly, incurred significant expense in renovating and maintaining the present building. The process has been and is ongoing. Most of the five floors used by the tribunal have received attention, some more than once. The fifth floor is the busiest space in the building. Many thousand civil claims, residential tenancies and planning and environment cases are heard there. It is too small for the demands made on it. So are the hearing rooms. The inadequate accommodation there is adding to the anxiety of the parties and detracting from the tribunal's equal access to justice objectives. But renovating this space would be very expensive – costing over \$1 million in my estimation. I am reluctant to request or authorise the expenditure of such a large amount of money when the building in other respects is no longer ideal for the tribunal's needs. I therefore recommend that, if it can, the government should afford greater priority to relocating the tribunal to a more suitable building. The potential regionalisation of the tribunal would not eliminate the need for appropriate accommodation in the CBD, but would need to be taken into account in determining the scope of that accommodation.

Recommendation 9 **The government should afford greater priority to relocating the tribunal to a more suitable building.**

(iii) Member support

To contain costs:

- members⁷⁰ usually sit alone – without bench clerks – in the tribunal's CBD hearing rooms

70 The judicial members have associates and a library allowance, so the comments here are not directed at them.

- members travel to and sit alone in the tribunal's outer-suburban and country Victorian hearing venues
- members have no library allowance and are not provided with copies of the legislation which is relevant to their work (they can access this legislation and legal texts online)
- members have limited secretarial support in the CBD and none at the outer-suburban and country venues
- members, including the deputy presidents who are responsible for the lists, have no legal research support
- deputy presidents do not have personal assistants, although they do have secretarial support

Although these measures are part of the tribunal's commitment to cost-efficiency, the increasing complexity of cases and the greater demands and expectations of the community require the issue of member support to be revisited. I am also concerned the deputy presidents are personally performing many administrative tasks when their skills could be better used in showing leadership in adjudication and ADR and in project development. Their administrative role will increase if the recommendations I make for performance management of members, among other things, are accepted.

The tribunal should, I recommend, have four research associates working in a pool to support members. The deputy presidents responsible for the five major lists or list clusters (civil claims and residential tenancies, guardianship, planning and environment, domestic building, real property and retail tenancies, and those in the human rights division) should be supported by five personal assistants to give them help with their co-ordination and other functions. Those assistants should be available to support the deputy presidents in the other lists when required.

I could not support the use of bench clerks in all cases, but the current system should be reviewed to identify when that is necessary.

Members should be provided with copies of the legislation relevant to their work, which should be updated at the tribunal's expense.

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| Recommendation 10 | The tribunal should have four research associates working in a pool to support members. |
| Recommendation 11 | The deputy presidents responsible for the five major lists or list clusters should be supported by five personal assistants. The personal assistants should be available to assist other deputy presidents when required. |
| Recommendation 12 | Tribunal members should be provided with copies of the legislation relevant to their work, which should be updated at the tribunal's expense. |

(iv) Administrative systems

While significant steps have been taken, the tribunal could further realise administrative efficiencies and service improvements which the amalgamation in 1998 has made possible. Overall, the balance between maintaining the functional operation of different jurisdictions in an amalgamated institution, on the one hand, and unifying the operation and administration of the tribunal, on the other, has been struck too much in favour of the former. The achievements of that approach should be acknowledged. The institutional amalgamation has been carried out successfully. The effort and dedication of the staff who have brought this about should be acknowledged. But in the administration and operation of the tribunal in the next ten years, there needs to be much greater emphasis on functional integration and operational unity, not just on institutional amalgamation.

On amalgamation there were four computer systems in use. That has been reduced to two. That too is a significant achievement. It is critical that the two computer systems be reduced to one. That objective can be achieved without loss of functional support in the administration of the various lists. Registry systems nowadays are so sophisticated that the individual needs of different jurisdictions in a single institution can be well catered for. The tribunal is awaiting the arrival of the ICMS registry system, which is being implemented in the three courts and the tribunal as part of an ambitious government project. The system recently commenced in the Supreme Court. I hope and anticipate that the ICMS will provide the comprehensive registry system which the tribunal needs.

The tribunal is an independent justice institution, not a government department. Further, it does not provide access to personal or private information about people or businesses in the cases before it, such as who has commenced or been the subject of an application and in what circumstances. On the other hand, the tribunal's work is the subject of legitimate interest by government and others in policy formulation and program development.

The tribunal does not presently have a good capacity to provide government, academics and other interested parties with objective anonymised statistical information about the cases before it. Nor does it have a good capacity to provide information about the processing steps taken to manage applications, timeliness, ADR, listings and determinations etc. I recommend that the information systems of the tribunal be upgraded to enable it to do so. I also recommend that the tribunal develop a protocol for the provision of appropriate information to interested parties, including government, business and researchers.

For many years, the staff in the registry of the tribunal were organised along pre-amalgamation lines. Single files were maintained for each matter. The files were not managed vertically end-to-end by single officers, but horizontally step-by-step by different officers according to the individual actions required. Generally, the work of the staff was organised around the performance of the process steps rather than around the ultimate resolution of the dispute. I think there are a number of problems with this approach, not the least being that our staff have much more to offer the tribunal and the community than that.

In 2007 before I was appointed, the tribunal commenced a review of the registry, which was implemented under my presidency in the spring of 2008 and the summer of 2009. Now files are generally managed by registry teams in lists, although within these teams there is still some functional separation along process step lines. The change-over period produced significant teething problems and caused inconvenience to many of the tribunal's users, especially in the planning and environment list, which I very much regret. These issues have been and are being worked through. In the end, I am confident the new system will be more efficient and user-friendly than the old.

Recommendation 13 **In the administration and operation of the tribunal in the next ten years, there should be much greater emphasis on functional integration and operational unity, not just on institutional amalgamation.**

Recommendation 14 **The information systems of the tribunal should be upgraded to enable it to provide interested parties with objective anonymised statistical information about the classes of cases before it, and to provide information about the processing steps taken to manage applications, timeliness, ADR, listings and determinations etc.**

Recommendation 15 **The tribunal should develop a protocol for the provision of such information to interested parties, including government, business, researchers and community organisations.**

(v) *Integrated case officer management*

I want to promote consideration of an innovative way of organising the work of the tribunal, which I will call integrated case officer management. Let me first set the scene.

There is a close connection between the role of the staff and the role of members in the achievement of equal access to justice. The most cost-efficient service and best quality outcomes for the community are achieved when the staff and the members work together performing their respective roles as part of a team. The equal access to justice challenges facing the tribunal can most effectively be confronted in this manner. *ONE VCAT* is a policy framework which encompasses these ideas.

One advantage of an amalgamated tribunal is that the administration is large enough to produce an efficiency dividend. The institution can try better ways of doing things so that dividend can be returned to the community. Integrated case officer management is one such innovation.

From my observation of administrative models in Australia and abroad, the role of case officers is very important to achieving optimum service and outcomes. Generally, under this system a case officer administers the file from start to finish, or at least for a significant period in the life of the file. The administration of the file is integrated in the hands of the case officer – hence my choice of name. In carrying out their work, the case officer establishes and maintains critical relationships with the tribunal's users – parties, advocates, witnesses, support agencies and others, depending on the nature of the case. In some jurisdictions, the case officer provides pre-hearing assistance to self-represented parties.

In small justice institutions, or in small lists in large institutions, integrated case officer management can occur naturally. The number of cases and staff is relatively small, and individual staff will usually manage individual files from start to finish. Alternatively, most staff will get to know most of the files, and the people who populate them. That is one reason why regional offices of justice institutions appear to be so much more engaged with their communities. The staff operate as case officers and they get to know the user community very well. There are small lists like that at VCAT. The staff operate as *de facto* integrated case officers. These lists operate very well.

In the administrative systems in tribunals in French speaking jurisdictions I visited – specifically, Quebec in Canada and Paris and Strasbourg in France – I observed integrated case officer management in action. The assistance offered to the public was pro-active from the moment the member of the public entered the tribunal building. In summary, this was the process followed:

- active reception – like a concierge service
- triage and, where appropriate, referral to an information officer to assist with diagnosing the problem, filling out forms and lodging the claim
- examination of the form by a technical officer for formal compliance and jurisdictional competence
- reference of the file to a case officer for management until hearing, working with the listing registrar when that time comes
- ideally, the case officer was the bench clerk during the hearing, but that didn't always happen
- the case officer did the post-hearing follow up work, as necessary

Integrated case officer management is not warranted for most cases in high volume lists where only modest administration and hearing (or ADR) time is required. But a significant volume of the tribunal's work would benefit from an administrative system having these features. It would be cost-efficient and assist in producing quality outcomes. This more personalised kind of administrative support would enable better pre-hearing preparation of files and the provision of due assistance to self-represented parties.

Here are the areas of the tribunal's work in which I think integrated case officer management could be beneficial:

- all major and complex cases
- major cases in the planning and environment list
- cases in the domestic building list
- human rights cases (especially anti-discrimination and guardianship)
- lists where access to justice could be improved with this kind of approach
- cases with parties or witnesses who have special physical, psychological or social needs
- any significant case involving a self-represented party

Before the registry review, the tribunal's administrative systems were virtually the opposite of integrated case officer management. Staff were generally responsible for the performance of process steps, not whole files or regular contact with users. With the implementation of the registry review, work teams now support specific jurisdictions and are responsible for file management from end to end. Where appropriate, integrated management by individual case officers could be the next step.

One of the submissions I have from staff is from the customer service team. Among their recommendations is for a concierge service in the reception area. I adopt that recommendation and others which are consistent with the model of administration I am here promoting.

I recommend the government support a pilot project implementing integrated case officer management in the administration of the tribunal.

Recommendation 16 **The tribunal should establish a concierge service in the reception area.**

Recommendation 17 **The government should support a pilot project implementing integrated case officer management in the administration of the tribunal.**

(vi) Modernising VCAT's image

There is a need to standardise and modernise the tribunal's logo and imaging. At present the logo developed in 1998 is still in use. But a number of others are also used. A number of variations have been made to the 1998 logo.

To represent unity, refresh the tribunal's image in the public's eye and announce the commencement of a new phase in the tribunal's evolution, I recommend that a new logo be developed for the tribunal. This should be used consistently across all aspects of its operations. No other should be used. The design and implementation of the logo should go hand in hand with the development of a communications strategy through which the tribunal can project its role to, and engage with, the community.

I do not recommend the change of the name of the tribunal. The VCAT 'brand' is very strong. The current name aptly describes what it does. I have considered a range of alternative names.⁷¹ None of them are as appropriate as the current name. However, it is important that the tribunal project to the community the full extent of its various jurisdictions. That can be done with the present name with modernised imaging and used pursuant to a communications strategy.

Recommendation 18 **The tribunal should have a new logo to represent unity, refresh the tribunal's image in the public's eye and announce the commencement a new phase in the**

71 For example, the Victorian Tribunal (inaccurate – there are others), the Victorian Disputes Resolution Tribunal (misleading – the tribunal also determines cases; while dispute resolution is a generic name, it tends to be associated with ADR; also there is a government disputes resolution service) and the Tribunal of Justice (strange to our ears).

tribunal's evolution. The tribunal's stationary, forms, documents, signage and website should be overhauled accordingly.

Recommendation 19 **The tribunal should have a communications strategy through which the tribunal can project its role to, and engage with, the community.**

Recommendation 20 **The name of the tribunal should not be changed.**

(vii) Upgrade recording system

Every hearing of a case at the tribunal should be recorded. The parties and the tribunal need a record of the proceeding. Parties should have access to the recording as of right, unless there is good reason to deny it, for a small fee. The present policy of the tribunal is more restrictive and should be revised along those lines. That is a matter within my control as the president which I intend to pursue.

Hearings are recorded at the tribunal's CBD office, but not when it sits on circuit. That is a deficiency. Remembering that members of the tribunal sit unaccompanied on circuit, it means that often there is only the party or parties and them in the hearing room. That too is a deficiency, as I mention elsewhere in this report. Among other things, disputes sometimes arise about what was said and done. That can complicate appeal proceedings. This needs to be addressed.

When hearings are recorded, parties can obtain a transcript at their own expense. The tribunal does not have the funds to provide the parties with a transcript, and I do not recommend that it be given this function. But the parties cannot obtain a transcript when the hearing is not recorded.

There are deficiencies in the recording system used at the tribunal's CBD office. This was adversely mentioned in a recent report of the Ombudsman, which recommended the tribunal upgrade its systems.⁷² The deficiencies relate to inadequacy of the recording equipment and the difficulty of editing poor-quality transcripts to ensure they are accurate. I adopt recommendations made by the Ombudsman and put it forward here.

One problem with the present arrangement is that the tribunal's recording picks up everything said in the hearing room at all times, even during breaks and confidential discussions. A solution needs to be found to that problem. But it should be recognised that other justice institutions have this problem. Most advocates appreciate that conversations in hearing rooms are recorded. It may be the solution is to put signs up bringing this to everybody's attention in the tribunal.

Recommendation 21 **Every hearing of a case at the tribunal, including when it sits on circuit, should be recorded.**

Recommendation 22 **Access to the recording should usually be as of right, for a small fee.**

Recommendation 23 **The tribunal should upgrade the recording system used at its CBD office to address deficiencies relating to inadequacy of the recording equipment and the difficulty of editing poor-quality transcripts to ensure they are accurate. The government should support that upgrade.**

⁷² Victoria, Ombudsman, *Brookland Greens Estate: investigation into methane gas leaks* (2009), 278 (recommendations 53 and 54).

(b) New technology and ADR

(i) *New technology*

In reference to new technology, the issue raised is whether the use of new technology at the tribunal has assisted parties to resolve disputes fairly and more speedily, or could be enhanced.

The tribunal has been a pioneer in the use of new technology. For example:

- *VCAT Online*. By this service, landlords (mainly those represented by estate agents) can commence applications via the internet. Most of the applications in the residential tenancies list are commenced in this way. The tribunal has plans to widen access to this service to social housing providers and tenants' advocacy organisations.
- *SMS reminders to tenants*. The tribunal has a pilot project underway by which it is reminding tenants of their hearing by SMS message.
- *Educational videos*. The tribunal has produced several. The most recent is 'Taking it to VCAT'. This is produced to the highest production standards and will enable every list in the tribunal to add a segment explaining how self-represented parties can present their case.
- *VCAT Learning Centre*. In 2009, the tribunal has established the Learning Centre for delivering professional development and training to members and staff, which is a first. The centre has facilities which allow members to be trained by video in a tribunal setting and then obtain video-based feedback about their performance. Embedding professional development in a justice institution in this way is internationally ground-breaking.
- *Video and teleconferencing*. The tribunal has video and teleconferencing facilities which are accessible to anyone anywhere in Australia.

The tribunal has a number of other initiatives soon to commence, including online initiations for small businesses (this is called 'Smartform') and computer-based management of major cases.

The experience of the tribunal in using new technology supplies a foundation for doing so to a greater extent to better achieve its equal access to justice objectives, especially in service delivery, adjudication and ADR in outer-suburban and country areas.

(ii) *Appropriate dispute resolution*

(A) **ADR at the tribunal**

The terms of reference asked whether the tribunal's use of ADR has assisted parties to resolve disputes fairly and more speedily, and whether ADR services could be enhanced.

The tribunal aspires to become a centre of excellence for ADR. As part of preparing for the achievement of that objective, the tribunal recently reviewed its ADR arrangements.⁷³

Alternative or appropriate dispute resolution (ADR) is an umbrella term for processes, other than judicial determination, in which an impartial person assists the parties to a dispute to resolve the issues between them. ADR encompasses processes such as mediation, conferencing, conciliation and facilitation.

ADR can provide a quicker, more flexible and cost effective alternative to traditional litigation. It can allow the parties to choose the process that best suits their needs and to work together to resolve their dispute and agree to a settlement that makes sense to them.

Moving to the present ADR processes of the tribunal, these have been in place since the creation of the tribunal in 1998.

73 See VCAT Annual Report 2008-2009, 54.

The tribunal's legislation was innovative in its inclusion of ADR as a method of resolving cases. It permits the tribunal to require parties to attend a compulsory conference.⁷⁴ The functions of a compulsory conference are:⁷⁵

- (a) to identify and clarify the nature of the issues in dispute in the proceeding;
- (b) to promote a settlement of the proceeding;
- (c) to identify the questions of fact and law to be decided by the Tribunal;
- (d) to allow directions to be given concerning the conduct of the proceeding.

Compulsory conferences are robust in nature. The tribunal tries to assist the parties to understand the legal and factual issues in the case and how they may be resolved by settlement.

Another example is mediation. The legislation permits the tribunal to refer a proceeding to mediation.⁷⁶ Mediation is a more facilitative process. The usual rule is that a member who mediates in a proceeding cannot go on to constitute the tribunal at the hearing.⁷⁷ That does not apply in civil claims cases under the *Fair Trading Act*⁷⁸ and residential tenancies cases,⁷⁹ where (subject to the determination of objections) the member can do so.

As we have seen, increasing the use of ADR was an objective of the legislation.

I will be later recommending a substantial upgrade of the home legislation of the tribunal with respect to ADR.

(B) VCAT and the NMAS

VCAT is a Recognised Mediator Accreditation Body (RMAB) under the National Mediator Accreditation Scheme (NMAS). VCAT's status as a RMAB is an important development because it allows VCAT to accredit mediators under the national scheme, and to deliver appropriate continuing professional development so that the tribunal's mediators meet their continuing accreditation requirements. To retain their accreditation mediators must complete at least 20 hours of continuing professional development in every two year cycle.

(C) VCAT's ADR judge and principal mediator

In March this year I appointed former Judge Iain Ross as ADR judge at VCAT. Justice Ross has since been appointed to the Supreme Court. His Honour was the first ADR judge at VCAT, indeed in a justice institution anywhere in Australia. In that capacity, and with the assistance of VCAT's principal mediator Marg Lothian, his Honour was responsible for the development and implementation of VCAT's ADR strategy, which I have approved after consultation with the heads of lists. The objective of that strategy is to position VCAT as a centre of excellence in ADR.

(D) VCAT's ADR strategy

VCAT's ADR strategy has three key components:

- enhancing capabilities
- measuring success
- improving outcomes

(E) Enhancing capabilities

ADR processes at VCAT are conducted by both tribunal members and by a panel of sessional mediators.

74 Section 83(1).

75 Section 83(2).

76 Section 88(1).

77 Section 88(6).

78 Clauses 28EE and 28FF of schedule 1.

79 Clauses 70 and 71 of schedule 1.

The tribunal recently 'refreshed' its panel, after an advertising, interview and selection process. At present there are 29 mediators on the panel and all are accredited mediators under the national scheme.

Mediation is the ADR process used by VCAT's panel mediators. Mediation can be described as a process in which the parties, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes for their proceeding. The emphasis of the process is for the parties to achieve a negotiated settlement. The mediator acts as an impartial third party to assist the parties to reach their decision. Mediators do not provide advice to parties, nor do they evaluate or adjudicate disputes. They can provide a 'reality check' on the positions adopted by the parties.

In addition to VCAT's panel mediators, tribunal members are also actively engaged in ADR processes across all of VCAT's jurisdictions. Such processes include mediation, case conferencing, compulsory conferences and the facilitation of expert conclaves. Over 60 VCAT members are accredited mediators.

At compulsory conferences, members may give the parties advice, for example, about the sort of evidence they will need to prove their case. These conferences are particularly useful in building matters and other large civil disputes.

The tribunal has over 90 accredited mediators at its disposal to assist parties in the resolution of their disputes. Many of our mediators have specialist expertise in particular disciplines such as building, construction and engineering. In 2008-2009 over 700 cases were finalised at mediation.

One of the key components to VCAT's ADR strategy is enhancing the tribunal's ADR capability. As part of that process the tribunal has offered training opportunities to members and staff who wish to become accredited mediators. The tribunal has conducted a five day mediation course in September 2009 for this purpose, attended by 18 members and staff.

We will also be building on our current professional development program for mediators by offering lunch time seminars and master classes.

Enhancing the tribunal's ADR capability has not just been about the number of mediators. It is also about extending access to ADR processes.

To date formal ADR processes have not usually been available to parties with small civil claims or in the residential tenancies jurisdiction, although members routinely employ ADR techniques to encourage settlement before they start to hear and determine a case. In these jurisdictions, every effort is made to keep the number of tribunal attendances to a minimum in order to deliver a cost effective dispute resolution service. Generally this means that parties only come to the tribunal once to have their dispute heard and determined.

VCAT is looking at a number of initiatives to enhance access to ADR.

In May and June this year the tribunal conducted a civil ADR blitz under the direction of the deputy president in charge of the civil claims list. The focus of the blitz was small civil claims which would not otherwise have been dealt with until October 2009. The blitz took place over six days and dealt with over 800 cases. About 20 members and mediators were involved, and all of the parties were given the option of having their dispute mediated. Over 150 matters were mediated. Other cases were adjudicated.

In the residential tenancy jurisdiction, the tribunal intends to pilot the use of telephone mediation in rent arrears/possession cases. The pilot will include cases from regional Victoria. The tribunal also intends to pilot the use of mediation in residential tenancies compliance cases.

(F) Measuring success

To properly evaluate the quality of the ADR processes the tribunal provides, it must be able to measure the outcome of those processes. Historically the measurement of success has been limited to settlement rates at formal mediations. As you will see, successive VCAT annual reports have consistently reported a 70 percent settlement rate at mediation.

But settlement rates tell us only part of the story. They say nothing about those cases where ADR has resolved some, but not all, of the issues in dispute. Nor do settlement rates necessarily reflect party satisfaction with the ADR process. Did the parties have an opportunity to put forward their point of view? Did they think the process was fair?

From 1 June 2009 panel mediators and VCAT members have been asked to complete an ADR report after every formal ADR process.

The ADR form identifies the ADR processes used and whether the dispute was settled. In cases where the dispute was not completely resolved the report will capture the extent to which the issues between the parties were narrowed. The tribunal also proposes to measure party satisfaction with the ADR process, by asking parties to complete a qualitative survey.

(G) Improving outcomes

Enhancing the tribunal's capabilities and more accurately measuring our success will provide it with some of the tools needed to improve ADR outcomes for the parties. These initiatives allow the tribunal to identify and replicate best practice.

Innovation can also contribute to improving our performance. The tribunal intends to pilot and evaluate innovative ideas.

In June this year the tribunal introduced a pilot mandatory cooling off period for mediations conducted by panel mediators where a party is not legally represented.

In circumstances where one or more of the parties are not legally represented at mediation and an agreement is reached, that agreement is now subject to a mandatory cooling off period of two business days. If any party, upon reflection, wishes to withdraw from the settlement within the two day period they can contact the tribunal by phone and advise us of their decision. The tribunal then contacts the other parties to inform them that the settlement has been revoked and the matter is usually set down for a directions hearing.

The 'cooling off' pilot will operate for six months. It will then be evaluated and, if successful, implemented across the tribunal. Early indications are that there have been few withdrawals and increased satisfaction.

By piloting, evaluating and implementing new ideas the tribunal hopes to improve ADR outcomes and position VCAT as a centre of excellence for ADR. The recommendations for legislative changes I have made have been considered with this in mind.

(H) VCAT mediation statistics 2005-2009

The extent of mediation at VCAT is substantial, as revealed by the tribunal's statistics for 2005-2009. The cases finalised prior to mediation are presented in table 2.

	2008/09	2007/08	2006/07	2005/06
Anti-discrimination list	4	17	6	17
Domestic building list	26	16	33	41
Planning and environment list	42	20	36	44
Retail tenancies list	2	3		
Legal practice list	0	2	3	2
Total	74	58	78	104

Table 2: cases finalised prior to mediation

The cases finalised at mediation are presented in table 3.

	2008/09	2007/08	2006/07	2005/06
Anti-discrimination list	96	87	90	93
Domestic building list	268	222	260	276
Planning and environment list	294	170	240	239
Retail tenancies list	33	35	32	14
Legal practice list	13	34	47	38
Total	704	548	669	660

Table 3: cases finalised at mediation

The mediation success rate is presented in table 4.

	2008/09	2007/08	2006/07	2005/06
Anti-discrimination list	68	72	65	59
Domestic building list	64	64	72	66
Planning and environment list	67	70	69	75
Retail tenancies list	53	62	59	58
Legal practice list	77	68	78	86
Total	329	70	69	70

Table 4: mediation success rate (%)

This is a substantial number of cases and a good success rate. The tribunal hopes to take ADR much further.

(I) Summary

I can report that the tribunal has been a pioneer of ADR in Victoria, has used ADR to increase access to dispute resolution to the Victorian community, including the business community, in most of its jurisdictions, and has been innovative in the techniques it has used. The tribunal has appointed the first principal mediator and the first ADR judge in an Australian justice institution to provide leadership in this area. The tribunal has recently reviewed its ADR arrangements to make them more effective, to improve the quality of the service provided and introduce formal accreditation requirements for its contract mediators. It has offered mediation training to staff and members at its new Learning Centre. The tribunal is embedding ADR in its operations as the twin of adjudication in the resolution of disputes, to be employed wherever appropriate. It sees ADR capacity on the part of members as an important aspect of their competence as judicial officers, one that enhances their skills in conducting hearings when they are performing adjudication functions. I have identified the principles for the application of ADR in the tribunal as a justice institution, on which I will later draw in this report.

(3) Jurisdictional issues

(a) Issues in terms of reference

The terms of reference ask whether the additional jurisdiction assigned to VCAT since 1998 has been appropriate and whether the process and principles under which the tribunal has acquired new jurisdiction could be enhanced. The terms of reference also refer to the tribunal's concurrent jurisdiction. I will also take the opportunity here to refer to administration orders in the guardianship jurisdiction and the demands on the civil claims, residential tenancies and owners corporation lists.

(b) General nature of new jurisdictions

I will begin by describing the general nature of the new jurisdictions which have been conferred and the way they have fitted into the tribunal's institutional framework. As you will see, the new jurisdictions conferred

on the tribunal since 1998 have enlarged the jurisdiction of the tribunal and altered the mix and increased the complexity of its work. But they have not changed its numerical caseload or its fundamental nature.

The base, added and present jurisdictions of the tribunal are set out in appendix 2.

I have already described the growth in the staff, members and budget of the tribunal.

From the start, the tribunal has been a civil and administrative tribunal. It has always had judicial and administrative jurisdiction. The additional jurisdictions have fallen into one or other of those categories. The tribunal has not been given any significant criminal jurisdiction. Its limited jurisdiction in this area can only be exercised by judicial members.

The ten-year initiation and finalisation statistics in appendices 3 and 4 show that the caseload of the tribunal overall has remained steady at 80,000-90,000 cases per year.

In terms of that caseload, the main jurisdictions of the tribunal have historically been residential tenancies, civil claims, guardianship and planning and environment. Cases in these lists continue to account for the vast majority of the tribunal's work (96% of finalisations in 2008-2009), despite the addition of a significant number of new jurisdictions since 1998.

From the start, the tribunal has always had significant jurisdiction in some civil and administrative areas where the caseload has been low or relatively low but the complexity has been relatively high or very high. In the civil area, domestic building, retail tenancies and credit cases fall into this category. Freedom of information, liquor licensing and mental health cases are examples in the administrative area. The addition of new jurisdictions of this nature since 1998 is not out of the ordinary for the tribunal.

VCAT was established as an amalgamated tribunal with a broad range of jurisdictions which were initially assigned to the civil and administrative divisions. The human rights division was created by the rules committee of the tribunal in 2001. The jurisdictions assigned to that division have also been of a civil or administrative nature. The human rights division was created and jurisdictions were assigned to it due to the distinct human rights content of those jurisdictions. Several more have recently been or are about to be assigned to this division.

As we know, the tribunal has received significant extra responsibilities in a range of jurisdictions in both the civil and administrative areas. Its acquisition of the jurisdiction to resolve disputes concerning common property and owners corporations is an example of the former. Its acquisition of the responsibility for regulating the health professions is an example of the latter. It is that same process which is ongoing in respect of the human rights division. As more regulatory laws of a human rights nature are being made by the parliament, so the jurisdictions assigned to that division are growing.

With one exception, the new jurisdictions added since 1998 have generated small or modest caseloads. In some, there has been no caseload at all. That too is not unusual for the tribunal. Some of the original 1998 jurisdictions have generated no, small or modest caseloads. The one exception has been consumer-trader and other disputes under the *Fair Trading Act 1999*, which have generated a significant caseload.

It is a general feature of the additional jurisdictions that, although the cases which go to hearing may not be many, they are more likely to be complex when they do. As I have said, the tribunal has always heard and determined cases of a complex nature. The new jurisdictions fall into no different category in that regard.

(c) Principles of acquisition

(i) Source of principles

Turning now to the principles on which the new jurisdictions have been conferred, the jurisdiction of the tribunal is a matter for the Victorian Parliament. There are no express statutory principles of acquisition. Any such principles could not bind a subsequent parliament in any event. The principles of acquisition governing the conferring of new jurisdiction on the tribunal are those which can be inferred from the

content and structure of the tribunal's own legislation, the accepted legal principles governing the exercise of the tribunal's existing jurisdiction (to which the new jurisdiction comes) and the terms of the legislation conferring new jurisdiction over time.

(ii) *Principles for new administrative jurisdiction*

On that basis, I can say that, generally, any new jurisdiction of an administrative nature has conformed to these principles:

Primary decision-maker

- legislation has created a decision-making power (not a rule-making power) to issue a licence, grant a permission, confer a right, regulate an activity, give access to a benefit or service or otherwise affect the interests of individuals or businesses
- the power is discretionary so that it can be reasonably exercised one way or the other depending on the facts and circumstances of the particular case, which means there is scope for argument among reasonable people about the correctness of the decision
- although discretionary, the power is not conferred in arbitrary or capricious terms and must be exercised according to accepted legal standards of objectivity, rationality and impartiality
- the exercise of the discretion involves considerations of principle or policy which are not of a legal nature, or not strictly of a legal nature, and which can be identified from the express terms of the legislation or implicitly from its scope and objects
- the decision-maker has an obligation to afford the person affected by the exercise of the power the opportunity to be heard, and there is no lesser obligation on the tribunal in this regard
- the legislation confers on the person affected a right of application for review on the merits to the tribunal, which the tribunal is legally obliged to hear and determine according to law

Tribunal

- the subject matter of the decision falls within the tribunal's existing expertise, the tribunal could reasonably be expected to develop that expertise, new members having that expertise are appointed or the legislation adds some special hearing requirements which ensures that expertise is obtained (for example, by making the provision for the appointment of additional specialist members)
- any hearing of the tribunal will, at least ideally, be tripartite, that is, there will usually be parties before the tribunal who will at least include the applicant for review and the decision-maker or some other person who is responsible for representing the decision-maker's side of the argument⁸⁰
- while special provisions may govern the exercise of the new jurisdiction by the tribunal – for example, by requiring it to be constituted by a panel or to adopt a certain procedure – the foundational principles of the tribunal's home legislation and manner of operating are respected
- the jurisdiction of the tribunal is not to make law or policy, but independently of the government and impartially to make the correct or preferable decision on the merits of the particular case under the enabling enactment
- the decision of the tribunal, subject to appeal, is binding and enforceable on and against all parties, including any government parties

These principles are an appropriate basis on which new jurisdictions of an administrative nature are to be assigned to the tribunal. There should be no change to these principles.

Human rights under the Charter are an important new consideration to take into account, especially the equality rights in s 8 and the right in s 24(1) to have civil proceedings heard by a competent, independent

80 I drew attention to the difficulties which occur when proceedings are not tripartite in *Lifestyle Communities (No 3)* [2009] VCAT 1869, [390]-[392].

and impartial tribunal (or court) after a fair and public hearing, subject only to demonstrably justified limits under law as mentioned in s 7(2).

In terms of the content of the laws governing decisions to be made by the tribunal, the principles of acquisition I have identified would accept a range from the specific to the general. The choice is for the legislature to make, having regard to the subject-matter and other considerations. Specific principles are desirable because they are more certain, but general principles may be necessary because they are more flexible. The important thing is that the principles are prescribed in or ascertainable from the enabling legislation.

The tribunal has an important role in the independent interpretation and application of rules in legislation and other instruments. Over time, the decisions of the tribunal may (subject to appeal) constitute a body of jurisprudence which provides legal guidance about how the legislation or instrument is to be administered (subject to subsequent enactment). But the role of the tribunal is not to make policy. According to the accepted principles governing the exercise of its review jurisdiction, its decision must respect the policy choices made explicitly or implicitly in the enabling legislation.

Recommendation 24 **The current principles by which the tribunal acquires new administrative jurisdiction are appropriate and should not be changed.**

(iii) *Principles for new civil jurisdiction*

In the civil jurisdiction, the parliament has conferred new jurisdiction on the tribunal where it has wanted to give parties ready access to an affordable and speedy means of resolving civil disputes, either by adjudication or ADR. I think the parliament has also taken into account the expertise of the tribunal, both in terms of the subject matter of the jurisdiction and the processes of adjudication and ADR by which it may be exercised.

I give as an example the additional jurisdiction conferred on the tribunal to determine applications arising out of disputes of co-owned land and goods. That jurisdiction is contained in Part IV of the *Property Law Act 1958*. The jurisdiction, which is effectively exclusive, was introduced by s 5 of the *Property (Co-ownership) Act 2005*. In the second reading speech, the Attorney-General said:⁸¹

The reason that the Supreme Court's jurisdiction to hear disputes between co-owners is limited is to ensure that these disputes can be dealt with in a more accessible and affordable forum for dispute resolution.

It was not a feature of the consultation process that the current principles by which the tribunal acquired new civil jurisdiction were inappropriate. I am not aware of any circumstances suggesting they should be changed. I do not recommend any change.

It is important for the tribunal to ensure it has and maintains appropriate processes and expertise for the exercise of new civil jurisdiction, both in terms of the substantive law and the processes to be followed. It has generally done so. Indeed, the tribunal is an acknowledged leader in the innovative practices it employs for taking expert evidence in domestic building cases.

Recommendation 25 **The current principles by which the tribunal acquires new civil jurisdiction are appropriate and should not be changed.**

(d) **Process for acquiring new jurisdictions**

As to process, I think it is important to adopt a systematic approach to the acquisition of new jurisdictions. The principles underlying this approach should be:

81 Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2005, 880 (Rob Hulls).

- the tribunal must implement and exercise such new jurisdictions as may be conferred on it by the parliament
- the new jurisdiction should come within the acquisition principles
- each participant in the new jurisdiction must know and understand their role
- the demands of the new jurisdiction must be properly costed and the tribunal must be adequately resourced to meet those demands
- any special rules or procedures which are necessary for the new jurisdiction, including provisions governing the composition of the tribunal in particular cases, must be identified and introduced in a timely way

I will say something about each of these principles in turn.

The role of the tribunal in providing independent review of administrative decisions and resolution of civil disputes is an important part of the justice system. It is the parliament's constitutional function to make laws conferring such jurisdictions on the tribunal as it sees fit. If the parliament makes laws extending the tribunal's role into new areas of jurisdiction, it is the tribunal's responsibility to implement them.

I have already dealt with the acquisition principles.

The tribunal's role and procedures need to be known and understood by the intended parties. For example, in the administrative jurisdiction in a regulatory case the parties are likely to be the regulator or primary decision-maker and the individual or business concerned. Cases in the tribunal are tripartite. Depending on the nature of the case at first instance, the regulator or primary decision-maker will be required to play an active role in the hearing before the tribunal on review.

Although the tribunal has inquisitorial powers and flexible procedures, it generally acts on evidence or information presented, and submissions made, by the parties. It generally decides cases within the framework of the issues which have been identified by the parties. It has the capacity, indeed the responsibility, to decide the case according to the governing legislation. In doing so, it may be required to go beyond the issues identified by the parties. But that only happens when there is something in the material before the tribunal which makes it possible and appropriate to do so.

It can be seen, therefore, that the role of the parties in cases before the tribunal is very important. The interest which the parties have in the subject-matter of the proceeding does not end because the case goes on review from the regulator to the tribunal. The regulatory obligations of the primary decision-maker require it to play an active role in the proceeding before the tribunal, unless there is some other individual or entity playing that role. The tribunal will look to the primary decision-maker (or whoever is playing their role) for evidence and submissions about the regulatory issues involved in the case. Of course, the tribunal equally looks to the applicant for review for evidence and submissions in relation to the same issues, because the tribunal's role is independently and impartially to make the correct or preferable decision on the merits.

The relatively informal procedures of the tribunal make it easier for parties to present their cases than in formal legal proceedings in a court. The costs of participation should be modest compared with a court. Government parties and applicants to administrative proceedings should be able to present their cases without substantial legal resources if they wish. But active participation and clear submissions are required, especially in cases involving important issues of principles.

Generally, effective decision-making by the tribunal in its merits-based administrative jurisdictions, especially in cases involving the regulation of a trade, industry, profession or activity, depends on these three factors:

- the facts and circumstances giving rise to the regulatory issues must be established, for the tribunal cannot identify those itself
- the parties must state clearly, from their position, what the relevant issues are and what the tribunal should decide in those facts and circumstances, and they must assist the tribunal with their submissions on those subjects

- a legislative or regulatory framework which specifies the applicable rules and principles with clarity, either explicitly or implicitly

One strength of the tribunal is it can have hearing panels with people of varying appropriate expertise. I would support any measure which adds depth to the tribunal's membership base as it would enhance this capacity. But even when the tribunal is constituted in a way that is optimum, these three factors must be present to ensure the decision is an effective response to the case.

Turning to the issue of resources, not every new jurisdiction will require additional resources. But many do. The potential costs include staff and member time, start-up training and development, ongoing training and development, any necessary renovations to hearing rooms, acquiring new technology (if necessary), community education (if required), new forms and stationery design (if required) etc. The tribunal wishes to devise a formula for identifying these costs, and I recommend that assistance be provided to enable it to do so. The provision of funding to meet these costs is a matter for discussion between the host agency and the tribunal.

Lastly, if special rules or procedures are needed, these must be identified in time to be implemented before the new jurisdiction commences. If it is intended that the jurisdiction be exercised by a presidential or judicial member or by a panel of members, these matters need to be discussed early. The potential inflexibility and delay which can result from overly prescriptive provisions about who can determine cases need to be taken into account.

It is desirable that the tribunal be involved in discussions about the acquisition of new jurisdiction at an early stage and well before the legislation is drafted. That is the present practice.

Recommendation 26 **The tribunal should be provided with assistance to devise a formula for identifying the cost of additional resources for new jurisdictions.**

Recommendation 27 **The process for conferring new jurisdictions on the tribunal should be systematic and follow sound principles and procedures, such as those specified in the report.**

(e) Concurrent jurisdiction

The terms of reference ask whether the exercise of concurrent jurisdiction with Victoria's courts has enhanced the administration of justice in Victoria.

I take this question to be whether the exercise by the tribunal of civil jurisdiction of a kind traditionally exercised by the courts has so enhanced the administration of justice.

When the community have a party-party civil dispute, they need just as much access to the tribunal as when they have a citizen-state administrative dispute. The principle of equal access to justice applies to both civil and administrative cases. The rationale of the tribunal in providing ready, affordable and fast access to a means of resolving disputes, by adjudication or ADR, applies in both cases.

The evolution of dispute resolution of small-medium cases in the Victorian legal system has seen the tribunal develop into the main provider of adjudication. It is a substantial provider of ADR in this area, but the private and public mediation industry plays a very large and important role in this regard. This evolution has occurred mainly through the legislation giving the resolution of small claims, consumer-trader and domestic building disputes to the tribunal.

The same process is occurring with common property and owners corporation disputes. Because of the importance of this area to the community, the tribunal has created a new owners corporation list which will enable it to provide specialist dispute resolution services to people with disputes in this category.

In this way, over time, the tribunal has created a different way (or paradigm) of resolving civil disputes, one that is generally much cheaper, more accessible and faster than the courts. This has been of great service to the Victorian community.

Some of the civil jurisdiction of the tribunal is exclusive, or effectively so. Thus consumer-trader disputes must be heard in the tribunal unless (for example) a proceeding in relation to the dispute was first commenced in a court.⁸² The reasons for this were explained by the Attorney-General in the second reading speech:⁸³

The reasons [underlying the provisions] are to allow the parties to a fair trading dispute a choice of forums in which to litigate and to ensure that a party wishing to take advantage of the benefits offered by the tribunal is not unfairly frustrated by another party commencing proceedings in a court merely as a tactical manoeuvre to put pressure on the other side to settle disadvantageously or to abandon the proceedings.

The jurisdiction of the tribunal in domestic building cases is also effectively exclusive.⁸⁴ The reasons for this were explained in the second reading speech of the Attorney-General when the legislation was introduced in 1995:⁸⁵

The public policy rationale for this proposal is the intention to provide a single, inexpensive, time-efficient and expert forum for the resolution of domestic building disputes. Domestic building disputes are a special category of dispute where timeliness of resolution is critical, and where less formal proceedings are more likely to reach the heart of the matter than the full panoply of the law. Therefore, a party to the dispute should be able to have the option of taking advantage of the benefits offered by the tribunal if a matter is brought before the courts for resolution.

There has been criticism of the extent to which the tribunal has achieved these objectives. I make various recommendations in this report for improving its performance in this regard.

Nonetheless, the policy rationale for conferring civil jurisdiction of a kind previously exercised only by courts is very strong. Parties should have access to the tribunal for the resolution of civil disputes. Steps are necessary to ensure that access is not undermined by parallel proceedings in a court. There should be only one forum. I support this approach. It protects the right of access of the community to affordable and fast dispute resolution. It has not given rise to any adverse consequences of which I have been made aware. I do not recommend any change.

There is one anomaly I wish to address. Where a supplier commences a proceeding in a court arising out of a small civil claim, the purchaser may thereafter make an application for the matter to be heard and determined by the tribunal. If the purchaser lodges the amount in dispute with the tribunal, the proceeding must be heard by the tribunal, not the court.⁸⁶

The anomaly is that the supplier does not have the same right if the purchaser issues proceedings relating to a small claim in a court. I recommend the legislation be amended to allow the supplier to issue proceedings in the tribunal, which would, on lodgement of the amount in dispute, result in the tribunal hearing and determining the matter in the supplier's application.

Having substantial jurisdiction of a civil nature places the tribunal in an excellent position to adopt innovative means of hearing and resolving cases. Flexibility, innovation, attention to substantial merits and cost-effectiveness are central to the tribunal's rationale in this regard.

82 *Fair Trading Act 1999*, s 111(1).

83 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 1999, 190 (Jan Wade).

84 *Domestic Building Contract Act 1995*, s 57(1).

85 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 October 1995, 697 (Jan Wade)

86 *Fair Trading Act 1999*, s 112A.

Recommendation 28 **The Fair Trading Act 1999 should be amended to allow the supplier in a small civil claim to issue proceedings in the tribunal, which would, on lodgement of the amount in dispute, result in the tribunal hearing and determining the matter in the supplier’s application.**

(f) Administration orders in the guardianship jurisdiction

The tribunal receives and finalises some 10,000 applications under the *Guardianship and Administration Act 1986* each year.⁸⁷ About 4,000 of these are administration reassessments.⁸⁸ This is the statutory setting, in brief.

Under that Act, the tribunal may appoint someone to be the administrator of the estate of a person with a disability.⁸⁹ The tribunal must first be satisfied that, among other things, the proposed administrator ‘will act in the best interests of the proposed represented person’.⁹⁰

The tribunal has ongoing responsibilities with respect to the administration of the estates of represented persons. For example, it is required to reassess administration orders at least once every three years⁹¹ and may do so at any time.⁹² The tribunal has powers to appoint auditors to examine or audit the accounts of an estate, at estate’s expense.⁹³ The tribunal has power to approve or disapprove of the acts of administrators, give them advice and make necessary orders.⁹⁴ The administrator’s primary responsibility is to act in the best interests of the represented person.⁹⁵ In doing so the administrator has the usual statutory powers of a trustee.⁹⁶ Administrators have strict record-keeping obligations, which include lodging yearly accounts with the tribunal.⁹⁷

Private administrations are normally carried out by family members, trusted friends and other suitable persons. There is a very limited ‘market’ for the provision of professional administration services for the estates of represented persons. Most of the estates are very small and provide a limited or no economic return to a professional administrator. In the result, as regards professional administrators, either State Trustees or a particular private administration company is usually appointed by the tribunal. That has been the case for many years. The amounts involved in each estate may be small, but the amount under professional administration in Victoria in aggregate is very large.

Two issues require close examination:

- the adequacy of the tribunal’s current powers and arrangements for carrying out reassessments of administration orders and examining the performance of administrators in individual cases
- the performance of the private professional administrator, having regard to the large aggregate amount under its administration and its obligations towards each individual represented person

The tribunal sought has assistance from the Department of Justice for resources and support so that the tribunal can review its powers and arrangements with respect to administration orders made by the tribunal

87 Appendices 3 and 4.

88 VCAT Annual Report 2008-2009, 25.

89 Section 46(1).

90 Section 47(1)(c)(i).

91 Section 61(1).

92 Section 61(2).

93 Section 58(1); see also s 79(5).

94 Section 55(4).

95 Section 49(1).

96 Section 51(1)(c), picking up the powers of trustees under the *Trustee Act 1958* (Vic).

97 Section 58(2).

and the performance of the administrator concerned. This will include the involvement of an independent auditor. Terms of reference for the work are under consideration. The assistance has been provided.

I recommend the government support the tribunal's examination of guardianship administration powers, processes, performance and related issues.

Recommendation 29 **The government should support the tribunal's examination of guardianship administration powers, processes, performance and related issues.**

(g) Civil claims, residential tenancies and owners corporation list demands

The civil claims and residential tenancies lists have grown in size and complexity since 1998. In particular, civil claims cases have grown by over 10% per year since 1996.⁹⁸ Since 1998, there has been no jurisdictional money limit on claims under the *Fair Trading Act* in that list. Owners corporation claims have also added to the demands on that list.

The civil claims and residential tenancies lists have been headed by the one deputy president, assisted by two senior members. With the creation of the new owners corporation list, it will be necessary to provide senior member leadership for it also. That can be achieved administratively. But even with three senior members assisting the deputy president, the demands are too great for one person.

Civil claims and residential tenancies are both very important. The point has been reached where the demands of managing, administering and leading them should be given to different people. The civil claims and residential tenancies lists should continue to be headed by deputy presidents, but separately.

The deputy president for the residential tenancies list can continue to be funded under the trust arrangements. With the separation of the leadership of the residential tenancies list from the civil claims list, it will be necessary for government funding to be made available for the new deputy president, if the government supports that course. I recommend that it does so.

The civil claims list is under resource pressure in any event. The increase in initiation demand has not been matched by finalisation performance.⁹⁹ The list has taken many steps to try to improve the rate of finalisations, including blitz days and other actions which have been described in this report. In the end, however, I believe that the resources available to the list are not sufficient and need to be increased. That can be done by splitting the leadership of the civil claims and residential tenancies lists, creating the position of a new deputy president for the former. I note that the tribunal presently has one deputy president less than it did in 1998.

Recommendation 30 **The government should provide funding for a deputy president to head the civil claims list.**

98 Appendix 3.

99 Appendices 3 and 4.

PART TWO: ENVISIONING THE NEXT DECADE

E VISION

Having evaluated the tribunal's performance in the first decade, let us envision the tribunal in the next decade.

The vision I promote is a modern, flexible and unified tribunal of justice which is accessible to the whole Victorian community and resolves civil and administrative disputes respectfully, fairly and cost-effectively, by appropriate means and in a timely way. This vision responds to the access, operational and jurisdictional issues specified in the terms of reference. It also responds to the findings I have made about those issues in the first part of this report. Each of the elements of this vision is intended to play a part in realising the tribunal as *ONE VCAT*.

I now explain each element in turn. In the course of doing so I will make a number of recommendations for legislative and organisational reform.

F MODERN

(1) Contemporary society

This is the modern age in which the tribunal operates.

Victorians are encouraged to play an active role in their community towards fulfilling their individual, family and social wellbeing. Most people try to be industrious and realise their personal and social potential. As society expects much of people, so do people have expectations of society, government and public institutions, such as VCAT. To an increasing degree, individuals expect public institutions to be efficient, responsive and competent in the performance of their functions. Individuals also expect to be treated with respect, and not just in the sense of being treated politely. They expect accountability, transparency and due attention to complaints.

Contemporary society is relatively well educated, but there are groups suffering from disadvantage and even illiteracy; it is socio-economically diverse, with significant numbers of people in CALD and Koori communities; it is highly connected by mass-communication systems, yet there are groups who are lonely and disengaged; transport systems are well developed, but distance remains a tyranny for people outside the main population centres in the city and the country; new technology offers great potential for overcoming some of these problems, although not everyone can use or get it and there is no substitute for personal service by a real human being; and people and businesses need access to the means of resolving civil and administrative disputes, yet may encounter many barriers of various kinds in doing so.

The Charter specifies the human rights which all individuals in society have. It gives these rights legal recognition as between the people and their government or those acting on its behalf. The rights foster respect for the personal and social autonomy of individuals in democratic society, and expect that respect to be shown to others in return. Subject to law, all public authorities, including the tribunal, must act compatibly with human rights. Failing to do so is unlawful. Any limitation on human rights must be demonstrably justified and authorised by law. The human rights include the legal equality rights and the right to a fair hearing before a competent, independent and impartial tribunal. The rights may involve positive obligations, not just passive recognition.

Where once the private legal profession undertook most advocacy work, now a host of legal aid and non-government organisations provide advocacy services. Government legal aid, private lawyers acting pro bono, community legal centres, public interest organisations, human rights resource centres, specialist advocacy groups, church and other community-based organisations, trade associations, business groups and others

are all active in advocating on behalf of particular causes or vulnerable people and groups. This is mostly done under the active encouragement of, and is often done with funding provided by, government. These advocacy organisations are very active in the tribunal because its informal and efficient way of operating makes it easier for them to be so and the subject matter of proceedings in the tribunal engages their legitimate interest.

The role of law in modern society is becoming increasingly complex. Legislation regulates activity in society and industry to an increasing extent. As the regulatory reach of the law has expanded in civil society, so the interaction between civil society and government has expanded. To enhance and protect the rights of people and businesses in respect of government decision-makers, and to foster a culture of consistency and excellence in government administration, the parliament has given many people and businesses affected a right of review on the merits against such decisions, usually by VCAT. The parliament has thus given the tribunal a vital and increasingly important role in Victoria's system of government. This places considerable responsibilities on the tribunal's shoulders, which are not likely to diminish.

The impact of disputing in society should be noted. Disputing is a negative force in people's lives and detracts from individual, family and community wellbeing. Civil and administrative disputes between parties are not just experienced individually. The negative effects of the dispute and the positive benefits of the resolution are, to a greater or lesser extent, externalised. Providing the means of resolving such disputes is a basic constitutional function of government. Society's interest in the efficient resolution of civil and administrative disputes, which is the principal function of the tribunal, thus extends well beyond the immediate parties. If disputes are 'resolved', people can 'move on' with their lives and their contribution to the community. Combined with increasing public knowledge of the Charter, the commitment of society and government to enhanced individual and collective wellbeing by prompt dispute resolution will result in yet further expectations being made of the tribunal.

The government has high expectations of the tribunal. Important statutory agencies look to the development of a deeper body of jurisprudence to offer guidance to government, business and the community. In matters of significant public interest and importance, the government expects high standards of performance from the tribunal in all respects. The significance of reviewing decisions and resolving disputes quickly is often emphasised by government, especially because of the economic costs of delay. Thus the tribunal faces demands – which are not unreasonable – for decisions and resolutions which are of high quality yet also fast.

The tribunal has a solid base from which to go forward but needs to respond to these and other demands of the modern age. Inside the tribunal that response has already begun. That internal response will only take the tribunal so far. To be fully effective, the process of modernisation must be driven by the Victorian Parliament. Accordingly, I recommend that the tribunal's legislation be upgraded, in the following direction.

(2) Legislative upgrade

(a) Modern statute for a modern age

While the tribunal's home legislation provides an excellent foundation, it is 'first-generation' legislation. The access, operational and jurisdictional demands on the tribunal in the modern age can only be met if that legislation is thoroughly overhauled. It is 'second-generation' legislation that is now needed.

I recommend amendments in these areas:

- objects and functions provisions
- enhancing powers of president
- competency-based member support
- expanding internal reconsideration
- appeal tribunal
- referring questions of law to the president

- guideline judgments
- code of conduct for members and mediators
- customer service charter
- complaints system for members and mediators
- reconstituting the tribunal
- oaths of office for members

Recommendation 31 **The legislation should be thoroughly overhauled to enable the tribunal to meet the access, operational and jurisdictional demands of the modern age. The legislation should be taken from ‘first-generation’ legislation to ‘second-generation’ legislation.**

(b) Objects and functions provisions

The 1998 Act does not contain any objects and functions provisions. Section 1 simply says: ‘The purpose of this Act is to establish a Victorian Civil and Administrative Tribunal.’ Section 44 just refers to the functions conferred by the primary Act and other enactments. That parliament had high expectations of the tribunal is clear enough from the content of the legislation and the parliamentary materials. But parliament did not explicitly state its expectations in creating one of our important public institutions of justice. I think that was an opportunity which democracy missed.

In the provisions about hearings in the tribunal, the legislation requires it to ‘act fairly and according to the substantial merits of the case’.¹⁰⁰ It also requires the tribunal to:¹⁰¹

conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

These are important provisions which help to define the nature of the tribunal in the hearing process. An objects and functions provision does much more. It defines the nature of the tribunal for all purposes.

I have found that amalgamating the pre-1998 tribunals has been achieved but not yet optimum institutional unity. The administrative arrangements have further to go in that direction. Many opportunities present themselves for responding to the demands of the modern age. There should be an objects and functions provision to inform and drive the modernisation of the tribunal. The provision should specify the features of the tribunal in the next era of its operations, as the parliament wishes to define them. It should include the main features of the recommendations I make in this report.

With the benefit of the Victorian legislation and our ten years of experience, the Queensland Parliament has recognised the need for an objects and functions provision in its recently enacted legislation.¹⁰² The legislation for the Commonwealth¹⁰³ and Australian Capital Territory¹⁰⁴ tribunals have objectives and objects and principles provisions. The legislation for the New South Wales Administrative Decisions Tribunal¹⁰⁵ and Consumer, Trader and Tenancy Tribunal¹⁰⁶ have objects provisions. The legislation for the West Australian State Administrative Tribunal has objectives.¹⁰⁷

100 Section 97.

101 Section 98(1)(d).

102 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 3 and 4.

103 *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

104 *ACT Civil and Administrative Tribunal Act 2008* (ACT), ss 6 and 7.

105 *Administrative Decisions Tribunal Act 1997* (NSW), s 3.

106 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 3.

107 *State Administrative Tribunal Act 2004* (WA), s 9.

The scope and operation of an objects and functions provision can be illustrated by reference to the Queensland legislation. These are sections 3 and 4 of the *Queensland Civil and Administrative Tribunal Act 2009*:

3 Objects

The objects of this Act are –

- (a) to establish an independent tribunal to deal with the matters it is empowered to deal with under this Act or an enabling Act; and
- (b) to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick; and
- (c) to promote the quality and consistency of tribunal decisions; and
- (d) to enhance the quality and consistency of decisions made by decision-makers; and
- (e) to enhance the openness and accountability of public administration.

4 Tribunal's functions relating to the objects

To achieve the objects of this Act, the tribunal must –

- (a) facilitate access to its services throughout Queensland; and
- (b) encourage the early and economical resolution of disputes before the tribunal, including, if appropriate, through alternative dispute resolution processes; and
- (c) ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice; and
- (d) ensure like cases are treated alike; and
- (e) ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal; and
- (f) maintain specialist knowledge, expertise and experience of members and adjudicators; and
- (g) ensure the appropriate use of the knowledge, expertise and experience of members and adjudicators; and
- (h) encourage members and adjudicators to act in a way that promotes the collegiate nature of the tribunal; and
- (i) maintain a cohesive organisational structure.

VCAT's legislation should be amended to include an objects and functions provision that explicitly specifies the expectations of the Victorian Parliament for the institution in every respect. This is really needed if it is to achieve its full potential. The objects and functions provision should show for everyone to see that the tribunal is one living tree. Something along the Queensland lines should be included in the Victorian legislation. Each of the matters in ss 3(a)-(e) and 4(a)-(i) warrant consideration for inclusion in the Victorian context. The object of independence is indispensable. There should also be a reference to therapeutic jurisprudence approaches (which I define later), wellbeing and community education, for reasons I later give. I recommend that this be included as an object: 'to promote equal access to justice'.

Recommendation 32 **The legislation should be amended to include objects and functions provisions that explicitly state the expectations of the Victorian Parliament for the institution in every respect.**

Recommendation 33 **The objects provision for the tribunal should include 'to promote equal access to justice'.**

(c) Enhanced powers of the president

(i) *Need for clearly defined powers of the president*

The effective functioning of the tribunal can only be carried out if the president is given clearly defined powers, which must be exercised according to the objects and functions specified by parliament.

The powers of the president under the 1998 Act are appropriately strong. This has contributed to the success of the tribunal to date. For the tribunal to go forward in the next era, these powers must be enhanced.

(ii) *Management and administration*

The present legislation makes the president responsible for the management and administration of the tribunal in every respect. This is fundamental but it achieves the result by a rather tortuous route.

The legislation confers on the president and vice-presidents responsibility for directing the business of the tribunal,¹⁰⁸ for the management of the administrative affairs of the tribunal¹⁰⁹ and for directing the places and times of sittings of the tribunal.¹¹⁰ It then makes the vice-presidents subject to the direction of the president in respect of these functions.¹¹¹ The legislation gives the president a principal registrar, chief executive officer and registrars to assist in the administration of the tribunal.¹¹² The principal registrar has statutory functions in respect of which he or she is directable by the president.¹¹³

In practice, the president (with the chief executive officer) manages the administrative affairs of the tribunal, assisted with advice and consultation from the vice-presidents and the heads of lists.

Due to their other duties, it is impossible for the vice-presidents to be responsible with the president for the administration of the institution. Further, at any one time, at least some of the vice-presidents will be working full-time not with the tribunal but with the County Court, of which they are judges. When working full-time at the court, the vice-presidents do not have regular contact with the tribunal. That management responsibilities are conferred on judges who may have limited contact with the tribunal is a serious deficiency in the legislation.

The role of the president of the tribunal should be clarified in line with the reality on the ground.

The judicial leadership model should be retained, as it is fundamental to the independence and effective operation of the tribunal as a justice institution. But judicial leadership should be enshrined in the person of the president, a judge of the Supreme Court.

Comparable tribunals invest total management responsibility in the single office of the president or their equivalent. For example, the president of the Commonwealth tribunal is responsible for 'managing the administrative affairs of the Tribunal.'¹¹⁴ In this respect the president is 'assisted' by the registrar.¹¹⁵ The functions of the president of the Queensland tribunal include 'managing the business of the tribunal to ensure it operates efficiently'.¹¹⁶ The chairperson of the New South Wales Consumer, Trader and Tenancy Tribunal is responsible for its effective and efficient 'operation' and 'management'.¹¹⁷

108 Section 30(1).

109 Section 30(2).

110 Section 30(3).

111 Section 30(4).

112 Section 32(1)(a)-(c).

113 Section 32(2).

114 *Administrative Appeals Tribunal Act 1975* (Cth), s 24A(1).

115 Section 24B.

116 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 172(2)(a).

117 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 12(1)(a) and (b).

I recommend the Victorian legislation be amended to make the president responsible for the management and administration of the tribunal. A simple and direct provision like the one in the Commonwealth legislation is a useful model to follow.

The vice-presidents will be a part of the heads of lists committee which I have recommended should be given statutory recognition as an advisory committee.

Recommendation 34 The legislation should be amended to make the president responsible for the management and administration of the tribunal.

(iii) Procedural and other directions

While the 1998 Act gives the president the power to manage the administration of the tribunal and direct its business, it is silent on a number of important matters. From the point of view of achieving the tribunal's equal access to justice and cost-efficiency objectives, this is not optimum.

The community, government and those working in the justice system have a great interest in the look, feel and layout of the tribunal's premises, hearing rooms and ADR facilities. They have an equal interest in the procedures followed by the tribunal for the conduct of hearings and ADR, including modes of address, openings for the assistance of self-represented parties, the order in which parties make submissions and call evidence, the manner in which lay and expert evidence is received and evaluated, the conduct of on-site inspections and actually conducting hearings on site, as well as other similar matters of practice and procedure.

The experience of justice in the community, the effective operation of the system in a given case, the capacity of the tribunal to adopt therapeutic approaches to its work and, generally, the achievement of equal access to justice in a cost-efficient way are heavily influenced by such considerations.

Consistency of presentation, practice and procedure, and of administrative treatment generally, is an important part of how the tribunal projects itself to the community as a justice institution. To overcome barriers to equal access to justice, and to operate most cost-effectively, the tribunal must engage with the community in various ways, which requires such projection. To break down the barriers of fear and unfamiliarity which impede equal access to justice, the tribunal needs to be able to say this is where you go, this is how it will look, this is what you will find, this is what to expect, this is how you refer to people, this is the procedure which will be followed, this is what to bring, this is when you speak, this is who to ask and this is what you do and where you go afterwards.

These things worry people, make them feel anxious, small and undignified, impair their personal autonomy and capacity for self-help and, for some, put them off exercising their rights altogether. Yet all are within the capacity of the tribunal, properly managed and led, to address. Achieving predictability of presentation, practice and procedure is thus part of achieving justice itself. Being able to answer these questions for the community in advance, and then delivering on those answers, is an indispensable feature of a modern tribunal of justice.

I am not suggesting every place or case in the tribunal should be organised or conducted in exactly the same way. The application of specialist expertise, which may involve particular physical arrangements and procedures, is part of the rationale of the tribunal. But the principles underlying the organisation of the tribunal's premises and work should be the same – empowering and enabling participation, achieving equal access to justice and cost-efficiency. The default position should be unity of presentation, practice and procedure. Deviations from this norm should be justified and principled.

Predictability of presentation, practice and procedure reduces costs for individuals and businesses for a number of reasons. For example, it is more user-friendly for advocates (lay and lawyer). I can give you a compelling example. One of the reasons why estate agents (at minimal expense to landlords) appear so

frequently in residential tenancies cases is that they are familiar with the highly predictable procedures which are there followed. This opens up the possibility of non-lawyer (in addition to lawyer) advocates for tenants, which I have under active consideration. This clearly demonstrates how predictable procedure, equal access to justice and cost-efficiency are closely connected.

That is the philosophical case in favour of paying close attention to the issues of presentation, practice and procedure in the tribunal. The tribunal's legislation should be amended to allow this to be done. No committee (such as the rules committee) should be given responsibility for this function. It should be the responsibility of the president, because it is central to the achievement of the objects and functions of the institution.

This is very much the drift of modern tribunal legislation. The president of the Queensland tribunal, for example, is responsible for 'giving directions about the practices and procedures to be followed by the tribunal'.¹¹⁸ The president of the Commonwealth tribunal is empowered to give directions as to:

- (a) the operations of the Tribunal generally; and
- (b) the operations of the Tribunal at a particular place; and
- (c) the procedure of the Tribunal generally; and
- (d) the procedure of the Tribunal at a particular place; and
- (e) the conduct of reviews by the Tribunal.¹¹⁹

The chairperson of the New South Wales Consumer, Trader and Tenancy Tribunal is empowered to give 'procedural directions to the members' and 'procedural directions with respect to a particular class or particular classes of proceedings'.¹²⁰

I recommend that the Victorian legislation be amended to give the president broad powers of this nature.

Recommendation 35 **The legislation should be amended to give the president broad powers in relation to the practice and procedure in the tribunal.**

(d) Competency-based member support

Members otherwise suitable should be appointed on their merits for the competence they possess. Members need support to maintain that competence and develop the skills required for their ever-changing judicial work. The same points may be made of mediators and other ADR practitioners.

The community has a strong interest in the competence (objectively defined and ascertained) of members of the tribunal as judicial officers. Everybody who has an interest in the quality and consistency of tribunal decisions should be interested in competency standards. So should members themselves. Competency standards are intrinsically linked to merit-based appointment. Competency-based appointment and training of judicial officers does not undermine their independence, it enhances it.

Competency standards specify what a justice institution expects of its judicial officers. The standards are objective in terms and reflect what is required of a judicial officer in the independent performance of their adjudicative and (where appropriate) ADR functions.

Competency standards are not imposed on judicial officers. The standards are identified by skilled judicial educators, under the direction of the head of the institution, working with the judicial officers themselves. Developing competency standards is thus an intrinsically collaborative process. The process is creative, team-building and, for the institution, unifying.

118 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 172(2)(b).

119 *Administrative Appeals Tribunal Act 1975* (Cth), s 20(2).

120 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 12(2)(c) and (c1).

Competency standards have application to the entire professional life-cycle of the member. The approach implies competency-based appointment, induction, mentoring, continuing education and training, performance-based management and appraisal and (where sought) reappointment. The professionalism, independence, performance and security of the member are supported in all these respects.

I recommend that competency-based member support embracing all these elements be implemented at the tribunal, for all members and mediators. The president should operate the system, but should be able to delegate his or her powers with respect to non-presidential members and mediators to the presidential members. The president should directly performance-manage the vice-presidents and the deputy presidents. The president should be competency-appraised but not performance-managed under the system. In the Commonwealth tribunal, the president is appraised by a senior member of his or her selection.

The case for competency-based member support at the tribunal is very strong. VCAT is a large amalgamated 'super-tribunal'. The institution needs mechanisms by which its statutory objects can be systematically achieved. Given the diverse nature of its jurisdictions, the large numbers of members and the way it needs to operate, this is a complex task. Reasonably consistent performance of the essential competencies of a judicial officer should be a basic expectation of the tribunal as a justice institution. That expectation can be implemented without derogating from the fundamental independence of the tribunal's members or the performance of their judicial functions.

Competency-based member support goes hand-in-hand with the tribunal's equal access to justice and cost-effectiveness objectives. These objectives are achieved very much through the performance of the adjudicative and ADR functions of members and mediators. The competencies required for the performance of these functions will be specified in the standards and reflect the expectations and aspirations of the tribunal, reflecting what parliament specifies on that subject. For example, giving due assistance to self-represented parties could be a standard of competency. Cost-effectiveness and therapeutic approaches to adjudication and ADR can be pursued through competency standards.

The Judicial College of Victoria embeds professional development and training of judicial officers in the justice system. Competency-based member support (with the elements I have mentioned) will embed professional development and training in the tribunal as an institution. The tribunal will need to remain within, and can contribute to, the college in achieving that objective. The relationship between the tribunal and the college in this respect is the relationship between the systemic function and the institutional function. These go hand-in-hand, each needing, supporting and respecting the other.

Outstanding work, which has gained wide acceptance within justice systems and institutions, as well as the community, has been done in this area, both in Australia and overseas. The Commonwealth tribunal has a competency-based professional development program. It embraces appointment, induction, mentoring, performance appraisal and evaluation.¹²¹

The competencies developed by the Commonwealth tribunal were influential in the development by the Judicial Studies Board in the United Kingdom of competencies for tribunals in that country.¹²² In other institutions I visited, both here and overseas, I saw many examples of competency-based training and member support (in its various respects) in successful operation. This too is very much the direction of modern tribunals, especially in Canada.

Under the tribunal's current legislation, the president 'is responsible for directing the professional development and continuing education and training of members.'¹²³ In doing so, the president may direct all members, specify classes of members or a specified member 'to participate in a specified professional development or

121 Commonwealth Administrative Appeals Tribunal, *Professional Development Handbook for Members* (2006).

122 United Kingdom, Judicial Studies Board, *Tribunal Competencies: Qualities and Abilities in Action* (2007).

123 Section 38A(1).

continuing education and training activity.¹²⁴ The direction may be given orally or in writing.¹²⁵

The president has never had to exercise these powers. The tribunal is fully committed to continuing education and training, and has an active committee chaired by a deputy president which meets regularly to discuss this subject and organise programs, including an annual conference. The members regularly use the many excellent courses offered by the Judicial College of Victoria and those offered internally at the tribunal and elsewhere. The tribunal has established a state of the art Learning Centre which will significantly improve its internal capacity to deliver continuing education and training for its members and mediators. It is intending to appoint a director to oversee the operations of the centre.

But this power of the president to direct members with respect to continuing education and training is not a power to establish competency-based support for members embracing induction, mentoring, performance management and appraisal and continuing education and training in that broad context. The existing powers of the president are too narrow in this regard and should be enhanced. I so recommend.

I support performance management and appraisal of members and mediators, but not without competency standards. It is the objective nature of the standards, which must be professionally ascertained in consultation with the judicial officers affected, which guarantees the protection of their integrity and independence.

Competency-based member support is linked with a member and mediator code of conduct, which I recommend, and the proper determination of complaints against them, which I also recommend.

If the tribunal's expectations of members are competency-based, and those expectations, and the support required to achieve them, are implemented through a system of competency-based member support, then this should be reflected in the process by which members are appointed and reappointed. The merits of a person's suitability for appointment should be considered (among other things) against the tribunal's competencies. The merits of a member's suitability for reappointment should be considered (among other things) against the president's report of their performance under those competencies. I so recommend.

Recommendation 36 **The legislation should be amended to give power to the president to establish competency-based support for members embracing induction, mentoring, performance management and appraisal and continuing education and training.**

Recommendation 37 **The merits of a member's suitability for appointment should be considered (among other things) against the tribunal's competencies. The merits of a member's suitability for reappointment should be considered (among other things) against the president's report of their performance under those competencies.**

(e) Expanding internal reconsideration

Under the 1998 Act, decisions can be reopened where, with reasonable excuse, the person did not appear at a hearing.¹²⁶ The tribunal's usual costs and advocacy rules apply to such applications. There are very few applications for reopening.

Under the *Guardianship and Administration Act*, parties and other entitled persons may apply for a rehearing

124 Section 38A(2).

125 Section 38A(3).

126 Section 120.

of an application made under that Act.¹²⁷ The tribunal is obliged to rehear the matter and has all of the functions of the tribunal at first instance.¹²⁸ The tribunal's usual costs and advocacy rules apply to such applications. There are very few applications for reconsideration, but it is a very useful power to have in cases for which it is appropriate.

Considered from the perspective of the tribunal as a whole, these powers are too narrow. The tribunal needs much more flexible powers to reconsider all decisions on the merits. The power to do so will provide parties with a ready means of having errors corrected, without having to go on internal appeal (if that course is made available) or external appeal to the Supreme Court.

Tribunals in comparable jurisdictions have much wider powers of reconsideration than our tribunal.

In the New South Wales Consumer, Trader and Tenancy Tribunal, the chairperson has a power to order the rehearing of an application in which the applicant may have suffered a substantial injustice.¹²⁹

In the Queensland tribunal, a party may apply for the reopening of a proceeding because they have a reasonable excuse for not appearing at the hearing or would suffer a substantial injustice because new evidence has become available.¹³⁰ The tribunal has a general power to reconsider a reopened proceeding.¹³¹

Both the First-tier¹³² and the Upper Tribunal¹³³ in the United Kingdom have a power to review their own decisions. These powers include the power to redetermine the matter.¹³⁴

There is no suggestion that the limited existing power of the Victorian tribunal to reconsider decisions in guardianship cases, or the similar power in these other jurisdictions, has been or would be abused. It is a useful power for the correction of obvious mistakes or allowing new evidence to be considered without the parties having to suffer the expense and inconvenience of an appeal.

A general power of reconsideration, subject to sensible limits, would enhance the tribunal's capacity for flexible and practical dispute resolution without risking its cost-efficiency. I recommend that the Victorian legislation be amended to give this power to the tribunal, whether or not an internal appeal tribunal is established. That is the important subject to which I now turn.

Recommendation 38 **The legislation should be amended to give the tribunal a general power of reconsideration, subject to sensible limits, whether or not an internal appeal tribunal is established.**

(f) Appeal tribunal

(i) *Present provisions inadequate*

The machinery in the tribunal's home legislation with respect to appeals is deficient. It has been overtaken by the legislation in comparable jurisdictions which have much stronger provisions in this respect.

I will first describe the current provisions in our legislation, then go to the legislation of other jurisdictions. That will lay the foundation for my recommendations on this subject.

127 Section 60A(1).

128 Section 60C(1).

129 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), s 68.

130 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 137.

131 Section 140.

132 *Tribunals, Courts and Enforcement Act 2007* (UK), s 9.

133 Section 10.

134 Sections 9(5)(a) and 10(5) respectively.

Under the 1998 Act, orders of the tribunal can be appealed on a question of law and by leave to the Supreme Court.¹³⁵ Appeals against decisions of judicial members of the tribunal are heard by the Court of Appeal; all other appeals are heard by judges of the trial division.¹³⁶ The court applies its rule that costs usually follow the event. The court also applies its advocacy rule that legal representation is usually allowed as of right.

(ii) Appeal tribunals in comparable jurisdictions

Tribunals in comparable jurisdictions have internal appeals. This is seen as a necessary component of their jurisdiction.

In the New South Wales Administrative Decisions Tribunal, internal appeals are available to an appeal panel in respect of most of the decisions made at first instance.¹³⁷ Appeals may be made on a question of law or (by leave of the panel) may extend to a review on the merits of the appealable decision.¹³⁸ External appeal is available to the trial division of the Supreme Court.¹³⁹

For internal appeals, the appeal panel must be constituted by three members assigned by the president,¹⁴⁰ which must have at least two judicial members and one non-judicial member. In this tribunal, the president is a district court judge¹⁴¹ and the deputy presidents are on the level of magistrates. They collectively are the judicial members. The president can be internally appealed to a panel of two judicial and one non-judicial member.

In the New South Wales Land and Environment Court, internal appeals are allowed in respect of most decisions at first instance, which are made by commissioners.¹⁴² Appeals are by way of re-hearing and fresh evidence is permitted.¹⁴³ Appeals are heard by single judges,¹⁴⁴ who are on the same level as judges of the Supreme Court.¹⁴⁵

There is no internal appeal system in the West Australian or Commonwealth tribunals. Appeals are allowed on questions of law by leave to the Supreme Court of Western Australia¹⁴⁶ and the Federal Court of Australia¹⁴⁷ respectively.

In the Australian Capital Territory tribunal, internal appeals are allowed in respect of decisions which are not themselves internal appeals.¹⁴⁸ The appeal can be on a question of law or fact.¹⁴⁹ The appeal tribunal is comprised of one or more presidential members, with or without one or more non-presidential members.¹⁵⁰ The appeal tribunal has original powers of review.¹⁵¹ External appeals are to the Supreme Court of the Australian Capital Territory on a question of fact or law by leave.¹⁵²

135 Section 148(1).

136 Section 148(1)(a) and (b).

137 *Administrative Decisions Tribunal Act 1997* (NSW), s 113(1).

138 Section 113(2).

139 Section 119(1).

140 Section 24(1).

141 Section 17(1).

142 *Land and Environment Court Act 1979* (NSW), s 39(1).

143 Section 39(2).

144 Section 6(1).

145 Section 9(2).

146 *State Administrative Tribunal Act 2004* (WA), s 105(1).

147 *Administrative Appeals Tribunal Act 1975* (Cth), s 44(1).

148 *ACT Civil and Administrative Tribunal Act 2008* (ACT), s 79(1)(b) and (2).

149 Section 79(2).

150 Section 81(3).

151 Section 82(b).

152 Section 86.

In the Queensland tribunal, which is the closest equivalent to our own, a party may go to the appeal tribunal from a decision of a non-judicial member,¹⁵³ subject to certain limitations and exclusions.¹⁵⁴ Appeals may be made on grounds of law¹⁵⁵ or mixed fact and law.¹⁵⁶ The appeal tribunal is usually constituted by one, two or three judicial members.¹⁵⁷ The president must be a judge of the Supreme Court of Queensland.¹⁵⁸ The deputy presidents must be judges of the District Court.¹⁵⁹ External appeals from decisions of the appeal tribunal or a judicial member are to the Court of Appeal of the Supreme Court, by leave¹⁶⁰ and can be on a question of law or mixed fact and law, depending on the nature of the appeal.¹⁶¹

In the United Kingdom, the *Tribunals, Courts and Enforcement Act 2007* (UK) establishes a First-tier Tribunal for making decisions at first instance¹⁶² and an Upper Tribunal for making decisions in appeals on any point of law.¹⁶³ External appeal is to the Court of Appeal from a decision of the Upper Tribunal, also on a point of law, by permission.¹⁶⁴ The Upper Tribunal also has a judicial review jurisdiction.¹⁶⁵

Introducing an appeal tribunal within VCAT would be consistent with the structure of generalist tribunals in their modern form. While VCAT was the first amalgamated tribunal to be established, it has lagged behind the tribunals which have followed it in this respect.

(iii) *Rationale for appeal tribunal*

There are three main reasons to have an appeal tribunal:

- to give parties a more accessible and affordable right of appeal
- to increase the consistency, predictability and quality of tribunal decision-making
- to encourage the tribunal to build a bank of jurisprudence

(A) **More accessible and affordable right of appeal**

At present, a party wanting to appeal has to make application for leave to the Supreme Court, and then conduct the appeal. This is a formal procedure, which usually requires legal representation. The party is at risk of having costs awarded against them. On the other hand, the party might obtain costs against the respondent if they succeed, which they usually would not in the tribunal.

The current system is asymmetrical. The procedure for making applications at first instance in the tribunal is accessible and affordable, legal representation is restricted or unnecessary and an order for costs is the exception not the rule. The appeal system is not as accessible and affordable, legal representation is thought to be necessary in most cases and costs usually follow the event.

More self-represented parties would be able to appeal in an internal appeal tribunal. They would be more familiar with the tribunal than the Supreme Court. The appeal tribunal would be able to access the original file, unless this was not appropriate. The paperwork would be simpler and the costs generally lower. Legal representation would be permitted by leave or according to the other usual rules of the tribunal. Costs

153 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(1).

154 Section 142(2)-(3).

155 Section 146.

156 Section 147.

157 Section 166(1).

158 Section 175(1).

159 Section 176(1).

160 Sections 149 and 150.

161 See ss 153-154.

162 Section 3(1).

163 Section 11(1).

164 Section 13(1) and (3).

165 Section 15(1).

would be the exception rather than the rule. It would be a big step for a self-represented party to appeal to the appeal tribunal, but a giant step to appeal to the Supreme Court.

A major advantage for represented parties is that the costs of an internal appeal would generally be lower than for an appeal to the Supreme Court, for similar reasons. The party could retain their present legal representation without feeling the need to obtain specialist representation in the Supreme Court. The generally more informal and simpler procedures in the tribunal would make an appeal there cheaper and more convenient.

An internal appeal would be much more manageable for institutional parties, such as regulators, local councils, non-governmental organisations, trade and industry groups, and others who have a strong stake in the effective operation of the legislation which the tribunal administers.

I am concerned that some decisions which are important in the public interest are not being appealed because of the need to go to the Supreme Court. In his report into the methane gas leaks at the Brookland Greens Estate, the Ombudsman reported my view that an internal appeal avenue might have been of real use in the circumstances of that case.¹⁶⁶

That more parties might appeal is not a persuasive reason not to have an appeal tribunal at VCAT. The present system is less accessible than it should be. I am concerned that some parties with legitimate grounds are not pursuing an appeal because of these restrictions. This is not consistent with the principle of equal access to justice, which should embrace an appropriate appeal system.

A positive feature of an amalgamated tribunal is that it provides a structure within which civil and administrative decision-making in many disparate jurisdictions may be made. Another feature of the model is that it can provide an accessible right of internal appeal to the parties when that would not have been available in a small tribunal.

As we saw, when the tribunal was established in 1998, it was hoped it would be a 'one-stop shop'. It was thought the president, as a judge of the Supreme Court, would hear appeals. That has not happened, and is not likely to happen.

(B) Consistency, predictability and quality

Consistency and predictability are important objectives of the justice system in general and the tribunal in particular. As we saw, inconsistency in decision-making among the pre-amalgamation tribunals, and the greater consistency expected of VCAT, were emphasised in the design of the 1998 legislation.

There were strong representations in the community consultations and from a significant body of stakeholders that the decisions of the tribunal are not sufficiently consistent or predictable. Decisions were seen to depend too much on the subjective views of individual members.

It may be said that consistency and predictability are an issue in the courts. Some say particular judges are for or against the prosecution or the defence in criminal cases, for or against plaintiffs or defendants in personal injury cases or for or against employers or unions in industrial cases. That needs to be borne in mind when evaluating criticisms of this nature as regards the tribunal.

As justice institutions, tribunals have a strong interest in the consistency, predictability and quality of their decisions. Without ever interfering with decision-making by their members, they need machinery for addressing these issues. Appeals are an important part of that machinery, as the structure of tribunals in comparable jurisdictions reveals.

The tribunal determines 80,000 - 90,000 cases each year in a wide variety of jurisdictions. It has a large number of members adjudicating these cases, many of them sessional who do not sit regularly. A system of

¹⁶⁶ Victoria, Ombudsman, *Brookland Greens Estate: investigation into methane gas leaks* (2009), 205.

this kind needs quality control mechanisms like an appeal tribunal. That is not to disparage the professionalism of the members but to make an objective observation about the nature of the system.

The more open-ended the governing provisions, the more scope is there for judgment by the individual member. The tribunal has a lot of provisions conferring powers or discretions of this nature.

Provisions conferring open-ended powers or discretions will not be interpreted to allow arbitrary, capricious or simply subjective decision-making. It must be principled. While individual decision-making within the allowable scope of the power or discretion is legally mandated, the scope for individual judgment will be discerned from the purposes of the legislation. In the end, the width and nature of that scope is a legal question which only judicial supervision on appeal (or judicial review) can finally determine.

Unless there is adequate access to such an appeal, the allowable scope of the power or discretion is seldom (if ever) finally determined. Individual decision-making can appear to be subjective across a range so wide as to be troubling. The problem is exacerbated where, as presently in the tribunal, there is no internal system of precedent so that no decision of a member binds any other member. As the disparate individual decisions mount up over time, decisions can appear to be made according to the preferences of individual judicial officers rather than the governing legislation. That, in the end, risks undermining the legitimacy of the institution as a whole.

This is one of the reasons why I take the attacks on the consistency and predictability of the decisions of the tribunal very seriously. Without denying the scope for judgment which is normally seen in jurisdictions of the kind administered by the tribunal, the community expects decisions which are reasonably consistent and predictable, and is disappointed with the institution (not just with the individual decision) when they are not. Unless that disappointment is dealt with, it can ripen into something deeper.

Judicial supervision acts as a safety valve which relieves pressure that is built up by these forces. But if the system is asymmetrical – access to determination at first instance is easy and usually affordable but access to appeal is less so – the role of judicial supervision is not carried out as effectively as it could be.

An appeal tribunal within VCAT, together with other measures I recommend, would be an effective way of dealing with the issues of consistency and predictability in its decision-making. The lack of an appeal tribunal is one factor explaining the public criticism which is directed against the tribunal in this regard.

Inconsistency and unpredictability have social and economic costs which should be recognised. The community, businesses and government should, on advice if necessary, be able to make decisions and order their affairs on the basis that the outcome of a tribunal proceeding is reasonably ascertainable. I can understand the sense of grievance of someone who has paid their legal advisers to tell them that the result depends on the member you get on the day.

Inconsistency and unpredictability create scope for argument in individual cases. This increases the cost of tribunal proceedings without any discernable benefit. Remembering the open-ended nature of many of the powers and discretions administered by the tribunal, this is one of the causes of public dissatisfaction with ‘creeping legalism’.

I accept that an appeal tribunal within VCAT could increase costs and delay to a certain extent in some cases. Minimising costs and delay can be taken into account when designing and resourcing the system, thus ameliorating the problem to an acceptable degree. There are judgments which have to be made in respect of various aspects of the operation of an appeal tribunal within VCAT, but these considerations do not defeat the strong arguments in favour of establishing one.

(C) Building a bank of jurisprudence

A traditional function of the courts – especially the higher courts – is to build up a body of jurisprudence to guide the resolution of future cases. Important principles of general application have been developed by this

means. The inductive development of the general system of the common law from decisions in individual cases over centuries is the best example.

The development of jurisprudence goes hand in hand, to a greater or lesser extent, with a system of binding precedents. Formal jurisprudence is judge-made law which is binding according to the precedential rules of the system, which may vary. Usually, in cases decided over a period of time, the judicial officers in the system concerned work out the precedential rules, as they may be appropriate for that system.

The tribunal makes decisions in a wide range of jurisdictions which are important to the community. A small but significant number of these decisions state principles which may be of general application and importance. Only a tiny proportion of the tribunal's decisions overall, and a small proportion of those representing generally important decisions, are ever appealed to the Supreme Court.

VCAT does not have an appeal tribunal. It has no internal system of precedent. No decision of a member binds any other member. Each member exercises independent adjudicative capacity.

The Red Dot decisions in the planning and environment list are a step in the right direction and have been generally well received. Under this system, decisions deemed to be significant for various reasons are given a notional red dot, signifying their potential importance. This is not, however, a substitute for a body of jurisprudence.

In the range of decisions which are made by the tribunal, there is considerable scope for the development of a body of tribunal jurisprudence. An appeal tribunal within VCAT would enable the principles governing the exercise of the tribunal's statutory powers in all of its jurisdictions to be developed and applied systematically.

Quite frequently in the tribunal, a decision is made on a question which has public importance. A party may have good reason to think the tribunal has incorrectly interpreted or misapplied the legislation or made some other error of principle. I think it is a serious weakness in the current system that the party cannot have that question reviewed on appeal in the tribunal. There is nowhere to take the question but the Supreme Court on appeal. Appeals there are infrequent and usually driven by private interests.

It is important that such questions be able to be resolved in the tribunal because it has specialist expertise in the issues which arise in civil and administrative disputes within its jurisdictions. It has rules of procedure, costs and advocacy which reflect the way things are done in the tribunal in these jurisdictions. The tribunal has an institutional interest in the effective administration of these jurisdictions, as well as the development of the jurisprudence which provides the framework of principle within which this can happen. It logically follows that VCAT should have an appeal tribunal. I so recommend.

Recommendation 39 An appeal tribunal should be established within VCAT.

(iv) Models

In comparable legislation, the appeal tribunals in generalist tribunals fall into two main categories:

- the appeal tribunal hears all appeals from decisions of all members and is supported primarily by the president and other full-time judges of superior court status (Supreme Court equivalent)
- the appeal tribunal hears all appeals from decisions of non-judicial members only and is supported by the president as a judge of superior court status (Supreme Court equivalent) and judges of district court status (County Court equivalent)

All models give the president the capacity and responsibility to constitute the appeal tribunal in an appropriate way for the given case.

Most systems require leave to be first obtained. Thus appeals are not generally available of right. The leave requirement is used as a filter.

In all systems, appeals do not automatically stay orders. The appellant must obtain a stay, which the tribunal may refuse.

If the recommendation in favour of an appeal tribunal within VCAT is accepted in principle, these matters will have to be examined. In any such examination, I suggest these be considered as important criteria:

- all parties wishing to appeal a decision of a member of the tribunal (however constituted) should have access to a VCAT appeal tribunal
- there should be choice of jurisdiction – if the parties are happy to take an appeal to the Supreme Court, they should be able to do so
- if a party brings an appeal to the appeal tribunal, it should be the one forum where the appeal is heard and determined, subject to final appeal to the Supreme Court
- in cases before the appeal tribunal, VCAT’s usual procedural, costs and advocacy rules should apply, subject to such modifications (if any) as may be necessary because of the special nature of the appeal proceeding
- the appeal tribunal system must provide for the development of an authoritative body of tribunal jurisprudence
- the appeal tribunal should be allowed to work out the rules of precedent as appropriate for VCAT
- the structure of the appeal tribunal should reflect and contribute to the principle of institutional unity and coherence, which is another reason why all appeals which parties wish to bring should be heard in the appeal tribunal

(g) Referring questions of law to the president

The present legislation operates inflexibly in that it does not give a member of the tribunal the power to refer questions of law for the determination of the president.

Under the 1998 Act, the tribunal has power, with the consent of the president, to refer questions of law to the Supreme Court.¹⁶⁷ It makes no provision for such questions to be referred for the determination of the president.

The parties should not have to go to the Supreme Court for determinations of questions of law if it is appropriate for the president to do so. The president of the tribunal is a Supreme Court judge. The tribunal was intended to be a ‘one-stop shop’. As in comparable jurisdictions, a member should be able to refer questions of law for determination by the president, subject to his or her approval.

Recommendation 40 **The legislation should be amended to allow a member to refer questions of law for determination by the president, subject to his or her approval.**

(h) Guideline judgments

Guideline judgments are a mechanism by which the appeal tribunal and/or the president of the tribunal can, after a hearing and due consideration, issue a guideline judgment on a question of general application. The facility adds flexibility and cost-efficiency to the tribunal’s processes, and ensures reasonable certainty in tribunal decision-making. A guideline judgment system avoids the risk that identical issues will have to be decided separately in different cases, and the risk that the issues will be inconsistently decided in such cases.

Guideline judgment systems operate successfully in tribunals in Canada. Tribunals in the United Kingdom have a similar facility.

A guideline judgment is not a substitute for an appeal. A guideline judgment system is not a substitute for an appeal system.

¹⁶⁷ Section 96.

A guideline judgment is a useful additional power for the tribunal to have when an issue of general application arises which is best dealt with comprehensively. Guideline judgment hearings (if necessary) can be conducted in a manner whereby multiple parties and interested persons or organisations can be heard. Guideline judgments can also be issued on the papers after a process of written submissions, if that is appropriate.

Many issues of public importance and general application arise in the tribunal which might usefully be dealt with by a guideline judgment, to be given either by the president or the appeal tribunal if one is established. I recommend that consideration be given to conferring jurisdiction to issue guideline judgments on the tribunal.

Recommendation 41 **Consideration should be given to conferring jurisdiction to issue guideline judgments on the tribunal.**

(i) Code of conduct for members and mediators

There is presently no statutory requirement for the president to develop a code of conduct for members and mediators.

The tribunal has informal codes of conduct. Further, the legal obligations of members are specified in the tribunal's legislation, the general principles of administrative law and the human rights in the Charter. While various aspects of these obligations relate to the conduct of members, they are not a comprehensive source of the obligations of members in terms of their conduct towards users of the tribunal.

The Council of Australasian Tribunals has published a practice manual for tribunals,¹⁶⁸ which contains guidance on the conduct of tribunal members. The Commonwealth Administrative Review Council has published 'A Guide to Standards of Conduct for Tribunal Members'.¹⁶⁹ These are very helpful sources, but are not intended for the general public.

A code of conduct is publicly available and specifies in the one place what is expected of a member or a mediator in the conduct of hearings or ADR. A code of conduct should be expressed in plain English. The general public should be able to understand it. It can be used by the tribunal to project to the community what they can expect of members and mediators. The code of conduct applies to the tribunal's relations with the parties, witnesses, advocates (lay or legal) and others. It can and should embrace therapeutic principles of wellbeing. In this way a code of conduct plays a positive role in bringing order and predictability into the relationship between the tribunal and all of its users.

The natural corollary of a code of conduct for members and mediators is a customer service charter for the administration.

It should be for the president to develop a code of conduct for members and mediators, and a customer service charter, consistently with the statutory objects and functions which I recommend should be included in the legislation. A good model is the Queensland legislation. There the president's functions of management include 'developing a code of conduct for members ...'.¹⁷⁰

Recommendation 42 **The legislation should be amended to include developing a code of conduct for members and mediators in the president's functions of management.**

168 Council of Australasian Tribunals, *Practice Manual for Tribunals* (2nd ed, 2009).

169 Commonwealth Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (revised edition, 2009).

170 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 172(2)(c)(i).

(j) Customer service charter

The tribunal's legislation does not require the president to develop a customer service charter. The tribunal has an informal charter of this nature. It needs to be upgraded in any event.

The development and publication of a customer service charter for the tribunal should be seen not simply as an administrative measure (important as it is in that respect). The relationship between the users and the administration of the tribunal influences how the users experience justice. In the landmark report of Sir Andrew Leggatt into the tribunal system of the United Kingdom, this notable passage occurs:¹⁷¹

It is important to remember that tribunals exist to serve the users, not the other way round. They need to be accessible by the variety of users they are intended to help. In order to make the tribunal experience a positive one for users they need advice and support at all stages of the appeal process.

Equal access and cost-effective justice objectives are best achieved by the tribunal operating as a unified whole. The administrative, adjudicative and ADR functions of the tribunal are working parts of the one machine. The objective of the tribunal – justice itself – must wholly embrace the efficient operation of the administration, including the relationship between the administration and its users.

Being responsible for the management of the administration of the institution, it is for the president to develop its customer services charter, consistently with the tribunal's statutory objectives and functions. I so recommend.

Recommendation 43 **The legislation should be amended to give the president statutory responsibility for developing a customer services charter for the tribunal.**

(k) Complaints system for members and mediators

The resolution of complaints against judicial officers in the courts is under consideration by the government.¹⁷² It may be that the members of the tribunal will be part of a new system. If that system is appropriately framed and is supported by the courts, I would I recommend that the members of the tribunal be included in it. It will take some time for this to be worked through.

In the meantime, I recommend that the president be given statutory responsibility for establishing a complaints system for members and mediators at the tribunal. A complaints system is an important part of the accountability and transparency of the tribunal as a justice institution. The tribunal has an informal complaints system for members and mediators, but this should be upgraded in line with the emphasis which is nowadays placed on this subject. Further, the general public are entitled to expect they can complain to a system which has statutory recognition. The shape and mechanics of the complaints system will be for the president to determine, taking into account the several models which may be drawn on.

Recommendation 44 **The president should be given statutory responsibility for establishing a complaints system for members and mediators at the tribunal.**

(l) Reconstituting the tribunal

The tribunal's legislation gives the president a limited power to reconstitute the tribunal.

171 Sir Andrew Leggatt, *Tribunals for users: one system, one service: report of the review of tribunals* (2001) 43.

172 Victoria, *Investigating complaints and concerns regarding judicial conduct: discussion paper*, The Hon. Rob Hulls MP, Attorney-General (2009).

Briefly, a party may so request¹⁷³ or the member or the president may consider that issue (on notice).¹⁷⁴ If the member decides the tribunal shall be reconstituted, the president must bring that about.¹⁷⁵ If the member decides against reconstitution, a party may make an application to the president, who can allow or reject it.¹⁷⁶ A reconstituted tribunal can have regard to any record of the proceeding.¹⁷⁷

The limitations in these provisions are designed to protect the integrity of the tribunal's process. That is a fundamental objective, but I think the provisions are unnecessarily rigid in this regard.

One serious problem is that the provisions may not allow the president to reconstitute the tribunal if a member, for any reason, becomes unavailable. On one view, the president's power to reconstitute is enlivened only after the member has rejected a reconstitution application. That cannot happen if the member is not available, say because the member's term has expired or the member falls ill or dies. On a number of occasions this has caused serious difficulty, inconvenience and expense for the parties.

Comparable tribunals give the president a general power of reconstitution to deal with the diverse circumstances in which the issue may arise. For example, the president of the Queensland tribunal has the power to 'change who is to constitute the tribunal for a matter'.¹⁷⁸ The legislation gives examples of when this may be necessary, including when a 'member constituting the tribunal becomes unavailable' or when a 'member constituting the tribunal has or acquires an interest, financial or otherwise, that may conflict with the proper performance of the member's functions'.¹⁷⁹ The president of the West Australian tribunal also has a general power to alter the constitution of the tribunal.¹⁸⁰

It would be an abuse of the president's power to use a general power of reconstitution for an improper purpose. It is clear from the nature of such a power that it can only be used to deal with exceptional circumstances, such as lapse of appointment, ill-health or death of a member and conflict of interest situations.

I recommend that the present powers of the president to reconstitute the tribunal be amended to give him or her a general power of reconstitution.

Recommendation 45 **The present powers of the president to reconstitute the tribunal should be amended to give him or her a general power of reconstitution.**

(m) Oaths of office for members

Members of the tribunal exercise considerable power and responsibility, which they must exercise as judicial officers.

At present, members of the tribunal do not take an oath or affirmation of office. This is anomalous. To reinforce and recognise the importance of their responsibilities in the public interest, members should be required to do so. I so recommend. There are various models to follow in the comparable legislation.¹⁸¹

Recommendation 46 **Members of the tribunal should be required to take an oath or affirmation of office, to reinforce and recognise the importance of their responsibilities in the public interest.**

173 Section 108(1).

174 Section 108(2).

175 Section 108(3).

176 Section 108(4) and (5).

177 Section 108(6).

178 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 168(1).

179 Note to s 168(1).

180 *State Administrative Tribunal Act 2004* (WA), s 11(8).

181 See eg *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 228(1).

G FLEXIBLE

(1) Important general principle

An important rationale of the tribunal is to enable the parliament, on an ongoing basis, to give the community easy access to the resolution of civil and administrative disputes. The tribunal has been deliberately designed to perform this function, as and when required. Flexibility is a necessary feature of this method of operating.

The strong vertebrae in the backbone of the tribunal are the lists in which large volumes of cases are resolved – residential tenancies, guardianship, civil claims and planning and environment. These are civil and administrative lists requiring different substantive and procedural expertise. The tribunal possesses that expertise and has the necessary institutional levers to direct it to where it is needed.

Matching substantive and procedural expertise with the nature of the case is an important principle. But it is also important to recognise that fairly hearing and determining cases according to law or binding principles involves the application of adjudicative techniques which have common features. The same may be said of ADR techniques, as these may be applied to different kinds of cases. These techniques involve well-understood competencies which are objective in nature and apply across the range of the tribunal's civil and administrative jurisdictions.

The fair and just determination of a civil dispute or review of a government decision depends on the application of, first, the relevant substantive principles and second, the member's skills as a judicial officer in conducting and determining the case. The skills required of a member as a judicial officer are homogenous (within a certain range), although those required of a member of the tribunal are not exactly the same as those required of a judge in a court. The substantive principles are heterogenous, although those applicable to determining many civil and administrative cases have common features within those categories.

The better are members supported in the acquisition and maintenance of generic techniques, the more flexibly deployable they are within the tribunal. To become competent in a new jurisdiction, the member need only acquire the substantive knowledge. His or her generic judicial techniques will be transferable as part of their stock in trade.

The tribunal has been very successful at bringing these transferable skills of judicial officers to bear on new jurisdictions as they have been conferred from time to time. It is very important that it be able to do so. A purpose of the amalgamated model was to enable the parliament to give legal protection to the community without the need to create a new institution. But for the tribunal, many of these protections would simply not have been created. Now they are almost expected.

There is no theoretical limit to this process, but the flexibility of the members to deal adequately with new jurisdictions must be matched by the institution's capacity to give them the necessary support in doing so. Both processes are dynamic. The process by which new jurisdictions are conferred may be influenced by but are not controlled by the tribunal. Supporting members in the performance of their functions under new jurisdictions is actually within the control of the tribunal.

Maintaining competence in the generic skill-set of members as judicial officers is a key to flexibility. The measures I recommend in this report are the key to maintaining judicial competence. They include the objects and functions provisions, the enhanced powers of the president and competency-based member support (in all its respects). The Learning Centre is the embodiment of the tribunal's aspirations in this regard.

Let me now turn to the role of non-lawyer and sessional members.

(2) Non-lawyer and sessional members

The tribunal has well over 100 non-lawyer members. Some are full-time, but the majority are sessional members. The full-time non-lawyer members hear cases very regularly, sitting alone in some cases in the

guardianship and planning and environment lists. There are non-lawyer sessional members who sometimes sit alone in those lists. The great majority of sessional members sit from time to time as part of a panel in those and other lists, especially the occupational and business regulation list.

Members possessing expertise in areas other than law make a very important contribution to the operation of the tribunal. Medical practitioners, engineers, accountants, planners, social workers and others bring invaluable skill to the tribunal, mostly on a sessional basis and usually as part of a panel. They form a necessary part of the paradigm of justice administered by the tribunal. They enable the tribunal to operate flexibly to meet the demands of our numerous jurisdictions. They enable the general community and those with valuable social and other insights to contribute to the adjudication process.

I maintain that non-lawyers can, with training, support and experience, acquire the necessary competencies in adjudication and ADR and practise those competencies to a high standard. It is the tribunal's responsibility to enable them to do so. I think the tribunal can do more adequately to support non-lawyer members, especially non-lawyer sessional members, in this regard.

The provision of training for non-lawyers in the legal system is a significant issue. It is necessary to think more carefully about that subject, rather than offering a rush of additional programs. The best way of delivering this kind of training needs to be considered and identified. I recommend that the government support a project which would research and design continuing education and training for non-lawyer judicial officers, especially those at the tribunal, and especially its sessional members. The Judicial College of Victoria has specialist expertise in the field of adult legal education as regards judicial officers. It may be that the project should be located there.

By the various means recommended in this report, I believe sessional members generally will be better supported by the tribunal.

One matter that requires attention is that the tribunal can and does pay for full-time members to attend the tribunal's annual one-day conference. It cannot afford to pay for sessional members to attend. Attending the annual conference is important to being part of the life of the tribunal. I recommend that funding be made available to pay sessional members to attend the conference.

Recommendation 47 **The government should support a project which would research and design continuing education and training for non-lawyer judicial officers, especially those at the tribunal, and especially its sessional members.**

Recommendation 48 **Funding should be made available to pay sessional members to attend the tribunal's annual one-day conference.**

(3) Part-time members

The home legislation of the tribunal makes provision for appointing part-time senior members¹⁸² and members¹⁸³. This provides the opportunity to respond flexibly to the needs of suitable members and the tribunal by making appointments on a part-time rather than a sessional basis. I support making greater use of this provision in appropriate cases.

182 *Victorian Civil and Administrative Tribunal Act 1998*, s 13(4).

183 Section 14(4).

H UNIFIED

The amalgamation of the pre-1998 tribunals has been successfully carried out. There is now the opportunity to achieve greater institutional unity and coherence of process and outcome.

The tribunal created by the statute is not a federation or a cluster of semi-autonomous work units. It is a single tribunal. The legislation has provisions requiring it to match the expertise of the member or panel hearing the case in some instances.¹⁸⁴ In that regard the legislation is speaking of *the* tribunal exercising jurisdiction of that nature.

The arrangement of the tribunal into divisions and lists is an important decision of policy made by the rules committee from time to time for the better discharge of the tribunal's functions. But the legislation does not require the tribunal to be organised into divisions or lists. The rules committee is given power to establish divisions of the tribunal and lists within those divisions.¹⁸⁵ It is not required to exercise that power. It is legally possible for the tribunal to operate without divisions or lists.

I have taken the opportunity to promote some positive changes to the list arrangements, including the allocation of some new, and the transfer of some existing, jurisdictions to the human rights division. The rules committee has acted to do so. I give this as an example of the capacity of the tribunal to introduce specialised structures and processes for particular purposes and cases when this is desirable. What the tribunal also needs to do is use its concomitant capacity to better harvest the systemic yield of amalgamation.

The substantial benefits of unity include increased size and resources. It is up to the tribunal to take full advantage of these benefits. In many respects it has done so. I think it can go further in this regard.

With the right statutory framework, effective leadership and the commitment of the staff and members, the benefits of unity which can be realised include these:

- positive outreach to and effective communication with the community
- effective and coherent relations with stakeholders
- independence, uncompromised in any respect
- systematic and universal sense of purpose
- consistently efficient administration, reflecting that purpose
- effective and sensitive customer service
- efficient and adequate administrative support across the whole tribunal, applied equitably
- competency-based member support (with all of its elements)
- collegiality, personal support and cross-fertilisation
- systematic continuing education and training in a state of the art learning centre
- stimulating variety of work, people and processes, with opportunities for personal and professional enhancement
- reasonably consistent processes and outcomes, both in adjudication and ADR
- flexibility without loss of expertise, and creatively identifying and responding to new challenges
- developing a modern paradigm of justice within the tribunal with high order expertise in (for example):

184 For example, in certain cases concerning the regulation of the health professions, the tribunal must be constituted by at least three members, of whom at least two must be health practitioners with professional qualifications in the health profession concerned: clause 11A of schedule 1. Further, in proceedings under a planning enactment, there must be at least one and sometimes two members who have sound knowledge of, and experience in, planning or environmental practice in Victoria: clause 52(1) of schedule 1.

185 Section 157(2) and schedule 2.

- ADR
- informal hearings
- cost-efficiency
- assisting self-represented parties
- developing community-law jurisprudence
- human rights
- modes of public education
- applying therapeutic jurisprudence

That the tribunal can, and in the interest of the community should, strive to achieve these benefits is, in my view, a fundamental policy priority – *ONE VCAT*.

As I have said, the 1998 Act gives the ultimate responsibility for managing the tribunal in all respects to the president. This is fundamentally important. It gives to the rules committee the power to establish divisions of the tribunal and lists within those divisions. This too is fundamentally important. The legislation does not specify organisational unity and coherence as an object or function, and does not require the president to carry that out or equip him or her with the optimum means of doing so. I have recommended that this deficiency be addressed by statutory amendment. In particular, as in the Queensland legislation, to ‘maintain a cohesive organisational structure’ (or some similar expression) should be a statutory function of the tribunal, and the president’s functions should include ‘developing a positive cohesive culture throughout the tribunal’s organisation’ (or similar words).

Recommendation 49 **The statutory functions of the tribunal should include to ‘maintain a cohesive organisational structure’ (or some similar expression).**

Recommendation 50 **The statutory functions of the president should include ‘developing a positive cohesive culture throughout the tribunal’s organisation’ (or similar words).**

I TRIBUNAL OF JUSTICE

VCAT is a tribunal, not a court. That is fundamental. The tribunal is part of the system of justice. That too is fundamental.

As soon as you say the word ‘tribunal’, you must think the word ‘justice’.

I have fully explained in my keynote address what I mean by a tribunal.¹⁸⁶ I won’t explain again at length here. In brief, a tribunal resolves disputes or decides cases within a limited statutory jurisdiction; follows informal and flexible processes; tries to be cost-effective and fast; maintains high accessibility to the community; where appropriate, achieves results by ADR; and, whenever necessary, determines civil and administrative cases according to law. A tribunal is usually not a policy-making body and is statutorily independent of government.

What do I mean by justice? What is the tribunal justice paradigm of which I speak? By justice I mean principled, impartial and authoritative decision-making according to law. Independence is fundamental to justice. The processes must be fair and the outcome determined by reference to objective, universally applying standards. Justice necessarily means deciding like cases alike; that is why the standards are principled and objective. Anything less is not equality before the law. Consistency and certainty are objectives of justice. There can be

186 Justice Kevin Bell, ‘The role of VCAT in a changing world: the president’s review of VCAT’ (speech delivered at the Law Institute of Victoria, Melbourne, 4 September 2008) 1.

no dictation given or influence applied from any outside source. The decision must be binding on the parties (including the government, if it is a party) and enforceable as such. Human rights must be respected unless the legislation unequivocally requires otherwise. Although the tribunal makes decisions of an administrative nature, which may involve policy considerations, it is not a policy-making body. It independently applies policies which (directly or indirectly) come from the legislation which governs the matter in issue.

These principles are contained in the tribunal's legislation, the general body of administrative law and the Charter.

Because the tribunal is a public authority under the Charter, and a competent, independent and impartial tribunal which determines civil proceedings, it is bound to act compatibly with the Charter, especially the equality rights in s 8 and the right to a fair hearing in civil cases in s 24(1). The equality rights involve equality in substance, not just in form. The right to a fair hearing applies universally, including to self-represented parties.

I emphasise the idea of a tribunal paradigm of justice because it captures the notion that the tribunal's function is to achieve that objective by operating in its own way. It would be a shame if tribunals ceded all talk of justice to the courts, for they have much that is important to say about it. There is no embarrassment in tribunals talking about justice. It is the end they pursue in their own way and a natural subject for their engagement.

The objective of equal access to justice is justice. The question always is, how can tribunals make that objective equally accessible to the general community? The function of the tribunal is to find innovative, cost-effective and fair ways of answering that question. As the first amalgamated civil and administrative tribunal, VCAT has been given an historic opportunity to do so.

In various ways in this report, I seek to reinforce the idea of VCAT as a justice institution, connect that idea strongly with its central objective of providing equal access to justice to the general community and make recommendations designed to help it carry that objective out. That is why, in the vision I promote for it, I speak of VCAT as a tribunal of justice. The Victorian Parliament has created an institution which is worthy of that description.

I want to emphasise the tribunal's role in setting standards of excellence in public administration. That has always been an important reason for having tribunals. Especially if the parliament upgrades the tribunal's statute and the government considers improving its resources, the tribunal will be fully equipped to perform that function.

Justice and excellence in public administration involve transparency, principled decision-making and justification. In the tribunal, these values are represented in parties being able to obtain reasons for decision and a recording of the hearing. They are also represented in an appeal tribunal within VCAT and better enforcement mechanisms. Let me turn to these subjects.

As to obtaining reasons for decision, most aspects of the usual rule in the legislation are perfectly appropriate. A party can require reasons within 60 days or another specified period.¹⁸⁷ If oral reasons have been given, the request must be made within 14 days.¹⁸⁸ The reasons must be given within 45 days,¹⁸⁹ unless extended by the president.¹⁹⁰

However, the exemptions in schedule 1 are not appropriate. As you have seen, in credit cases, civil claims cases under the *Fair Trading Act* and residential tenancies cases, the request for reasons must be made 'in the proceeding before or at the time of the giving or notification of the Tribunal's decision in the proceeding.'¹⁹¹

187 Section 117(1).

188 Section 117(2).

189 Section 117(3).

190 Section 117(4).

191 Clause 11 (credit), cl 28HH (civil claims under the *Fair Trading Act*) and cl 76 (residential tenancies).

As revealed during the community consultation, many people – I would think most people in the community – are not aware of this requirement. The tribunal does not have a practice of informing people. Those who want reasons often lose the right to obtain them because they don't ask out of ignorance.

I appreciate that civil claims and residential tenancies are high volume lists. Members in these lists routinely decide many cases each day. Even so, giving reasons for decision is an important part of the accountability and transparency of the tribunal's decision-making processes. Creating a right to reasons subject to a technical requirement of which many people are left unaware is not being accountable and transparent.

I recommend the current restrictions on the availability of reasons in these lists be repealed. However, there should be a statutory amendment, applying in all cases, that if oral reasons were given, a transcript of those reasons (which may be revised by the member) will, at the member's direction, stand as the reasons for decision, and be provided at the tribunal's expense. This is commonly done in other jurisdictions, such as the courts exercising federal family law jurisdiction. A member may elect to provide full written reasons instead.

As to the availability of recordings of hearings, you have my recommendations in that regard.

I have dealt with an appeal tribunal within VCAT.

Enforcement was raised by many people in the consultation process. There is a view that the tribunal is not tough enough when enforcing its orders. The tribunal will reflect upon this question, but every enforcement case has to be decided on its own merits.

People also submitted the current filing provisions were costly and inconvenient. Monetary orders have to be filed with the appropriate court where they are then enforced as an order of that court.¹⁹² Non-monetary orders are filed with the Supreme Court with a certificate from a judicial member stating this is appropriate, whereupon it is to be enforced as an order of that court.¹⁹³

The reasons for this filing procedure is to activate the enforcement mechanisms which are attached to the courts. I think it is time to consider whether it is really necessary to require parties to take this additional step. I think it is adding to costs and may not have objective justification. I recommend that consideration be given to tribunal orders being enforced as orders of a court without being filed in a court.

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| Recommendation 51 | The current statutory restrictions on the availability of reasons for decision in the credit, civil claims and residential tenancies lists should be repealed. |
| Recommendation 52 | There should be a statutory amendment, applying in all cases, that if oral reasons are given, a transcript of those reasons (which may be revised by the member) will, at the member's direction, stand as the reasons for decision and be available free of charge to the parties. |
| Recommendation 53 | Consideration should be given to tribunal orders being enforced as orders of a court without being filed in a court. |

192 Section 121.

193 Section 122.

J ACCESSIBLE TO THE WHOLE COMMUNITY

(1) Equal access to justice

Equal access to justice is a fundamental human right recognised in international law and the Victorian Charter. The principle is central to our democratic system of government and underpins the operation of our public institutions, especially the courts and VCAT. Equality does not just mean formal equality – treating everybody equally. It embraces equality in substance and practical effect. It means taking positive steps to ensure the special needs of people who are disadvantaged or vulnerable are considered and acted on. As a public authority under the Charter, the tribunal is (subject to law) bound to act compatibly with the human rights which enshrine the principle of equal access to justice.

I have found the tribunal has generally improved access to justice and equitable outcomes for the community. However, there are several deficiencies in its operation in this regard which should be addressed. I will deal with these deficiencies by reference to the recommendations I make.

(2) Regionalisation

I have reported there is relatively poor access to the tribunal by people in outer-suburban Melbourne and country Victorian areas.

There are a number of reasons for this. An important reason is that the tribunal has one office in Victoria in the CBD of Melbourne. The tribunal sits on circuit in court houses and other locations in metropolitan and country Victoria. This is welcome but not a sufficient response to the problem.

Lack of access to the tribunal by people in outer-suburban Melbourne and country Victoria was the strongest access criticism made during the community consultation.

I recommend that the tribunal be regionalised. There should be branch offices of the tribunal in outer-suburban Melbourne and country Victoria. There should be a significant decentralisation of all aspects of the tribunal's services.

The ideal model for a branch office of the tribunal is the Liverpool office of the Consumer, Trader and Tenancy Tribunal in Sydney, New South Wales. That office has about ten staff, two full-time members, two hearing rooms, a reception area and ADR facilities. It is located in modest commercial premises in a central location.

Regionalising the tribunal will have implications for the operation of the present CBD head office of the tribunal. But the tribunal will always need a substantial head office, preferably in the legal precinct of Melbourne.

I recommend regionalisation of the tribunal for these reasons:

- to overcome the present cost, distance and inconvenience access barriers
- to allow the tribunal to develop and implement outreach strategies to overcome systemic access barriers
- to embed the tribunal in local communities (including business communities) so that it can be an engaged and visible presence in those communities
- to enable the tribunal (over time) to employ staff from local communities, thus increasing its connection with and increasing local employment in such communities
- to enable the tribunal to build partnerships with local councils, community organisations and business groups through which knowledge of and access to its services can be increased
- to enable the tribunal to address the systemic barriers to access being experienced by CALD and Koori communities

- to enable the tribunal to innovate with service delivery which is attuned to local community and business needs, including opening times, venues and the use of new technology to reach outlying areas

Most of these objectives cannot be achieved in the same way or to the same extent, if at all, by the tribunal's current approach to its service arrangements.

A VCAT branch office should be integral to the community. In my view, it must have engagement, community education, local partnerships and outreach functioning. These can be readily achieved with the employment of one community education and liaison officer in each branch, in addition to the other usual staff. That is a small price to pay for the benefits which will be achieved. The manager should be a person committed to and preferably skilled in these areas.

If accepted, regionalisation would have to be implemented over time. This is due to the staffing, resourcing and reorganisation issues involved. However, I recommend an outer-suburban and country pilot be established as soon as possible.

If accepted, the government would need to consider the options. My view is that the branch office should be separately located from the courts and must be seen to be independent of the government. The tribunal is not a court. The physical arrangements and the services of a court are directed at the needs of a court, which are considerable. The tribunal's needs in this regard are different, and also considerable. The individual needs of the tribunal should be recognised. Its physical needs are modest and can be met in a commercial-standard building. The tribunal has no criminal jurisdiction. It should have a user-friendly reception and administration. It should show a tribunal-like and not a court-like face to the community. To fulfil its access to justice objectives in a local community, the tribunal should be allowed to arrange and administer, and function and grow, in its own individual space.

- Recommendation 54** **The tribunal should be regionalised. There should be branch offices of the tribunal in outer-suburban Melbourne and country Victoria.**
- Recommendation 55** **A community education and liaison officer should be employed in each branch office of the tribunal.**
- Recommendation 56** **An outer-suburban and country branch office pilot for the tribunal should be established as soon as possible.**

(3) VCAT mobile

At modest expense, the tribunal could offer the full range of its adjudicative, ADR and educational services in a specially fitted mobile vehicle, such as those used to take library services to country Victorians.

The service would need about two staff (one doubling as a driver) and one member (who could be sessional). If cases are properly screened, there should be no security issues. The vehicle would be fitted with computer access to the tribunal's head office and would also have video and teleconferencing facilities.

Even if VCAT is regionalised, there will be remote areas which will be hard to reach. Having this kind of facility would enable it to do so.

VCAT mobile would be a flexible, highly-used and visible resource for the tribunal.

I therefore recommend that the government should establish a VCAT mobile. To increase services in outer-suburban and regional areas, this should be a priority and not await regionalisation.

- Recommendation 57** **The government should establish a 'VCAT mobile' as a priority, to increase services in outer-suburban and regional areas.**

(4) VCAT in a box

VCAT in a box is the concept of equipping a tribunal team – say one staff officer and one member – to go to regional shopping centres, community organisations, local councils and similar destinations to deliver adjudication, ADR or educational services. By screening the cases, they can take everything they need in a ‘box’.

The resources needed to implement this concept are modest. A project needs to be established to identify how it can be done and the cost-benefit of using staff and member resources in this way. I so recommend.

Recommendation 58 **There should be a project to identify how ‘VCAT in a box’ can be established and the cost-benefit of using staff and member resources in this way.**

(5) Upgrade of website

The tribunal’s website is functional but tired. It needs to be upgraded in line with the modernisation of the tribunal overall. The website should be the major point of communication between the tribunal and the community, including (eventually) the parties.

As the first amalgamated civil and administrative tribunal, VCAT should aspire to world’s best practice in its public communications, especially through its website.

An updated website will be a critical tool in achieving the tribunal’s equal access to justice objectives. It must provide a range of assistance to all users, especially self-represented parties. It should be the public face of the tribunal to the community.

The tribunal’s website, and its upgrade, should be integrated into the tribunal’s communication and education strategy.

The parties to tribunal proceedings should (if they can and want that access) be able to access their file on-line and find out the status of their case. If it is in a queue waiting to be heard, they should be able to see when that is likely to be. If it has been heard and the decision is reserved, they should be able to see when that decision is expected. This service is available in the federal courts, which can be used as a model.¹⁹⁴ I recommend this be implemented at the tribunal.

In the operation of the tribunal in the modern age, there will be information and educational material available on the website which will be invaluable to schools and similar institutions. The tribunal is in an excellent position to make a major contribution to community legal education. It has the content on which such education can be based. This should be seen as a significant opportunity. While the tribunal has the content, it is not a public educator by function. There is scope for partnerships between the tribunal and other institutions by which their experience can be joined.

I therefore recommend the substantial upgrading of the VCAT website.

Recommendation 59 **The VCAT website should be substantially upgraded as the major point of communication between the tribunal and the community, including (eventually) the parties.**

Recommendation 60 **The parties to tribunal proceedings should be able to access their file management details on-line and find out the status of their case.**

194 For example, Family Law Court File Search.

(6) Universal electronic initiation

The tribunal has on-line initiation for (mostly) private landlords in residential tenancies cases. That kind of facility is shortly to be extended to small businesses in civil claims in similar cases (this is called 'Smartform').

While these initiatives and others like them are very welcome, the principle of equal access to justice supports all people having access to on-line initiation, if that is practicable. The tribunal is already exploring the extension of on-line initiation in residential tenancies cases to tenancy organisations and social landlords. It should go further if possible.

I recommend the government support a project to investigate on-line initiation in all cases where this is possible.

Recommendation 61 **The government should support a project to investigate on-line initiation in all cases where this is possible.**

(7) Self-represented persons strategy

(a) The nature of the problem

As I said in *Tomasevic v Travaglini*,¹⁹⁵ most self-represented persons suffer from two disadvantages: lack of professional skill and ability and a lack of objectivity.

As described by the Australian Institute of Judicial Administration, this is the disadvantage that comes from a lack of professional skill and ability:¹⁹⁶

By definition litigants in person lack the skills and abilities usually associated with legal professionals. Most significantly, lack of knowledge of the relevant law almost inevitably leads to ignorance of the issues that are for curial resolution for the court or tribunal... This ranges from lack of knowledge of courtroom formalities, to a lack of knowledge of how the whole court process works from the initiation of a proceeding to hearing. Litigants in person also lack familiarity with the language and specialist vocabulary of legal proceedings.

This is the disadvantage of the second kind – a lack of objectivity:¹⁹⁷

The problem of self-representation is not just a lack of legal skill – it is also a problem of a lack of objectivity and emotional distance from their case. Litigants in person are not in a good position to assess the merits of their claim...

Of all the justice institutions in the Victorian legal system, the tribunal faces this problem to the greatest extent. In the great majority of the thousands of hearings conducted by the tribunal every year, most of the parties are self-represented. Ensuring that self-represented parties get equal access to justice is a major challenge to the tribunal as an institution, and institutional means must be adopted to address it.

First, to the common law and human rights framework.

(b) Duty to give due assistance to self-represented persons

Because self-represented persons experience these disadvantages, courts and tribunals must give them due assistance in the presentation of their case. This is an aspect of the fundamental duty of judicial officers to afford all parties a fair trial. I identified the scope of this duty in *Tomasevic v Travaglini*:¹⁹⁸

195 (2007) 17 VR 100, 116.

196 Australian Institute of Judicial Administration Inc, *Litigants in person management plans: issues for courts and tribunals* (2001) 3 (footnote omitted).

197 Ibid 4 (footnote omitted).

198 (2007) 17 VR 100, 130; approved in a case concerning the tribunal in *Macdiggers Pty Ltd v Dickinson* [2008] VSC 576, [55] per Warren CJ: 'The Tribunal has a special responsibility to [the applicant] given the circumstance of him appearing in person.'

The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed...

The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances – it must ensure a fair trial, not afford an advantage to the self-represented litigant.

The obligations of the tribunal in this regard are reinforced by the Charter, which requires it to act compatibly with the equality rights in s 8 and the right to a fair hearing in civil cases in s 24(1). As a public authority under the Charter, the tribunal is obliged to do so. The human rights in the Charter in this respect require the tribunal not simply to recognise the right of all persons equally to bring and prosecute an application in the tribunal, but to take appropriate positive and substantive steps to ensure all parties are able to do so effectively.

Applying these principles, it is permissible, and it may be necessary in a given case, for the tribunal:

- to explain to a self-represented party the procedures to be followed
- to direct the self-represented party positively to the legal and factual issues in the case, helping them to understand what they are
- to direct the self-represented party negatively away from irrelevant issues, explaining why
- to assist the self-represented party to present their evidence and to test the evidence of the other party, in that regard asking questions of the self-represented party or the witnesses of the other party to a limited extent where necessary
- to assist the self-represented party to present their submissions in the case by directing their attention to the relevant issues and asking for their response

In performing this function, the tribunal cannot become the advocate of the self-represented person and must balance the assistance they give with their duty to act fairly, objectively and impartially towards all parties.

While that legal framework is strong, it is general in terms and not specifically tailored for the tribunal, which faces special challenges in this area.

(c) Legislating for a positive duty to assist all parties

The 1998 Act requires the tribunal to act fairly¹⁹⁹ and makes it subject to the rules of natural justice.²⁰⁰ It does not deal with the problems encountered by the tribunal in making sure that parties understand the issues in the case and the tribunal's practices and procedures. The legislation needs to be strengthened in this regard.

An important part of the solution to this problem is to include in the statute of the tribunal the expectations of the parliament (on behalf of the community). I recommend the amendment of the legislation to require the tribunal to ensure that all parties (including self-represented parties) understand the issues in the proceedings, and the practices and procedures of the tribunal, and give due assistance to parties who need it.

199 Section 97.

200 Section 98(1)(a).

The recently enacted legislation for the Queensland tribunal deals with this issue. This is s 29:

- (1) The tribunal must take all reasonable steps to –
 - (a) ensure each party to a proceeding understands –
 - (i) the practices and procedures of the tribunal; and
 - (ii) the nature of assertions made in the proceeding and the legal implications of the assertions; and
 - (iii) any decision of the tribunal relating to the proceeding; and
 - (b) understand the actions, expressed views and assertions of a party to or witness in the proceeding, having regard to the party's or witness's age, any disability, and cultural, religious and socioeconomic background; and
 - (c) ensure proceedings are conducted in a way that recognises and is responsive to –
 - (i) cultural diversity, Aboriginal tradition and Island custom, including the needs of a party to or witness in the proceeding who is from another culture or linguistic background or is an Aboriginal person or Torres Strait Islander; and
 - (ii) the needs of a party to, or witness in, the proceeding who is a child or a person with impaired capacity or a physical disability.
- (2) The steps that can be taken for ensuring a person understands something mentioned in subsection (1)(a) include, for example –
 - (a) explaining the matters to the person; or
 - (b) having an interpreter or other person able to communicate effectively with the person give the explanation; or
 - (c) supplying an explanatory note in English or another language.

I recommend that amendments along these lines be introduced.

Recommendation 62 **The legislation should be amended to require the tribunal to ensure that all parties (including self-represented parties) understand the issues in the proceedings, and the practices and procedures of the tribunal, and give due assistance to parties who need it.**

(d) Enhancing the powers and duties of the principal registrar

The 1998 Act confers a duty on the principal registrar to 'give reasonable assistance on request to a person in formulating an application.'²⁰¹ By various organisational processes (and delegations), this function is performed by a number of staff at the tribunal.

This provision is passive in that it operates only on request. It then confers a duty to assist a person in formulating the application, which is a limited duty.

The narrow scope of this provision does not start off the relationship between the user and the tribunal on the right foot. The administration of the tribunal should proactively assist people to obtain equal access to justice. As I have said, even though they are administrative in nature, the functions performed by the tribunal staff are an aspect of justice itself.

The obligations on the principal registrar and the staff should reflect the importance of their role in the tribunal for the user. This can be represented in a reformulated provision relating to the functions of the principal registrar.

201 Section 67(4).

Again, the legislation for the Queensland tribunal has addressed this question. This is s 30:

The principal registrar must give parties and potential parties reasonable help to ensure their understanding of the tribunal's practices and procedures, including, for example, reasonable help to complete forms required under this Act or the rules.

This provision should be used as a possible model. To ensure that any new provision definitely picks up the obligations of the principal registrar under the old provision, I recommend that it specifically include giving reasonable assistance to a person to formulate their application.

I thus recommend the tribunal's legislation be amended to enhance the powers and duties of the principal registrar to assist users of the tribunal.

Recommendation 63 **The legislation should be amended to enhance the powers and duties of the principal registrar to assist users of the tribunal, including giving reasonable assistance to a person to formulate their application.**

(e) Litigant in person coordinator

The tribunal needs to increase its internal capacity to assist self-represented persons. The Supreme Court has established a very successful program where a Litigant In Person Coordinator provides non-legal advice and assistance to litigants in person about their case. The tribunal should adopt this model for its own use.

The role of a litigant in person coordinator would not be to provide legal advice. It would be to assist litigants in person with information and assistance about the procedures and practices followed by the tribunal, the various steps involved in a proceeding and sources of legal advice if this is needed. A coordinator is also a source of advice to the tribunal about how it can best arrange its services to enable parties to represent themselves, if that is their wish. The coordinator would also support the tribunal's community legal education activities and feed their experience in to the design of the tribunal's continuing education and training programs for members.

I therefore recommend the government support the appointment of a litigant in person coordinator at the tribunal.

Recommendation 64 **The government should support the appointment of a litigant in person coordinator at the tribunal.**

(f) Expand pro bono legal services

The Victorian Bar offers pro bono assistance at the courts in addition to that provided through non-government organisations. For example, it has a formal arrangement with the Supreme Court whereby judges can refer appropriate cases to the scheme.

The Victorian Bar has offered to expand that scheme to include the tribunal. I gratefully accept that offer. I recommend that the tribunal establish a legal representation referral arrangement with the Victorian Bar, to be supported by changes to the tribunal rules (subject to the approval of the rules committee).

On the initiative of the Victorian Bar, there are discussions between the tribunal and the bar about barristers with planning experience providing pro bono assistance in planning and environment cases. I am grateful for the bar's promotion of this possibility.

The Law Institute of Victoria has likewise offered to assist the tribunal in any way it can in suitable cases where pro bono assistance by solicitors may be required. I gratefully accept that offer and so recommend.

Recommendation 65 The tribunal should establish a legal representation referral arrangement with the Victorian Bar, to be supported by changes to the tribunal rules.

(g) Establish a self-representation civil law service

Self-represented parties are part of the tribunal's life. The tribunal exists (among other reasons) to ensure they (and other parties) obtain access to the means of resolving civil and administrative disputes. With the best support available, large numbers of persons, by choice or necessity, appear in the tribunal self-represented. We open our doors to them.

In the public meetings I held as part of the community consultation, I discussed with many people what made for a successful self-represented appearance in the tribunal. The answers were very consistent:

- some prior knowledge of the procedures that would be followed in the hearing, so that the person knew – more or less – what to say and do
- some prior knowledge of the laws or principles governing the case, so that the person could – to a reasonable degree – bring their case within the tribunal's frame of reference
- some source of advice about these matters, be that from someone in the family, a friend or a community legal centre, whether that person was a lawyer or a non-lawyer, as long as they had a basic understanding of the procedures and issues involved

People said that, where these three conditions were met, they could usually get by representing themselves in most routine cases. That is my own experience. There are large numbers of people in this category who can and should be assisted in this way.

Where people did not have a source of advice about these matters, they were all at sea and the experience of appearing for themselves was a very negative one. I remember one member of the community coming a long way at night to a consultation in the country to tell me how angry he was at being 'absolutely creamed' by the legal representative of the other party on such an occasion.

Preparing people to represent themselves successfully at the tribunal thus involves the provision of assistance about the procedures to be followed and the issues in the case. The function of a self-representation civil law service is to provide that assistance before the hearing.

A service of this kind could be established as an office of the government, like Victoria Legal Aid, or as an independent organisation, like a specialist community legal centre, or by similar means or combination of means.

In Queensland such a service is provided by a specialist legal service. The Self-Representation Civil Law Service helps people with advice and assistance about their case all the way to the door of the court, but no further. It is not means tested, but assisting the disadvantaged and vulnerable is a priority. The service is operated by a full-time solicitor and paralegal, assisted by volunteer lawyers.

The assistance provided includes legal assistance, assisting with negotiations, drafting documents, conducting legal research, assistance with referral to sources of non-legal advice, referral to lawyers for legal advice, explaining the legal issues in the case and how to present the case in the best possible light, advice about the rules and procedures involved, understanding the affect of orders and not complying with them and, finally, some free mediation.

From January 2010, the service will commence providing assistance to people with cases in the new Queensland tribunal, concentrating on human rights cases (which there include guardianship, anti-discrimination and children's services cases).

Victoria needs a service of this kind. When people are provided with competent advice, expressed in basic and common sense terms, about the procedures of the tribunal and the issues raised by their case, their

capacity for self-representation is significantly enhanced. The member of the tribunal then has something to build on when they are conducting the hearing. A service of this kind will make a significant contribution to building individual and community capacity and enhancing wellbeing. I therefore recommend that the government support the establishment of a self-representation civil law service and consider the Queensland model as one to follow.

Recommendation 66 **The government should support the establishment of a specialist self-representation civil legal service.**

(h) No further restrictions on legal representation

As we have seen, there were strong criticisms in the community consultations of the role of lawyers in proceedings in the tribunal. Many individuals saw them as being responsible for ‘creeping legalism’.

As a response to that problem, I raised the possibility of excluding all legal representation in cases involving subject matter worth less than \$50,000 (unless there were exceptional circumstances). The proposal attracted luke-warm support from the community, with strong support and opposition at either extreme, and no support or strong opposition from most of the tribunal’s stakeholders.

This proposal is not the answer. Let me explain why.

The right to representation is very important. There have to be very strong reasons for denying people the right to be represented in the tribunal by the advocate of their choosing, including a lawyer.

The current legislation already contains restrictions of this kind, which are intended to balance the right to advocacy against the tribunal’s informal way of operating. It may be that these restrictions need to be more diligently applied and efficient, but that is a question concerning the application of the current rules.

It is difficult to formulate an appropriate exclusionary rule. It would require a lot of exceptions. A wide exclusionary rule with many exceptions may do more harm than good.

It is wrong to blame lawyers for doing their job. If the system needs to be fixed, this will not be achieved by excluding all legal representation.

Lawyers are not the only powerful advocates in the tribunal. There are lots of experts and non-legal professional advocates in the same category. Do we exclude them too?

The legal system is recognising the need to assist self-represented parties. The tribunal is doing so more and more. In time, the tribunal will develop procedures and systems for ensuring self-represented persons have a positive experience of justice, even if they are opposed by a legally represented party.

‘Creeping legalism’ is a feature of cases that are legally and factually complex, especially if the governing principles are open-ended and allow a lot of scope for argument. Excluding lawyers will deny the parties and the tribunal the benefit of their submissions on the issues. It will not make the cases less factually and legally complex.

In conclusion, the tribunal needs to increase its own capacity consistently to provide due assistance to self-represented (and other) parties, which will not be achieved by imposing further restrictions on legal representation.

I recommend no increase of the existing restrictions on legal representation at the tribunal. I do think it is important for the present leave provisions to be properly observed. I recommend that in all cases where leave is granted for a party to be represented by an advocate, the decision to grant leave be formally recorded by the member. This will ensure that the issue is properly considered in each case.

Recommendation 67 **There should be no increase of the existing restrictions or legal representation at the tribunal.**

Recommendation 68 **In all cases where leave is granted for a party to be represented by an advocate, the decision to grant leave should be formally recorded by the member.**

K RESOLVING CIVIL AND ADMINISTRATIVE DISPUTES

By a civil or administrative dispute, I mean the party-party and citizen-state disputes in which applications may be commenced in the original²⁰² or review²⁰³ jurisdiction of the tribunal under its home legislation. Such applications may be brought as of right (with very rare exception) and, if competent, must be determined by the tribunal.

By resolution of such a dispute, I mean using the determinative and other powers of the tribunal in that legislation, whether by adjudication or ADR. I make recommendations for enhancing the tribunal's legislative capacity for ADR below.

In the velvet glove of the concept of 'dispute resolution' is the hard fist of the unequivocal statutory responsibility of the tribunal, as a justice institution, to vindicate legal rights when called on to do so.

Accepting that, the rationale of the tribunal is to adopt cost-effective and flexible means of resolving civil and administrative disputes, focussing in a practical way on the substantive issues and being innovative about what those means might be.

I make no recommendation under this heading because all the relevant recommendations are dealt with elsewhere in this report.

L RESPECT

As you have seen, in *Tribunals for Users* Sir Andrew Leggatt spoke of the positive experience of justice for users. Hold in your mind that idea of justice as human experience and consider its connection with the value of respect and what the tribunal can do to enhance the wellbeing of users, whoever they are and whatever the outcome.

The community look to their public institutions for integrity, efficiency, service and (this may not be obvious) affirmation. People well understand that, in justice institutions, they may win or lose according to the applicable rules, or achieve a satisfactory outcome by ADR. The community do, however, expect their dignity to be respected.

The international research and common human experience tells us the satisfaction of the user turns greatly on their perception of how they were treated and less on the result they achieved. This passage from a classic article on the subject by the social psychologist, Tom Tyler, explains why:²⁰⁴

People value the affirmation of their status by legal authorities as competent, equal, citizens and human beings, and they regard procedures as unfair if they are not consistent with that affirmation. To understand the effects of dignity, it is important to recognize that government has an important role in defining people's view about their value in society. Such a self evaluation shapes one's feelings of security and self-respect.

There were very strong representations in the community consultations about the treatment which people say they received in the tribunal. The comments were very much bound up with the criticism of 'creeping legalism'. It is not possible for me to investigate all these allegations of poor treatment. Collectively they

202 *Victorian Civil and Administrative Tribunal Act 1998*, s 41.

203 Section 42.

204 Tom Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in D B Wexler and B J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (1996), 10-11.

amount to something the tribunal must address. It must be said, however, that it was not alleged the tribunal is generally disrespectful to users. There were many glowing descriptions of the tribunal's treatment of people.

Everybody, including many lawyers, finds hearings in courts and tribunals difficult. Some people are terrified by them and feel literally sickened by the experience, however well they are treated. For self-represented parties and non-lawyer advocates, these feelings are usually much stronger. Yet a hearing that is 'successful' (win or lose) for the participant can be personally uplifting and have very positive consequences for their wellbeing.

The tribunal needs to manage the negative impact and enhance the positive impact of its processes on users and the broader community. It can do both without the slightest compromise of its adjudicative and other responsibilities. For that it needs an operating principle, which is respect. That will take us to therapeutic jurisprudence and its focus on wellbeing.

What people in the community are saying is that procedures and hearings which are exclusive and not inclusive represent an assault on their personal dignity. People come to the tribunal to experience justice. To some, the idea of justice involves the application of fair process and legal principle to the 'case'. To a participant, the idea of justice involves the application of fair process and legal principle to 'me'. When the system makes them feel excluded, they can be left feeling undervalued, small and undignified. I saw this feeling genuinely expressed many times during the community consultations.

Inappropriate familiarity between the tribunal and some users and the appearance of 'clubbiness' in the processes of the tribunal have a corrosive effect on public confidence in the institution. As I wrote in the keynote address:²⁰⁵

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 procedure of the tribunal. This is felt at the personal level and experienced as disrespect for the dignity of the individual.

From whence does justice arise? Out of the ordinary human experience of us all. The general community experience justice in the stream of their lives and not just in terms of the hearing or its outcome. In practical terms, I would identify the user's first contact with the tribunal as the commencement of their experience of justice with us. What happens in the call centre or at the front counter is therefore of great importance. That is why we should, as the customer service staff submit, have a concierge during busy times, among other initiatives. That is to treat users with respect.

The entire previous experience of contact between users and the tribunal is brought to the hearing room (unless the case is resolved by ADR or otherwise). The impressions gained by the user impact on their behaviour in that room. In terms of the conduct of the hearing, the tribunal has a powerful interest in the nature and standard of its pre-hearing service to users.

Self-represented parties do not expect the earth. However, providing better assistance to them, as I recommend in this report, will impact favourably on their participation in the hearing, improve their wellbeing and that of everybody else in the process and enhance public confidence in the tribunal and the legal system generally.

In a certain respect, all participants in the tribunal as an institution of justice are 'in it together'. Parties, witnesses, advocates, tribunal staff, members and others come together (by compulsion or voluntarily) to observe the rules which justice prescribes for the determination or other resolution of the case in dispute. In doing so, we all interact with each other, with significant personal consequences. Mutual respect and

205 Justice Kevin Bell, 'The role of VCAT in a changing world: the president's review of VCAT' (speech delivered at the Law Institute of Victoria, Melbourne, 4 September 2008) 18.

personal responsibility should be the basis of that interaction. Respect lies at the heart of human rights. That is one reason why human rights are a positive force for everybody involved in the tribunal.

Even in justice institutions where legal representation is the norm, these considerations have importance. In one where self-representation is the norm, they are especially important. The tribunal is such a case.

The other side of the coin is the way some users treat the tribunal, both staff and members. Many people with challenging behaviours, and others who simply should know better, treat the tribunal poorly. This is upsetting for staff and members. It impairs the performance of their work. It is for the tribunal to deal with these situations, for which we need to provide better training. This is within the tribunal's hands.

These are not theoretical issues for the tribunal. They affect and will continue to affect the everyday performance of the tribunal, both as to staff and members, and the relations between the tribunal, its users and the community. The tribunal needs a framework for considering these issues in terms of the actions it might take to order its relations with users in the most positive way and to enhance individual and community wellbeing. I think therapeutic jurisprudence provides that framework.

Therapeutic jurisprudence may be defined as 'an interdisciplinary study of the law's effect on physical and psychological wellbeing'.²⁰⁶ The basic idea is for the law or legal institutions, so far as possible, to minimise the negative impacts and promote the positive impacts of their actions on individual and community wellbeing. Therapeutic jurisprudence points to the potential therapeutic and anti-therapeutic effects of legal rules, procedures and roles.²⁰⁷ Therapeutic justice is interstitial: it occupies the space within and allowed by binding laws. It invites the institution and the judicial officer to administer the law, so far as possible, consistently with promoting the wellbeing of the participants. Judicial responsibilities are respected. Self-represented tenants are still evicted by justice institutions following therapeutic jurisprudence approaches. But the way it is done is intended to be dignified and humane. That might involve giving advice about emergency housing assistance. Hence the significance, in therapeutic terms, of the tribunal's recent initiative of making a social assistance data base available on the desktop computer of all members.

The tribunal is a partner in the innovative Neighbourhood Justice Centre in Collingwood, an inner-suburb of Melbourne. The main work of the centre is sentencing offenders for summary offences. But the tribunal sends members to hear civil claims, guardianship and residential tenancies cases at the centre, and its head magistrate is a member of the tribunal. I have approved one of its qualified mediators as a tribunal mediator.

The legislation for the centre requires it to perform its functions 'with the objectives of simplifying access to the justice system and applying therapeutic and restorative approaches in the administration of justice'.²⁰⁸ I think this is a good precedent for the tribunal to follow. It would allow the tribunal to work within an appropriate framework when addressing important issues which are not now mentioned in our home legislation, without impairing in any way the performance of the tribunal's primary statutory functions.

I therefore recommend that an objects and functions provision for the tribunal include 'applying therapeutic approaches to the administration of justice', or a principle along these lines.

Recommendation 69 **The objects and functions provision for the tribunal should include 'applying therapeutic approaches to the administration of justice', or a principle along those lines.**

206 Michael King et al, *Non-adversarial justice* (2009) 22.

207 Ibid 28-29.

208 *Courts Legislation (Neighbourhood Justice Centre) Act 2006*, s 1.

M FAIRLY AND COST-EFFECTIVELY

These are fundamentally important obligations of the tribunal which I have stressed throughout this report.

Under the tribunal's home legislation, the governing principles of administrative law and the human rights in the Charter, a fair hearing is the only kind of hearing which the tribunal can lawfully conduct. Cost-effectiveness cannot be achieved at the cost of fairness.

Fairness has a procedural and substantive connotation. The community expects the procedures of the tribunal to be fair, in the sense of providing everybody with an equal opportunity to present their case. This involves a special duty to assist self-represented parties, as I have explained. The community also expects the law to be applied openly, transparently, according to objective principles which everybody can access and understand, and not arbitrarily. I have made a number of recommendations in the report for enhancing the fairness of the tribunal's decision-making processes in both respects.

Cost-effectiveness is fundamental because the tribunal was established to provide affordable access to justice for the Victorian community. It can achieve this objective by adopting flexible and informal procedures for adjudicating cases and innovative means of resolving disputes, including compulsory conferences, mediation and other forms of ADR, all without compromising fairness.

I have found the tribunal has a strong commitment to cost-effective resolution of disputes across the whole suite of its jurisdictions. The main challenges to meeting this objective are in complex cases and in delivering services to the outer-suburban and country regions.

I have considered whether the tribunal could more cost-effectively manage major civil cases in a special list. I have not been able to resolve this question in my own mind, but remain open to the possibility. At present such cases are closely managed from the outset. While the procedures for doing so can always be improved, I am not sure a special list would necessarily produce such improvements. I intend to continue my consideration of this issue. Integrated case officer management of major cases would definitely be beneficial.

There is the opportunity to manage major cases in the planning and environment list faster and more cost-effectively for the parties by establishing a major cases list for cases of that kind. I recommend the establishment of a major cases list for planning and environment cases of that nature. The government has already announced its support for such a list and discussions are underway about this proposal.

It is important that, when major case lists are established, this is done with no reduction in cost-effectiveness in cases in the tribunal's ordinary lists, and no loss of fairness to parties in the dedicated list.

Industry associations and others have promoted the concept of continuous improvement in terms of the cost-efficiency of the tribunal's processes of dispute resolution. I think this is a positive way of capturing the idea that the tribunal should always be striving to be a low-cost dispute resolution forum, using all means available to improve its performance in this regard. I recommend the tribunal adopt the principle of continuous improvement in the implementation of its cost-efficiency objective. This should be considered as a possible statutory objective, but the tribunal will start implementing it administratively.

Industry associations and others have also promoted the concept of early mediation, including on-site mediation and hearings in domestic building and planning and environment cases, to reduce the cost of dispute resolution. I agree with these views and have made recommendations accordingly.

Recommendation 70

A major cases list for planning and environment cases of that nature should be established, with no loss of service to cases in the standard list, and no loss of fairness to the parties in the dedicated list.

Recommendation 71 **The tribunal should adopt the principle of continuous improvement in the implementation of its cost-efficiency objective. This should be considered as a possible statutory objective.**

N APPROPRIATE MEANS

(1) Twinning adjudication and appropriate dispute resolution

I use 'appropriate means' to describe applying means of dispute resolution which are appropriate to the case. The choice is made according to the nature and needs of the dispute and the parties, not according to a fixed view that one means of resolution is necessarily better than another, or that one means only should be tried.

The means available fall broadly into the categories of adjudication and ADR. To my mind, these means are twins, each having their own strengths and weaknesses. In the resolution of disputes and the organisation of the tribunal's resources, a rational decision should be made about when and how to apply these means. The tribunal should have an enhanced capacity to do so. This will significantly increase its flexibility and cost-effectiveness.

Making decisions about when and how to adjudicate a dispute or resolve it by ADR does not occur in a vacuum of principle.

The tribunal is an institution of justice and ADR is not a substitute for justice. It is a means of achieving justice. Equal access to justice is a human right of fundamental importance and the basic function of the legal system to provide. If adjudication and ADR are twins, one does not thrive at the expense of the other. The function of both is to achieve justice. They complement each other. ADR is not to be applied in a way that compromises equal access to justice. It is another way of achieving it, and often a better way. A justice institution which allows ADR to compromise justice is a contradiction in terms. If a party wants to access adjudication to obtain vindication of their legal rights, they must ultimately be given that access. That actually assists ADR, because it is then carried out in the shadow of law.²⁰⁹ The parties are conscious of what adjudication may award.

The systems of the tribunal must be geared to providing access to adjudication cost-efficiently. They must also be geared to providing world's-best practice ADR. The provision of ADR involves special challenges where the parties have unequal bargaining power. That is often the case at the tribunal. Those challenges must be confronted. It may be that, in such a case, one kind of ADR should be adopted rather than another, or the case must go to adjudication. There are difficulties with purely interests-focussed mediation when the parties are not equal in bargaining power. The ADR may need to be more rights focussed, with the ADR practitioner playing a more active role. This may have implications for the qualifications of the ADR practitioner. There is a need for further work on this aspect of ADR. The recommendations in this report are designed with these principles in mind.

In this report, I have made recommendations for enhancing the effectiveness, consistency and quality of adjudication. Let me deal here with enhancing ADR.

(2) Tribunal as a centre of excellence in ADR

As I explained in part one, the tribunal aspires to becoming a centre of excellence in ADR. The steps already taken towards advancing that objective were explained. Among other things, the tribunal has a principal mediator, an ADR judge, a mediation centre, a learning centre and a systematic mediation program.

209 See the classic article by Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

The following recommendations are made to help the tribunal build on that foundation to bring the objective to fruition.

(3) Permanent ADR judge and principal mediator

The role of appropriate dispute resolution at the tribunal is of fundamental importance. In recognition of that importance, the first president of the tribunal, Justice Murray Kellam, appointed a senior member to be a principal mediator. I built on that initiative by establishing the position of ADR judge in 2009. This enabled the tribunal to review its mediation and other ADR functions, as well as the means by which it carries those functions out. The tribunal now has a more systematic approach to the implementation of ADR, but the opportunity exists to take this much further. The tribunal's first ADR judge has been appointed to the Supreme Court.

The importance of ADR at the tribunal should be recognised with the permanent establishment of the position of ADR judge at the tribunal, to be filled by a vice-president (County Court judge). The tribunal usually has two full-time vice-presidents on secondment from the County Court at any one time. I recommend that a third position of ADR judge be created, who would be an additional County Court judge. The judge would be expected to remain at the tribunal for the usual term of the appointment of a judge as a vice-president (presently five years).

The tribunal ADR judge would, subject to the direction of the president, manage the tribunal's ADR program, providing leadership in all aspects of its operation. The judge would be assisted by the tribunal's principal mediator and an executive assistant (additional to the tribunal's present compliment).

The ADR judge would also perform significant adjudicative work, both to obtain the benefit of their judicial capacity and also to enable them to maintain that capacity. But their primary function would be to implement and develop the role of ADR in the tribunal and to establish it as a centre of excellence in that respect.

The position of ADR judge and principal mediator should receive some recognition in the tribunal's legislation, say by giving the president power to appoint a judge and a member to those positions.

Recommendation 72 **A position of ADR judge should be created at the tribunal, to be filled by a vice-president (County Court judge) of the tribunal for the usual term of appointment for a vice-president (five years).**

The functions of the ADR judge and the conduct of ADR at the tribunal should be supported by a complete revision of the 1998 Act in this respect. To that subject I now turn.

(4) Legislative upgrade of ADR

I have said the 1998 Act was innovative in its day for including ADR provisions. To repeat, it makes provision for compulsory conferences,²¹⁰ mediation²¹¹ and settlement of proceedings.²¹² These are 'first-generation' provisions. The tribunal has used these provisions to grow its substantial ADR services. However, the role of ADR in the legislation should be significantly upgraded, in line with the importance of this means of resolving disputes in the tribunal in the modern age. It needs 'second-generation' provisions.

The legislation for tribunals in comparable jurisdictions provides a model that might be followed.

The legislation for the Commonwealth tribunal has a division dealing with 'alternative dispute resolution processes'.²¹³ It contains second-generation provisions. It is based on a definition of ADR processes (which VCAT's legislation lacks). This is that definition:²¹⁴

210 Section 83.

211 Section 88.

212 Section 93.

213 *Administrative Appeals Tribunal Act 1975* (Cth), division 3 of part IV.

214 Section 3(1).

In this Act, unless the contrary intention appears:

...

alternative dispute resolution processes means procedures and services for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) neutral evaluation; and
- (d) case appraisal; and
- (e) conciliation; and
- (f) procedures or services specified in the regulations;
- (g) but does not include:
- (h) arbitration; or
- (g) court procedures or services.

This is a very useful way of describing ADR. It brings order to this sometimes loose subject. In VCAT, however, there is no need to exclude arbitration.

The Commonwealth legislation goes on to empower the president to direct that proceedings be referred to ADR.²¹⁵ The president may give directions about ADR processes,²¹⁶ which is consistent with the president's power to give directions to tribunal members generally. Under the legislation, directions may relate to:²¹⁷

- (a) the procedure to be followed in the conduct of an alternative dispute resolution process; and
- (b) the person who is to conduct an alternative dispute resolution process; and
- (c) the procedure to be followed when an alternative dispute resolution process ends.

The legislation makes provision with respect to agreements reached by ADR,²¹⁸ the inadmissibility of evidence,²¹⁹ objecting to particular members conducting an ADR process,²²⁰ conducting ADR processes by telephone, closed-circuit television or other means of communication²²¹ and the engagement of private ADR practitioners.²²²

The legislation for the New South Wales Administrative Decisions Tribunal contains a whole part dealing with 'alternative dispute resolution'.²²³ It allow mediation and early neutral evaluation.²²⁴ The legislation for the New South Wales Consumer, Trader and Tenancy Tribunal is in similar terms,²²⁵ but there the tribunal is directed also to promote conciliation²²⁶ and may conduct preliminary conferences.²²⁷

215 Section 34A(1).

216 Section 34C(1).

217 Section 34C(2).

218 Section 34D.

219 Section 34E.

220 Section 34F.

221 Section 34G.

222 Section 34H.

223 *Administrative Decisions Tribunal Act 1997* (NSW), part 4 of chapter 6.

224 Section 103.

225 *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW), part 5.

226 Section 54.

227 Section 55.

The legislation for the Queensland tribunal has first-generation provisions for ADR in the form of compulsory conferences²²⁸ and mediation.²²⁹

In my view, the second-generation provisions in the Commonwealth legislation deals most effectively with this subject. This could be used as the model for new provisions in Victoria.

In the consideration of any new provisions for ADR in VCAT's home legislation, I recommend the following principles should be taken into account:

- the various known forms of ADR should be listed, without defining those forms
- there should be provision to add additional forms by regulation or in the tribunal's rules
- the tribunal should be empowered to apply a form of ADR to the resolution of the dispute, as may be required in a given case
- ADR should be subject to the general control and direction of the president
- members (including judicial members) should be authorised to conduct ADR, as well as persons engaged by the tribunal for this purpose
- all ADR providers at the tribunal should be appropriately qualified
- the president should have the power and authority to direct that appropriate steps be taken for the management of ADR at the tribunal, including the appointment of contract ADR providers
- the president should have the power to appoint a vice-president to the position of ADR judge, and a member to the position of principal mediator

Recommendation 73 **The role of ADR in the legislation should be significantly upgraded, in line with the importance of this means of resolving disputes in the tribunal in the modern age.**

(5) ADR initiatives

(a) Innovating in ADR

The tribunal has been very innovative in ADR. I offer the following recommendations and suggestions in that spirit.

(b) Early intervention (swat) mediation

My consultations in country Victoria revealed a potential for resolving disputes quickly by early intervention mediation. The potential exists across all jurisdictions and everywhere in Victoria. It could be piloted, however, in planning and environment cases in the country. I so recommend.

Here is the concept (which I call 'swat' mediation):

- the tribunal and local councils agree on general criteria for selecting cases for early mediation and the procedures for carrying that mediation out (there would need to be consultation with the professions)
- the local council selects suitable cases for early mediation, preferably within a few weeks of the application being commenced in the tribunal, and notifies the tribunal
- the tribunal then screens the case to ensure it is suitable for and ready for early mediation (this may involve talking with the parties)
- if suitable, the tribunal then seeks the consent of the parties to an early mediation process

228 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 67.

229 Section 75.

- if the parties consent, the tribunal sends a mediator quickly to the locality of the dispute to conduct the mediation

Swat mediation attracted strong support in the consultation process, both in the country and in the city.

The benefits of this kind of mediation are that the dispute might be resolved quickly before positions harden. The mediation process is consensual and involves local council, the permit applicant and any objectors. This would help to attack the problem of delay in resolving applications in the country.

The resources needed to support the project would be additional sessional members or mediators to carry out the early mediations. That the planning and environment list presently only uses members to conduct mediations is an issue that will need to be considered. Early intervention mediation must operate quickly and flexibly to be successful. However, sufficient expertise is also an important consideration.

Recommendation 74 **The government should consider supporting a pilot project implementing early intervention (swat) mediation in planning and environment cases in country Victoria.**

(c) Telephone mediation

There are many examples of highly successful telephone mediation programs. The best known is the telephone mediation of residential tenancies disputes in New Zealand and the mediation of civil disputes conducted by Consumer Affairs Victoria in Melbourne. Both have developed telephone mediation into an expert technique of dispute resolution.

The members of the tribunal believe there is high potential for telephone mediation in residential tenancies disputes in the tribunal. Such mediation would likely increase the participation of tenants in the tribunal's processes of dispute resolution. They are presently under-represented. Their physical attendance at the tribunal would not be required. All they would need is access to a telephone. There is similar potential in small claims cases in the civil claims list.

I recommend the government support a pilot program for carrying out telephone mediation in the residential tenancies list of the tribunal, to be extended (if successful) to small claims in the civil claims list and other cases in the tribunal if appropriate.

Recommendation 75 **The government should support a pilot program for carrying out telephone mediation in the residential tenancies list of the tribunal, to be extended (if successful) to small claims in the civil claims list and other cases in the tribunal if appropriate.**

(d) Self-help negotiation

Many people are capable of resolving disputes themselves, but need help to understand how to go about it.

The tribunal's upgraded website should include advice and information on conducting effective negotiations. I so recommend.

Recommendation 76 **The tribunal's upgraded website should include advice and information on conducting effective self-help negotiations.**

(e) Roving mediation

The idea of 'roving mediation' is that, in busy lists, offering mediation on the day can result in the settlement of many cases which have not previously been mediated. This is especially warranted for some residential

tenancies and small claims cases for which mediation is not separately offered. It is strongly supported by the members of the tribunal.

The system would operate such that, rather than making fixed appointments for a mediation, the tribunal would simply make mediators available to anyone who wishes to use them on the day of the hearing.

The tribunal successfully employed this concept in its recent blitz days in the civil claims list. I observed roving mediators in action in the Landlord and Tenant Board in Ontario, Canada and the Consumer, Trader and Tenancy Tribunal in Sydney, New South Wales.

The tribunal should, where possible, make mediation available on the day of hearings to all willing parties (roving mediation).

Recommendation 77 **The tribunal should, where possible, make mediation available on the day of hearings to all willing parties.**

O TIMELINESS

Timeliness is a fundamental objective of the tribunal. Delay causes great individual, social and economic cost. The tribunal needs to become a delay-intolerant institution.

As I have noted, delay featured strongly in the criticisms made in the consultation process. I have made many recommendations in this report which should result in timeliness being improved.

There is a tendency to approach the problem of delay as one to be addressed when it becomes urgent, rather than continuously. Consistently listing and deciding cases in a timely way in a high volume tribunal with diverse jurisdictions requires leadership and management. It is here that I want to make an additional contribution.

Achieving best practice in timeliness first requires business systems which produce the right and correct data. Only by this means can files and decision-making be tracked and assessed against performance standards set by the tribunal's leadership. Data input is a critical step which is sometimes overlooked. The tribunal is working on its business systems to ensure it obtains the right and best data to support its performance objectives in regard to timeliness. I have made recommendations in this regard.

The timeliness of both members and staff is a proper subject for performance management. As to staff, the tribunal has started to use time-based milestones to monitor areas of untimely performance. As to members, the recommendations I make for competency-based continuing education and training, performance management and member support should result in best practice being achieved over time in this area.

I do make clear here that the performance management I envisage for the tribunal's members will include the issue of timely production of decisions and, in cases where that is relevant, the reduction of decisions outstanding. The usual action required where this becomes a serious problem is relieving the member of their usual adjudicative and other duties so that satisfactory progress can be made. This subject needs to be handled sensitively in discussions between the member concerned and their head of list or the president.

Building member capacity in decision writing and giving oral reasons, and better member support, is an important part of the solution. I have made several recommendations about those subjects in this report.

Finally, the tribunal does not currently benchmark its performance against other tribunals or courts. Doing so would provide a point of comparison and enable the tribunal to learn from the experience of other justice institutions. I therefore recommend that the tribunal participate in performance benchmarking with other tribunals and courts, using a framework and standards which are appropriate for a civil and administrative tribunal.

Recommendation 78 **The tribunal should participate in performance benchmarking with other tribunals and courts, such as that which is available under the International Courts Benchmarking Program.**

P CONCLUSION

This report contains an extensive examination of the access, operational and jurisdictional issues specified in the terms of reference and was prepared after extensive consideration.

In part one, I evaluate the performance of the tribunal in its first decade. In part two, I envision the tribunal in the next decade.

My fundamental conclusion is that VCAT has soundly proved the worth of the amalgamated tribunal model which it uniquely established in 1998, but its legislation and operations need a thorough overhaul if it is to face the demands of the modern age.

APPENDIX 1: TERMS OF REFERENCE

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

APPENDIX 2: VCAT'S JURISDICTIONAL GROWTH 1998 – 2009²³⁰

A JURISDICTIONS ON ESTABLISHMENT 1998

ADMINISTRATIVE DIVISION		
Accident Compensation Act 1985	Freedom of Information Act 1982	Planning and Environment Act 1987
Adoption Act 1984	Gaming No. 2 Act 1997	Plant Health and Plant Products Act 1995
Agricultural and Veterinary Chemicals (Control of Use) Act 1992	Gift Duty Act 1971	Podiatrists Registration Act 1997
Architects Act 1991	Health Act 1958	Prevention of Cruelty to Animals Act 1986
Barley Marketing Act 1993	Health Services Act 1988	Private Agents Act 1996
Biological Control Act 1986	Heritage Act 1995	Probate Duty Act 1962
Births, Deaths and Marriages Act 1996	Hospitals Superannuation Act 1988	Professional Boxing and Martial Arts Act 1985
Business Franchise Acts	Industrial and Provident Societies Act 1958	Prostitution Control Act 1994
Catchment and Land Protection Act 1994	Infertility Treatment Act 1995	Public Transport Competition Act 1995
Children and Young Persons Act 1989	Land Acquisition and Compensation Act 1986	Second-Hand Dealers and Pawnbrokers Act 1989
Chiropractors Registration Act 1996	Land Tax Act 1958	Stamps Act 1958
Community Services Act 1970	Liquor Control Reform Act 1998	State Employees Retirement Benefits Act 1979
Conservation, Forests and Lands Act 1987	Litter Act 1987	State Superannuation Act 1988
Consumer Credit (Victoria) Act 1995	Livestock Disease Control Act 1994	Subdivision Act 1988
Country Fire Authority Act 1958	Local Authorities Superannuation Act 1988	Superannuation (Portability) Act 1989
Dairy Industry Act 1992	Local Government Act 1989	Taxation Administration Act 1997
Dangerous Goods Act 1985	Lotteries Gaming and Betting Act 1966	Tertiary Education Act 1993
Debits Tax Act 1990	Marine Act 1988	The Constitution Act Amendment Act 1958
Domestic (Feral and Nuisance) Animals Act 1994	Meat Industry Act 1993	Therapeutic Goods (Victoria) Act 1994
Drugs, Poisons and Controlled Substances (Amendment) Act 1997	Medical Practice Act 1994	Trade Measurement Act 1994
Education Act 1958	Mental Health Act 1986	Transport Accident Act 1986
Emergency Management Act 1986	Metropolitan Fire Brigades Act 1958	Transport Act 1983
Emergency Services Superannuation Act 1986	Mildura College Lands Act 1916	Transport Superannuation Act 1988
Environment Protection Act 1970	Mineral Resources Development Act 1990	Travel Agents Act 1986
Equipment (Public Safety) Act 1994	Motor Car Traders Act 1986	Valuation of Land Act 1960
Estate Agents Act 1980	Nurses Act 1993	Veterinary Practice Act 1997
Extractive Industries Development Act 1995	Occupational Health and Safety Act 1985	Victims of Crime Assistance Act 1996
Farm Produce Wholesale Act 1990	Optometrists Registration Act 1996	Victoria State Emergency Service Act 1987
Finance Brokers Act 1969	Osteopaths Registration Act 1996	Victorian Plantations Corporation Act 1993
Financial Institutions Duty Act 1982	Parliamentary Salaries and Superannuation Act 1968	Vocational Education and Training Act 1990
Firearms Act 1996	Pay-Roll Tax Act 1971	Water Act 1989
Flora and Fauna Guarantee Act 1988	Pipelines Act 1967	Water Industry Act 1994

230 Source: VCAT Annual Reports, 1998-1999 – 2008-2009.

CIVIL DIVISION		
Building Act 1993	Fair Trading Act 1999	Residential Tenancies Act 1997
Chattel Securities Act 1987	Guardianship and Administration Act 1986	Retail Tenancies Reform Act 1998
Consumer Credit (Victoria) Act 1995	House Contracts Guarantee Act 1987	Small Claims Act 1973
Credit (Administration) Act 1984	Instruments Act 1958	Subdivision Act 1988
Credit Act 1984	Medical Treatment Act 1988	Trustee Companies Act 1984
Domestic Building Contracts Act 1995	Mental Health Act 1986	Water Act 1989
Equal Opportunity Act 1995	Motor Car Traders Act 1986	Water Industry Act 1994
Estate Agents Act 1980		

B ADDITIONAL JURISDICTIONS 1999-2000 and 2000-2001

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Children's Services Act 1996		
First Home Owners Grant Act 2000		
Physiotherapists Registration Act 1998		
Road Transport (Dangerous Goods) Act 1995		
Wildlife Act 1975		

C ADDITIONAL JURISDICTIONS 2001-2002

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Health Records Act 2001		Equal Opportunity Act 1995
Information Privacy Act 2002		Guardianship and Administration Act 1986
		Instruments Act 1958
		Medical Treatment Act 1988
		Mental Health Act 1986
		Trustee Companies Act 1984

D ADDITIONAL JURISDICTIONS 2002-2003

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Victorian Institute of Teaching Act 2001		Racial and Religious Tolerance Act 2001

E ADDITIONAL JURISDICTIONS 2003-2004

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Seafood Safety Act 2003		

F ADDITIONAL JURISDICTIONS 2004-2005

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Occupational Health and Safety Act 2004	Housing Act 1983	
	Legal Profession Act 2004	
	Retirement Villages Act 1986	

G ADDITIONAL JURISDICTIONS 2005-2006

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Health Professions Registrations Act 2005	Property Law Act 1958	
Working with Children Act 2005		

H ADDITIONAL JURISDICTIONS 2006-2007

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Aboriginal Heritage Act 2006	Disability Act 2006	Disability Act 2006
Disability Act 2006		
Electricity Safety Act 2006		
Owner Drivers and Forestry Contractors Act 2005		
Surveying Act 2004		
Private Security Act 2004		

I ADDITIONAL JURISDICTIONS 2007-2008

ADMINISTRATIVE DIVISION	CIVIL DIVISION	HUMAN RIGHTS DIVISION
Owners Corporation Act 2006	Owners Corporation Act 2006	
Education and Training Reform Act 2006		

J VCAT'S CONSOLIDATED JURISDICTIONS 2008-2009²³¹

ADMINISTRATIVE DIVISION		
Aboriginal Heritage Act 2006	Fisheries Act 1995	Public Health and Wellbeing Act 2008
Accident Compensation Act 1985	Flora and Fauna Guarantee Act 1988	Public Transport Competition Act 1995
Adoption Act 1984	Freedom of Information Act 1982	Racing Act 1958
Agricultural and Veterinary Chemicals (Control of Use) Act 1992	Fundraising Appeals Act 1998	Rail Safety Act 2006
Architects Act 1991	Gambling Regulation Act 2003	Relationships Act 2008
Associations Incorporation Act 1981	Gas Safety Act 1997	Road Management Act 2004
Biological Control Act 1986	Health Act 1958	Road Transport (Dangerous Goods) Act 1995
Births, Deaths and Marriages Registration Act 1996	Health Professions Registration Act 2005	Second-Hand Dealers and Pawnbrokers Act 1989
Building Act 1993	Health Services Act 1988	Sports Event Ticketing (Fair Access) Act 2002
Business Franchise Acts	Heritage Act 1995;	State Employees Retirement Benefits Act 1979
Catchment and Land Protection Act 1994	Infertility Treatment Act 1995	State Superannuation Act 1988
Cemeteries and Crematoria Act 2003	Land Acquisition and Compensation Act 1986	Subdivision Act 1988
Children, Youth and Families Act 2005	Liquor Control Reform Act 1998	Superannuation (Portability) Act 1989
Children's Services Act 1996	Livestock Disease Control Act 1994	Surveying Act 2004
Conservation, Forests and Lands Act 1987	Local Government Act 1989	Taxation Administration Act 1997
Consumer Credit (Victoria) Act 1995	Marine Act 1988	Therapeutic Goods (Victoria) Act 1994
Co-operatives Act 1996	Meat Industry Act 1993	Trade Measurement Act 1995
Country Fire Authority Act 1958	Melbourne and Metropolitan Board of Works Act 1958	Transport Accident Act 1986
Dangerous Goods Act 1985	Metropolitan Fire Brigades Act 1958	Transport Act 1983
Disability Act 2006	Mildura College Lands Act 1916	Transport Superannuation Act 1988
Domestic (Feral and Nuisance) Animals Act 1994	Mineral Resources (Sustainable Development) Act 1990	Travel Agents Act 1986
Drugs, Poisons and Controlled Substances Act 1981	Motor Car Traders Act 1986	Unclaimed Money Act 2008
Education and Training Reform Act 2006	Occupational Health and Safety Act 2004	Utility Meters (Metrological Controls) Act 2002

231 Including VCAT (Amendment No 1) Rules 2009 and VCAT (Lists Amendment) Rules 2009 (not commenced at publication).

ADMINISTRATIVE DIVISION		
Electoral Act 2002	Owner Drivers and Forestry Contractors Act 2005	Valuation of Land Act 1960
Electricity Safety Act 1998	Owners Corporations Act 2006	Veterinary Practice Act 1997
Emergency Management Act 1986	Parliamentary Salaries and Superannuation Act 1968	Victims of Crime Assistance Act 1996
Emergency Services Superannuation Act 1986	Pipelines Act 2005	Victoria State Emergency Service Act 2005
Environment Protection Act 1970	Planning and Environment Act 1987	Victorian Plantations Corporation Act 1993
Equipment (Public Safety) Act 1994	Plant Health and Plant Products Act 1995	Victorian Qualifications Authority Act 2000
Estate Agents Act 1980	Prevention of Cruelty to Animals Act 1986	Water Act 1989
Extractive Industries Development Act 1995	Private Security Act 2004	Water Industry Act 1994
Firearms Act 1996	Professional Boxing and Combat Sports Act 1985	Wildlife Act 1975
First Home Owner Grant Act 2000	Prostitution Control Act 1994	Working with Children Act 2005

CIVIL DIVISION		
Building Act 1993	Fair Trading Act 1999	Property Law Act 1958
Chattel Securities Act 1987	House Contracts Guarantee Act 1987	Residential Tenancies Act 1997
Credit Act 1984	Housing Act 1983	Retail Leases Act 2003
Credit (Administration) Act 1984	Landlord and Tenant Act 1958	Retirement Villages Act 1986
Consumer Credit (Victoria) Act 1995	Legal Profession Act 2004	Sale of Land Act 1962
Disability Act 2006	Motor Car Traders Act 1986	Subdivision Act 1988
Domestic Building Contracts Act 1995	Owner Drivers and Forestry	Water Act 1989
Estate Agents Act 1980	Owners Corporations Act 2006	Water Industry Act 1994

HUMAN RIGHTS DIVISION		
Assisted Reproductive Treatment Act 2008	Health Records Act 2001	Mental Health Act 1986
Disability Act 2006	Information Privacy Act 2000	Public Health and Wellbeing Act 2008
Equal Opportunity Act 1995	Instruments Act 1958	Racial and Religious Tolerance Act 2001
Guardianship and Administration Act 1986	Medical Treatment Act 1988	Trustee Companies Act 1984

APPENDIX 3: VCAT'S CASE INITIATIONS 1998 – 2009²³²

LIST	1998 – 1999	1999 – 2000	2000 – 2001	2001 – 2002	2002 – 2003	2003 – 2004	2004 – 2005	2005 – 2006	2006 – 2007	2007 – 2008	2008 – 2009
ADMINISTRATIVE DIVISION											
General	1,927	1,429	1,372	1,537	1,843	1,465	1,087	870	856	921	1,047
Taxation ²³³	20									26	8
Land valuation	62	26	145	182	124	98	209	94	70	99	289
Planning and environment	2,802	3,092	3,138	3,349	3,271	3,702	3,515	3,542	3,250	3,640	3,643
Occupational and business regulation	146	139	106	107	137	144	113	109	139	341	302
DIVISIONAL TOTAL	4,957	4,686	4,761	5,175	5,375	5,409	4,924	4,615	4,315	5,027	5,289
CIVIL DIVISION											
Civil claims	2,518	3,835	5,243	5,124	5,109	5,131	6,488	6,855	8,043	8,975	11,545
Credit	328	110	94	77	103	182	236	215	300	379	552
Domestic building	911	855	1,036	829	866	839	825	831	825	756	898
Legal practice								98	291	329	200
Real property	31	23	31	31	35	43	71	67	175	173	154
Residential tenancies	59,234	68,588	71,541	69,191	66,216	64,213	65,950	66,302	65,453	61,089	56,010
Retail tenancies	157	199	203	215	222	161	197	170	226	205	264
DIVISIONAL TOTAL	63,179	73,610	78,148	75,467	72,551	70,569	73,767	74,538	75,313	71,906	69,623
HUMAN RIGHTS DIVISION											
Anti-discrimination	415	519	497	469	464	481	433	451	361	340	303
Guardianship	5,764	8,953	9,036	8,743	8,717	9,896	9,333	9,346	10,229	9,698	10,778
DIVISIONAL TOTAL	6,179	9,472	9,533	9,212	9,181	10,377	9,766	9,797	10,590	10,038	11,081
WHOLE OF TRIBUNAL											
TRIBUNAL TOTAL	74,315	87,768	92,442	89,854	87,107	86,355	88,457	88,950	90,218	86,971	85,993

232 Source: VCAT Annual Reports 1998-1999 – 2008-2009 (descriptions reflect current list and divisional allocations).

233 Taxation list statistics/general list statistics combined in the years 1999-2000 to 2006-2007.

APPENDIX 4: VCAT'S CASE FINALISATIONS 1998 – 2009²³⁴

LIST	1998 – 1999	1999 – 2000	2000 – 2001	2001 – 2002	2002 – 2003	2003 – 2004	2004 – 2005	2005 – 2006	2006 – 2007	2007 – 2008	2008 – 2009
ADMINISTRATIVE DIVISION											
General	2,843	2,064	1,596	1,234	1,620	1,953	1,293	962	774	790	784
Taxation ²³⁵							66	32	26	12	24
Land valuation	157	24	51	136	187	119	90	118	190	79	179
Planning and environment	2,695	3,154	3,056	2,988	3,448	3,828	3,544	3,602	3,233	3,324	3,341
Occupational and business regulation	45	103	161	114	106	141	119	119	133	188	348
DIVISIONAL TOTAL	5,740	5,345	4,864	4,472	5,361	6,041	5,112	4,833	4,356	4,393	4,676
CIVIL DIVISION											
Civil claims	3,108	3,223	5,007	4,935	4,835	5,610	6,137	6,554	7,414	8,855	9,430
Credit	383	182	134	81	139	166	231	225	278	380	526
Domestic building	892	817	829	965	859	847	826	900	892	813	790
Legal practice								125	249	328	237
Real property	37	27	22	34	35	44	45	57	145	154	190
Residential tenancies	57,500 ²³⁶	67,978	71,621	67,843	68,103	65,050	66,244	66,495	65,201	60,772	53,989
Retail tenancies	122	157	202	221	227	157	184	171	212	198	238
DIVISIONAL TOTAL	62,042²³⁷	72,384	77,815	74,079	74,198	71,874	73,667	74,527	74,391	71,500	65,400
HUMAN RIGHTS DIVISION											
Anti-discrimination	490	497	483	508	482	491	451	369	477	324	331
Guardianship	5,899	9,036	8,357	9,328	8,762	9,607	9,331	9,746	9,835	10,696	10,779
DIVISIONAL TOTAL	6,389	9,533	8,840	9,836	9,244	10,098	9,782	10,115	10,312	11,020	11,110
WHOLE OF TRIBUNAL											
TRIBUNAL TOTAL	74,225	87,262	91,519	88,387	88,803	88,013	88,561	89,475	89,059	86,913	81,186

234 Source: VCAT Annual Reports 1998-1999 – 2008-2009 (descriptions reflect current list and divisional allocations).

235 Taxation list statistics/ general list statistics combined in the years 1998-1999 to 2003-2004.

236 Residential tenancies statistics for 1998-1999 record the minimum number of cases finalised in the list.

237 Civil division statistical total for 1998-1999 records the minimum number of cases finalised in the division.

APPENDIX 5: PRESIDENT'S REVIEW PUBLIC CONSULTATIONS

A REGIONAL CONSULTATIONS

Mildura	
16 April 2009	<p>Mildura Rural City Council Attendees: Seven representatives of the council, including councillors, senior administration and staff from the planning department Location: Council Chambers, Mildura Rural City Council, 180-190 Deakin Avenue, Mildura</p>
	<p>North West Law Association Attendees: Five members of the law association representing law firms in the Mildura region Location: Mildura Magistrates' Court, 56 Deakin Avenue, Mildura</p>
	<p>Mildura Magistrates' Court Attendees: Tour of court room facilities with the local registrar Location: Mildura Magistrates' Court, 56 Deakin Avenue, Mildura</p>
	<p>Mildura community forum Attendees: Thirteen members of the local community, including representatives of welfare and community interest groups, local businesses and VCAT users Location: Mildura Function Centre, Mildura Recreation Reserve, Mildura</p>
Ballarat	
27 April 2009	<p>Ballarat Magistrates' Court Attendees: Tour of court room facilities with the local registrar Location: Ballarat Magistrates' Court, 100 Grenville Street South, Ballarat</p>
	<p>Consumer Affairs Victoria Attendees: Four staff and conciliation officers of the local CAV office, the Grampians region executive officer of the Regional Aboriginal Justice Advisory Committee and a local community welfare organisation representative Location: CAV office, 11 Sturt Street, Ballarat</p>
	<p>PACT Community Support Attendees: Four representatives of PACT, including case workers, advocates and senior administration Location: PACT Community Support, 1/15 Main Street, Ballarat</p>
	<p>Ballarat community forum Attendees: Thirty-six members of the local community, including representatives of welfare, community interest and professional groups, local businesses and VCAT users Location: North Ballarat Football Club, Creswick Road, Ballarat</p>
28 April 2009	<p>Ballarat community roundtable Attendees: Eleven representatives of local welfare and community organisations, including Uniting Care Ballarat, Centacare, Ballarat Health Service and PACT Community Support Location: Centacare Ballarat, 1220 Sturt Street, Ballarat</p>
	<p>City of Ballarat Council Attendees: Six representatives of the council, including councillors, senior administration and staff from the planning department Location: Craig's Hotel, Lydiard Street, Ballarat</p>
Bendigo	
29 April 2009	<p>City of Greater Bendigo Council Attendees: Seven representatives of the council, including councillors, senior administration and staff from the planning and city strategy departments Location: City of Greater Bendigo Council Offices, 195 Lyttleton Terrace, Bendigo</p>
	<p>Bendigo Magistrates' Court Attendees: Tour of court room facilities with the local senior registrar Location: Bendigo Magistrates' Court, 71 Pall Mall, Bendigo</p>
	<p>Consumer Affairs Victoria Attendees: Three staff and conciliation officers of the local CAV office Location: CAV office, 60 Mitchell Street, Bendigo</p>

	<p>Bendigo Law Association Attendees: Eight to ten members of the law association representing law firms and community legal advocates in the Bendigo region Location: Loddon Campaspe Community Legal Centre, 29 Queen Street, Bendigo</p> <p>Bendigo community roundtable Attendees: Seven representatives of local welfare and community organisations, including St Luke's Anglicare, Loddon Mallee Housing, Women's Health Loddon Mallee, EASE and the Advocacy and Rights Centre Location: City of Greater Bendigo Council Offices, 195 Lyttleton Terrace, Bendigo</p> <p>Bendigo community forum Attendees: Thirty-three members of the local community, including representatives of welfare, community interest and professional groups, local businesses and VCAT users Location: Capital Theatre, Bendigo's Performing Arts Centre, 50 View Street, Bendigo</p>
Shepparton	
30 April 2009	<p>Shepparton Magistrates' Court Attendees: Tour of court room facilities with the local senior registrar Location: Shepparton Law Courts, High Street, Shepparton</p> <p>Greater Shepparton City Council Attendees: Eight representatives of the council, including councillors, senior administration and staff from the planning department Location: Greater Shepparton City Council, 90 Welsford Street, Shepparton</p> <p>Shepparton community forum Attendees: Thirty-four members of the local community, including representatives of welfare, community interest and professional groups, local businesses and VCAT users Location: Goulburn Valley Hotel, 223 High Street, Shepparton</p>
1 May 2009	<p>Goulburn Valley Law Association Attendees: Three members of the law association representing law firms in the Shepparton region Location: Dawes & Vary Solicitors, 159 Welsford Street, Shepparton</p> <p>Shepparton community roundtable Attendees: Four representatives of local welfare and community organisations, including Goulburn Valley Health, the Regional Information and Advocacy Council and the Goulburn Valley Community Health Service Location: Goulburn Valley Community Health Service, 399 Wyndham Street, Shepparton</p>
Geelong	
14 May 2009	<p>Geelong community forum Attendees: Sixty-eight members of the local community, including representatives of welfare, community interest and professional groups, local businesses and VCAT users Location: Geelong Conference Centre, Adams Court, Eastern Park, East Geelong</p>
15 May 2009	<p>City of Greater Geelong Council Attendees: Three representatives of the council, including councillors and staff from the planning department Location: Geelong City Hall, 30 Gheringhap Street, Geelong</p> <p>Geelong community roundtable Attendees: Five representatives of local welfare and community organisations, including Diversitat, Bethany Community Support and the Salvation Army Social Housing Service Location: Bethany Community Support, 1 Gibb Street, North Geelong</p> <p>Consumer Affairs Victoria Attendees: Three staff and conciliation officers of the local CAV office Location: CAV office, 65 Gheringhap Street, Geelong</p> <p>Geelong Law Association Attendees: Seven members of the law association representing law firms and community legal advocates in the Geelong region Location: Geelong Law Courts, Railway Terrace, Geelong</p> <p>Geelong Magistrates' Court Attendees: Tour of court room facilities with the local senior registrar and the permanent VCAT clerk Location: Geelong Law Courts, Railway Terrace, Geelong</p>
Morwell	
19 May 2009	<p>Latrobe City Council Attendees: Six representatives of the council, including councillors, senior administration and staff from the planning department Location: Latrobe City Council, 141-150 Commercial Road, Morwell</p>

	<p>Morwell community roundtable Attendees: Eleven representatives of local welfare and community organisations, including Latrobe Community Health Service, Gippsland Multicultural Services, Gippsland Disability Advocacy, Anglicare Victoria, Aboriginal Family Violence Prevention and Legal Service, and Gippsland Community Legal Service Location: Latrobe Community Health Service, 81-85 Buckley Street, Morwell</p>
	<p>Latrobe Magistrates' Court Attendees: Tour of court room facilities with the local senior registrar Location: Latrobe Valley Law Courts, 134 Commercial Street, Morwell</p>
	<p>Consumer Affairs Victoria Attendees: Two staff and conciliation officers of the local CAV office Location: Morwell Justice Service Centre, 25 Ann Street, Morwell</p>
	<p>Gippsland Law Association Attendees: Seven members of the law association representing law firms in the Gippsland region Location: Victoria Legal Aid, corner Chapel and George Streets, Morwell</p>
	<p>Morwell community forum Attendees: Forty-nine members of the local community, including representatives of welfare, community interest and professional groups, local businesses and VCAT users Location: GippsTAFE Waratah Training Restaurant, corner Princes Drive and Monash Way, Morwell</p>

B GREATER METROPOLITAN MELBOURNE CONSULTATIONS

Melbourne CBD	
11 May 2009	<p>Melbourne CBD community forum Attendees: One hundred and twelve members of the public, including representatives of welfare and community interest groups, local businesses, professionals, advocates and VCAT users Location: Citigate Melbourne, 270 Flinders Street, Melbourne</p>
Dandenong	
29 July 2009	<p>Greater Dandenong City Council Attendees: Five representatives of the council, including councillors, senior administration and staff from the planning department Location: Greater Dandenong City Council, 397-405 Springvale Road, Springvale</p> <p>Dandenong community forum Attendees: Forty-five members of the Dandenong community and surrounds, including representatives of welfare and community interest groups, local businesses and VCAT users Location: Paddy O'Donoghue Centre, 18-34 Buckley Street, Noble Park</p>
Frankston	
30 July 2009	<p>Mornington Peninsula Shire Council Attendees: Fifteen representatives of the council, including councillors, senior administration and staff from the planning and sustainable communities departments Location: Mornington Peninsula Shire Council, 90 Besgrove Street, Rosebud</p> <p>Frankston City Council Attendees: Six representatives of the council, including councillors, senior administration and staff from the planning and communities departments Location: Frankston City Council, Civic Centre, corner Young and Davey Streets, Frankston</p> <p>Frankston community forum Attendees: Eighty-five members of the Frankston and Mornington Peninsula communities, including representatives of welfare and community interest groups, local businesses, professionals, advocates and VCAT users Location: Frankston Arts Centre, corner Young and Davey Streets, Frankston</p>
Ringwood	
4 August 2009	<p>Maroondah City Council Attendees: Ten representatives of the council, including councillors, senior administration and staff from the planning department Location: Maroondah City Council, City Civic Centre, Braeside Avenue, Ringwood</p> <p>Ringwood community forum Attendees: Forty-three members of the Ringwood community and surrounds, including representatives of welfare and community interest groups, local businesses and VCAT users Location: Karrylyka Centre, Mines Road, Ringwood East</p>

Reservoir	
5 August 2009	<p>Darebin City Council Attendees: Seven representatives of the council, including councillors, senior administration and staff from the planning, community and culture, and aged and disability services departments; also attending the meeting were three visiting mayors from the Whittlesea City Council, Banyule City Council and Yarra City Council Location: Darebin City Council, 350 High Street, Preston</p> <p>Reservoir community forum Attendees: Twenty-two members of the Reservoir community and surrounds, including representatives of welfare and community interest groups, local businesses and VCAT users Location: Oakhill Community Centre, corner Acheron Avenue and North Road, Reservoir</p>
Footscray	
6 August 2009	<p>Maribyrnong City Council Attendees: Eleven representatives of the council, including councillors, senior administration and staff from the planning, sustainable development, and community planning and advocacy departments Location: Maribyrnong City Council, Council Offices, corner Hyde and Napier Streets, Footscray</p> <p>Footscray community forum Attendees: Eighteen members of the Footscray community and surrounds, including representatives of welfare and community interest groups and VCAT users Location: Footscray Church Hall, 10a Hyde Street, Footscray</p>
Werribee	
11 August 2009	<p>Wyndham City Council Attendees: Nine representatives of the council, including councillors, senior administration and staff from the planning department Location: Wyndham City Council, Civic Offices, 45 Princes Highway, Werribee</p> <p>Werribee community forum Attendees: Eighteen members of the Werribee community and surrounds, including representatives of welfare and community interest groups and VCAT users Location: Iramoo Community Centre, 84 Honour Avenue, Wyndham Vale</p>

C GENERAL STAKEHOLDER CONSULTATION MEETINGS

24 March 2009	<p>President's review luncheon Attendees: Fifteen guests representing Consumer Affairs Victoria, Law Institute of Victoria, Victorian Law Reform Commission, Victorian Equal Opportunity and Human Rights Commission, Master Builders Association of Victoria, Office of the Public Advocate, Victoria Legal Aid and the Victorian Bar Council Location: RACV Club, 501 Bourke Street, Melbourne</p>
13 May 2009	<p>Victorian Planning and Environment Law Association Attendees: Twenty board members and invited guests of the Victorian Planning and Environment Law Association, representing planning and environment legal practitioners, planning consultants and local and state government planning authorities Location: Urbis, Level 10, 120 Collins Street, Melbourne</p>
21 May 2009	<p>Law Institute of Victoria Attendees: Twenty committee members and staff of the Law Institute of Victoria, representing the Institute's committees with respect to courts practice, administrative review and constitutional law, government lawyers, access to justice, discrimination, disability law, elder law, litigation and leases; the meeting was chaired by the LIV president Location: Law Institute of Victoria, 470 Bourke Street, Melbourne</p>
14 July 2009	<p>Planning Backlash Attendees: Thirty members of Planning Backlash, representing a coalition of over 150 resident and community groups from Melbourne and country and coastal Victoria Location: Oaks on Collins, 480 Collins Street, Melbourne</p>
20 July 2009	<p>Planning Institute of Australia Attendees: Fifty members and guests of the Planning Institute of Australia, representing planning and environment legal practitioners, planning consultants, property development interests and local and state government planning authorities Location: Mallesons Stephen Jacques, 600 Bourke Street, Melbourne</p>
24 September 2009	<p>Master Builders Association of Victoria Attendees: Six representatives of the Master Builders Association of Victoria, including senior administration, the MBA housing and VCAT review action committees, and the policy and legal divisions of the association Location: Master Builders Association, 332 Albert Street, East Melbourne</p>

APPENDICES

13 October 2009	The Victorian Bar Attendees: Four representatives of the Victorian Bar Council; the meeting was chaired by the council's chairperson Location: Owen Dixon Chambers, 205 William Street, Melbourne
15 October 2009	Inner South Metropolitan Mayors Forum Attendees: Sixteen mayors and CEOs of councils forming the Inner South Metropolitan Mayors Forum; councils included the Cities of Bayside, Boroondara, Glen Eira, Kingston, Melbourne, Port Phillip, Stonnington and Yarra Location: Melbourne City Council, Melbourne Town Hall, Swanston Street, Melbourne
13 November 2009	VCAT members and mediators conference Attendees: One hundred (approximate) full time and sessional members and mediators of the tribunal Location: Intercontinental Hotel at the Rialto, 495 Collins Street, Melbourne

APPENDIX 6: LIST OF RECOMMENDATIONS

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PART ONE: EVALUATING THE FIRST DECADE

15	Recommendation 1	The heads of lists committee should be given statutory recognition as an advisory committee of the president.
15	Recommendation 2	The tribunal should have executive/strategic financial management capacity, while retaining its transactional/operational financial capacity.
16	Recommendation 3	The judicial leadership governance model of the tribunal and the president's responsibility for managing the tribunal in every respect should not be changed.
16	Recommendation 4	There should be no change to the president being a Supreme Court judge.
25	Recommendation 5	There should be a Koori liaison officer at the tribunal.
25	Recommendation 6	There should be a feasibility study on establishing a 'Koori tribunal' within the tribunal.
27	Recommendation 7	The tribunal should have a community education officer.
27	Recommendation 8	The tribunal should have a statutory community legal education objective.
27	Recommendation 9	The government should afford greater priority to relocating the tribunal to a more suitable building.
28	Recommendation 10	The tribunal should have four research associates working in a pool to support members.
28	Recommendation 11	The deputy presidents responsible for the five major lists or list clusters should be supported by five personal assistants. The personal assistants should be available to assist other deputy presidents when required.
28	Recommendation 12	Tribunal members should be provided with copies of the legislation relevant to their work, which should be updated at the tribunal's expense.
29	Recommendation 13	In the administration and operation of the tribunal in the next ten years, there should be much greater emphasis on functional integration and operational unity, not just on institutional amalgamation.
29	Recommendation 14	The information systems of the tribunal should be upgraded to enable it to provide interested parties with objective anonymised statistical information about the classes of cases before it, and to provide information about the processing steps taken to manage applications, timeliness, ADR, listings and determinations etc.
29	Recommendation 15	The tribunal should develop a protocol for the provision of such information to interested parties, including government, business, researchers and community organisations.
31	Recommendation 16	The tribunal should establish a concierge service in the reception area.
31	Recommendation 17	The government should support a pilot project implementing integrated case officer management in the administration of the tribunal.

- 31** Recommendation 18 The tribunal should have a new logo to represent unity, refresh the tribunal's image in the public's eye and announce the commencement a new phase in the tribunal's evolution. The tribunal's stationary, forms, documents, signage and website should be overhauled accordingly.
- 32** Recommendation 19 The tribunal should have a communications strategy through which the tribunal can project its role to, and engage with, the community.
- 32** Recommendation 20 The name of the tribunal should not be changed.
- 32** Recommendation 21 Every hearing of a case at the tribunal, including when it sits on circuit, should be recorded.
- 32** Recommendation 22 Access to the recording should usually be as of right, for a small fee.
- 32** Recommendation 23 The tribunal should upgrade the recording system used at its CBD office to address deficiencies relating to inadequacy of the recording equipment and the difficulty of editing poor-quality transcripts to ensure they are accurate. The government should support that upgrade.
- 40** Recommendation 24 The current principles by which the tribunal acquires new administrative jurisdiction are appropriate and should not be changed.
- 40** Recommendation 25 The current principles by which the tribunal acquires new civil jurisdiction are appropriate and should not be changed.
- 42** Recommendation 26 The tribunal should be provided with assistance to devise a formula for identifying the cost of additional resources for new jurisdictions.
- 42** Recommendation 27 The process for conferring new jurisdictions on the tribunal should be systematic and follow sound principles and procedures, such as those specified in the report.
- 44** Recommendation 28 The Fair Trading Act 1999 should be amended to allow the supplier in a small civil claim to issue proceedings in the tribunal, which would, on lodgement of the amount in dispute, result in the tribunal hearing and determining the matter in the supplier's application.
- 45** Recommendation 29 The government should support the tribunal's examination of guardianship administration powers, processes, performance and related issues.
- 45** Recommendation 30 The government should provide funding for a deputy president to head the civil claims list.

PART TWO: ENVISIONING THE NEXT DECADE

- 48** Recommendation 31 The legislation should be thoroughly overhauled to enable the tribunal to meet the access, operational and jurisdictional demands of the modern age. The legislation should be taken from 'first-generation' legislation to 'second-generation' legislation.
- 49** Recommendation 32 The legislation should be amended to include objects and functions provisions that explicitly state the expectations of the Victorian Parliament for the institution in every respect.
- 49** Recommendation 33 The objects provision for the tribunal should include 'to promote equal access to justice'.

- 51** Recommendation 34 The legislation should be amended to make the president responsible for the management and administration of the tribunal.
- 52** Recommendation 35 The legislation should be amended to give the president broad powers in relation to the practice and procedure in the tribunal.
- 54** Recommendation 36 The legislation should be amended to give power to the president to establish competency-based support for members embracing induction, mentoring, performance management and appraisal and continuing education and training.
- 54** Recommendation 37 The merits of a member's suitability for appointment should be considered (among other things) against the tribunal's competencies. The merits of a member's suitability for reappointment should be considered (among other things) against the president's report of their performance under those competencies.
- 55** Recommendation 38 The legislation should be amended to give the tribunal a general power of reconsideration, subject to sensible limits, whether or not an internal appeal tribunal is established.
- 60** Recommendation 39 An appeal tribunal should be established within VCAT.
- 61** Recommendation 40 The legislation should be amended to allow a member to refer questions of law for determination by the president, subject to his or her approval.
- 62** Recommendation 41 Consideration should be given to conferring jurisdiction to issue guideline judgments on the tribunal.
- 62** Recommendation 42 The legislation should be amended to include developing a code of conduct for members and mediators in the president's functions of management.
- 63** Recommendation 43 The legislation should be amended to give the president statutory responsibility for developing a customer services charter for the tribunal.
- 63** Recommendation 44 The president should be given statutory responsibility for establishing a complaints system for members and mediators at the tribunal.
- 64** Recommendation 45 The present powers of the president to reconstitute the tribunal should be amended to give him or her a general power of reconstitution.
- 64** Recommendation 46 Members of the tribunal should be required to take an oath or affirmation of office, to reinforce and recognise the importance of their responsibilities in the public interest.
- 66** Recommendation 47 The government should support a project which would research and design continuing education and training for non-lawyer judicial officers, especially those at the tribunal, and especially its sessional members.
- 66** Recommendation 48 Funding should be made available to pay sessional members to attend the tribunal's annual one-day conference.
- 68** Recommendation 49 The statutory functions of the tribunal should include to 'maintain a cohesive organisational structure' (or some similar expression).
- 68** Recommendation 50 The statutory functions of the president should include 'developing a positive cohesive culture throughout the tribunal's organisation' (or similar words).

- 70** Recommendation 51 The current statutory restrictions on the availability of reasons for decision in the credit, civil claims and residential tenancies lists should be repealed.
- 70** Recommendation 52 There should be a statutory amendment, applying in all cases, that if oral reasons are given, a transcript of those reasons (which may be revised by the member) will, at the member's direction, stand as the reasons for decision and be available free of charge to the parties.
- 70** Recommendation 53 Consideration should be given to tribunal orders being enforced as orders of a court without being filed in a court.
- 72** Recommendation 54 The tribunal should be regionalised. There should be branch offices of the tribunal in outer-suburban Melbourne and country Victoria.
- 72** Recommendation 55 A community education and liaison officer should be employed in each branch office of the tribunal.
- 72** Recommendation 56 An outer-suburban and country branch office pilot for the tribunal should be established as soon as possible.
- 72** Recommendation 57 The government should establish a 'VCAT mobile' as a priority, to increase services in outer-suburban and regional areas.
- 73** Recommendation 58 There should be a project to identify how 'VCAT in a box' can be established and the cost-benefit of using staff and member resources in this way.
- 73** Recommendation 59 The VCAT website should be substantially upgraded as the major point of communication between the tribunal and the community, including (eventually) the parties.
- 73** Recommendation 60 The parties to tribunal proceedings should be able to access their file management details on-line and find out the status of their case.
- 74** Recommendation 61 The government should support a project to investigate on-line initiation in all cases where this is possible.
- 76** Recommendation 62 The legislation should be amended to require the tribunal to ensure that all parties (including self-represented parties) understand the issues in the proceedings, and the practices and procedures of the tribunal, and give due assistance to parties who need it.
- 77** Recommendation 63 The legislation should be amended to enhance the powers and duties of the principal registrar to assist users of the tribunal, including giving reasonable assistance to a person to formulate their application.
- 77** Recommendation 64 The government should support the appointment of a litigant in person coordinator at the tribunal.
- 78** Recommendation 65 The tribunal should establish a legal representation referral arrangement with the Victorian Bar, to be supported by changes to the tribunal rules.
- 79** Recommendation 66 The government should support the establishment of a specialist self-representation civil legal service.
- 79** Recommendation 67 There should be no increase of the existing restrictions or legal representation at the tribunal.
- 80** Recommendation 68 In all cases where leave is granted for a party to be represented by an advocate, the decision to grant leave should be formally recorded by the member.

- 82** Recommendation 69 The objects and functions provision for the tribunal should include 'applying therapeutic approaches to the administration of justice', or a principle along those lines.
- 83** Recommendation 70 A major cases list for planning and environment cases of that nature should be established, with no loss of service to cases in the standard list, and no loss of fairness to the parties in the dedicated list.
- 84** Recommendation 71 The tribunal should adopt the principle of continuous improvement in the implementation of its cost-efficiency objective. This should be considered as a possible statutory objective.
- 85** Recommendation 72 A position of ADR judge should be created at the tribunal, to be filled by a vice-president (County Court judge) of the tribunal for the usual term of appointment for a vice-president (five years).
- 87** Recommendation 73 The role of ADR in the legislation should be significantly upgraded, in line with the importance of this means of resolving disputes in the tribunal in the modern age.
- 88** Recommendation 74 The government should consider supporting a pilot project implementing early intervention (swat) mediation in planning and environment cases in country Victoria.
- 88** Recommendation 75 The government should support a pilot program for carrying out telephone mediation in the residential tenancies list of the tribunal, to be extended (if successful) to small claims in the civil claims list and other cases in the tribunal if appropriate.
- 88** Recommendation 76 The tribunal's upgraded website should include advice and information on conducting effective self-help negotiations.
- 89** Recommendation 77 The tribunal should, where possible, make mediation available on the day of hearings to all willing parties.
- 89** Recommendation 78 The tribunal should participate in performance benchmarking with other tribunals and courts, such as that which is available under the International Courts Benchmarking Program.



PRESIDENT'S REVIEW

Victorian Civil and Administrative Tribunal (VCAT)
Level 1, 55 King Street, Melbourne VIC 3000
Email: vcat@vcat.vic.gov.au
www.vcat.vic.gov.au

www.vcatreview.com.au