practice note

Residential Tenancies Practice Note (15-02)

Burgess: Eviction in Two Decisions

Purpose of Practice Note

This practice note provides an analysis of the recent decision of *Burgess & Anor v Director of Housing & Anor [2014] VSC 648 (17 December 2014)* ("*Burgess*"). Notably, there are a total of six decisions in relation to this matter.

Burgess has given a breakdown of the processes that must be observed by a public authority when seeking to evict a tenant.

To be evicted by a public authority, there are two parallel legal processes that must be satisfied; Firstly, compliance with *Residential Tenancies Act 1997*. Secondly, compliance with administrative law principles (including compliance the Charter obligations under section 38(1)). The first is most obviously address via VCAT, the second is subject to the scrutiny of the Supreme Court, and has therefore been far less clear until the decision of Burgess.

Section 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* ("**the Charter**") imposes strict obligations on public authorities with respect to their decision making obligations.

This practice note focuses on relevant considerations and thresholds when seeking to evict a tenant. However, these same principles apply to any administrative decision making by a public authority. This may extend to local Councils, public hospital, or even public trustees.

The *Burgess* decision outlines that the administrative decision evict exist as two decisions, and that *both* should attract procedural fairness, and given consideration to hardship and the proportionality between the restriction on the human right and the purpose of the decision (i.e. what is the eviction intended to do).

The first decision is to issue the notice to vacate. The second decision is the decision, (once a possession order is made) to proceed with purchasing and allowing the warrant to be executed.

It is important to note that this practice note does not extensively address interpretation of legislation obligations under section 32(1) of the Charter. This practice note focuses on the administrative dimension of a public authority's decision to evict pursuant to section 38.

The Charter and administrative principals do not apply to private tenancies (see, section 4 and 38(3) of the Charter).

How to Use this Practice Note

Unfortunately, access to judicial intervention for an issue for non-compliance with the Charter must be determined by the Supreme Court via a process call judicial review (Order 56 of *Supreme Court (General Civil Procedure) Rules 2005*).

This is a potentially expensive and complex process that relies on the Charter and complex administrative law principles. While there is usually a rush to file documents to begin proceedings, the proceedings can take anywhere from 6 months to over a year to resolve if it proceeds to adjudication.

In the vast majority of cases, matters will settle by negotiations and even the possibility of a review if there is merit to a judicial review.

Because of the complexity of administrative law and the Charter, this practice note is divided into 7 parts:

1. *Limiting Human Rights*
2. *Errors of Law*
3. *Relevant Human Rights*
4. *Social Housing – Who is a public authority?*
5. *How is the decision made?*
6. *Protective Costs Orders*
7. *Practical Tips*

Schedule 1 – example letter requesting reasons for the notice

Summary of Burgess - The two decisions: (1) Notice Decision & (2) Warrant Application decision

In the subsequent decision Burgess & Anor v Director of Housing & The Victorian Civil and Administrative Tribunal (No 2) [2015] VSC 70 (4 March 2015) at [2], Macaulay J sets out a succinct summary of the two decisions that formed the basis of errors that set aside the ability of the Director to purchase a warrant:

"*In my principal reasons I summarised my conclusions [245]:*

(a) Notice decision:

(i) in making the notice decision the Director failed to observe the rules of natural justice and failed to take into account certain matters he was bound to consider, including rights protected under s 17 of the Charter[1];

(ii) accordingly, the notice decision was affected by jurisdictional error and was unlawful within the meaning of s 38 of the Charter;

(iii) nevertheless, the Director's notice decision ceased to have any ongoing legal effect on rights once VCAT made its possession order dated 13 May 2013 so that, on the principles set out in Wingfoot, the notice decision is not amenable to the remedy of certiorari.

(b) Warrant application decision:

(i) in making the warrant application decision the Director failed to take into account certain matters he was bound to consider, including rights protected under s 17 of the Charter;

(ii) accordingly, the warrant application decision was affected by jurisdictional error and was unlawful within the meaning of s 38 of the Charter;"

(iii) but, unlike the notice decision, the warrant application decision continues to have ongoing legal affect despite VCAT issuing the warrant of possession, so that, notwithstanding the principles set out in Wingfoot,[2] that decision is amenable to the remedy of certiorari."

1. Limiting human rights (s7) & Proper consideration factors

Section 7 is a key interpretative provision that provides a frame work for balancing competing human rights, and outlines that circumstances in which human right can be limited. Namely, that the limitation must "*demonstrably justifiable*." This applies to the drafting of legislation, the creation of policy by a public authority and application of that policy when making decisions.

If a law or administrative decision limits, or proposes to limit a human right, or interfere with human dignity, equality and freedom, the relevant factors that *must* be taken into account as part of the "proper consideration" as outlined in sections 32 and 38 of the Charter include the following:

(a) The nature of the right

(b) The importance of the purpose of limitation

(c) The nature and extent of the limitation

(d) The relationship between the limitation and its purpose

(e) Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Section 7(3), specifically prohibits limitations that are *more* than those which can be demonstrably justifiable. It is this respect, section 7 requires that whenever a human right is interfered with, there should be a clear reasoning and a paper trail to demonstrate that the consideration has been proper performed and taken into account the above factors.

These factors effectively attract a hardship test in the sense that the decision maker cannot turn a blind eye to the implications of their decision simply because they have a legal right. They must consider the nature of their decision with respect to that particular individual(s) that is affected by their decision. However, as long as they consider the hardship this is unfortunately sufficient.

Less Restrictive Means Test, Proportionality and Purpose

There is little binding precedent about the consideration of any less restrictive means under section 7(3) of the Charter. Obviously in order to assess other alternatives, it is necessary to identify not the just the intention and effect of the decision, but the purpose of what the decision is intended to bring about.

For example:

> A notice to vacate may be served for no reason if someone is alleged to be causing a nuisance, and it is thought that the most effective way of bringing the issue to an end is by removing them from the property. The purpose of the decision is not to bring about an eviction; the purpose of the eviction is to prevent the nuisance from recurring.

In this example, it is readily apparent a misconstruction of the "purpose of the limitation", will distort what a less restrictive alternative might mean if the purpose cannot be uncovered.

The ability to understand the objective that the landlord is trying to accomplish is necessary to the justification of the decision and for the tenant to be entitled to procedural fairness.

If the "purpose of the limitation" is readily apparent then it is the best opportunity to try to practically resolve the matter without proceeding to VCAT.

If the landlord, or agent, arbitrarily refuses to explain the decision, then should be the subject of a complaint pursuant to the Charter, an FOI, or Orders for discovery of documents on the basis of the limitation not being justified, nor demonstrated, and as a fundamental denial of procedural fairness.

This reasoning, or the absence of communicating it, is the first thing that is necessary to approach a decision to evict, or at an even earlier stage, the giving of a notice to vacate.

This is particularly apparent on the giving of a no reason notice to vacate, or a rent arrears matter which is being treated particularly aggressively (and possibly in breach of their own policy).

Proportionality

In *P J B v Melbourne Health & Anor (Patrick's case) [2011] VSC 327 (19 July 2011),* Bell J affirms that the Charter should be use to bolster an interpretation of a robust act that is intended to enliven the rights contained in the Charter, and only restrict those rights in accordance with section 7 of the Charter.

The proper construction of the legislation outlined in section 32, and as highlighted in *Project Blue Sky*, imposes strict obligations on how statutory construction should be utilised by decision makers. The *Charter* mandates where there are multiple constructions possible, which construction *must* be adopted. His Honour states at [77]:

> *"In my view, in s 13(a) and other provisions of the Charter , 'arbitrarily' is not used as an ordinary English word but as a term having a particular meaning which is embodied in art 17(1) of the covenant. By using this term in s 13(a), the legislature instituted a greater degree of human rights protection for the people of Victoria than would have flowed from using the word in the ordinary sense. To reject this meaning of the term would significantly reduce the protection which Parliament intended to confer.*
> …
> *[84] The views of the committee and Professor Nowak on the concept of arbitrariness in art 9(1) were carefully examined by Black CJ, Sundberg and Weinberg JJ in Minister for Immigration Multicultural and Indigenous Affairs v Al Masri.[139] On the basis of that examination, their Honours held that arbitrary in that article meant* ***'unproportional or unjust'****.[140]*
> …
> *[308] In R v Momcilovic,[410] Maxwell P, Ashley and Neave JJA accepted that proportionality is at 'the heart of the inquiry mandated by s 7(2) of the Charter.'"*

Competing Human Rights

In almost all cases, there will be competing human rights. Such an example may include the competition between the individual's rights to access housing on a creation application, and the Directors Hardship of the waiting list (see *Giotopoulos v Director of Housing [2011] VSC 20 (7 February 2011)*; *Cosic v Director of Housing & Anor [2007] VSC 486)*.

In other cases, it may be the safety and security of neighbours, and the right of the home of the alleged offender of trafficking drugs (see Veitch v Director of Housing [2008] VSC 442 (21 October 2008)).

In some cases such as an arrears policy, the rights in competition will have a clear weight in favour of the tenants.

In relation to the exercise of balancing these competing rights, the decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (8 October 2014)*, Chief Justice French makes the following statement in the context of competing human rights at [126]:

> *"These considerations were reflected in the observations of McPherson JA in Fangrove Pty Ltd v Tod Group Holdings Pty Ltd****[159]*** *that the common law maintains the distinction between the protection afforded to personal or property interests and economic interests because* ***the common law "values the physical integrity of a person at a level well above the interests of commerce.****"*

In summary, competing and subsequent limitation of rights (section 7) requires a proper consideration (section 32), and the justification is to ensure that the decision is not arbitrary (section 13). While this purports to be a strong set of requirements, in many cases, the demonstrably turning of the mind, and taking into account all relevant factors will usually protect an administrative decision that was available to the decision maker, even if it is not the preferred one from the tenant's perspective.

2. Errors of law

According to *Osland v Secretary to the Department of Justice [2010] HCA (23 June 2010)*, an error of law enlivens the jurisdiction of the Supreme Court to provide relief. This applies to both section 148 appeals and Order 56 Judicial Reviews.

In *Commissioner of State Revenue v STIC Australia Pty Ltd [2010] VSC 608 at [10]* the question of law provides the basis on the ground which a party is entitled to apply of judicial intervention and obtain relief.

> *"The question of law is framed by the grounds. Where the grounds do no more than indicate that the subject matter of the proposed appeal invites reconsideration of the merits of the decision, the jurisdiction of the Court is not enlivened, even though the question of law identified may be expressed in judicial review terms. The proposed notice of appeal must identify that the issues sought to be agitated on the appeal raise a question of law. If the question of law, properly analysed, is not a question of law, the form of its expression does not turn it into a question of law."*

According to *Willcocks v Comcare FCA 1315 (13 September 2001)*, an error in law must be demonstrated to be unlawful, not merely undesirable or having not been given sufficient weight.

> *"[6] As is now well understood any court reviewing a decision of the Tribunal cannot turn "a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision": Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259 at 272. Those "proper principles" do not allow for doubtful fact finding to be characterised as an error of law. As Kenny J commented in Minister for Immigration and Multicultural Affairs v Rajalingam [1999] FCA 719; (1999) 93 FCR 220 at 257 "[a] tribunal ... does not commit an error of law merely because it finds facts wrongly or upon a doubtful basis, or because it adopts unsound or questionable reasoning".*
>
> *Likewise those "proper principles" do not require it to be shown that all matters raised in the proceeding before the Tribunal are dealt with in the reasons. For the purposes of s 43(2B) of the AAT Act, the Tribunal is not obliged to give a "line-by-line refutation" of an applicant's evidence either generally or in those respects where there is evidence contrary to findings of material fact made by the Tribunal: Re Minister for Immigration and Multicultural Affairs; Ex part Durairajasingham (2000) 168 ALR 407; see generally Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 180 ALR 1."*

It is therefore paramount for parties not to get confused between a *merits* review as compared to a review on the basis of an error in law. Challenges to factual finding, or to the weight that attached to particular evidence will almost never give rise to appeal or judicial review (cf. *Wednesbury* below).

Generally, speaking an error of law can be made in relation to judicial decision makers:

- *Ultra vires* (acting beyond or without authority) – not have power under the legislative or empowering instrument
- Improper exercise of power
- Failing to take a relevant consideration
- Taking to account an irreverent consideration

- Procedural Fairness Grounds * (complex area of law unto itself, for more information see here)
    - Denial of Natural Justice
- Irrationality or illogicality (exceptional circumstances)* (Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611, 625.
- Insufficiency of reasons (exceptional circumstances)
- *Wednesbury* threshold - exceptional circumstances (fact finding so irrational, no reasonable decision maker could have reached this conclusion on the basis of the facts). (see also Minister for Immigration and Citizenship v Li [2013] HCA 18 (8 May 2013); Barker, Justice Michael --- "Legal unreasonableness: Life after Li" (FCA) [2014] FedJSchol 15)
- Failing to give sufficient reasons (*Re Minister for Immigration and Multicultural and Indigenous Affairs [2003] HCA 56; 216 CLR 212; 201 ALR 327; 77 ALJR 1829 (2 October 2003)*, Kirby see below)

An error of law cannot be found on the basis that:

- The finding was "not reasonably open."
- Preferring one parties evidence over another
- Insufficient weight was given to particular facts
- The decision was not best option in the eyes of the potential appellant.

By way of summary, the threshold for "proper consideration" principal alone is relatively easy to satisfy. It merely requires that it must be considered and be given *some* weight by being placed on the scale, it is not in error of the proper consideration principles in section 38 if it is given consider to be one kilogram instead of two.

The main lens upon which to challenge the weighing lies in section 7 and 13, in relation to the proportionality and the arbitrariness of the decision.

Relevant Considerations

In the context of Burgess, the court considered the principles of *relevance* in administrative decision making. The court is extremely concerned around clogging administrative decision making with procedures that are not relevant to the decision. In this sense, the meaning of proper is likely to be considered proportionate to the degree of detriment faced by the effect burden against the burden of formulating processes that entitle parties to procedural fairness (i.e. the policy is different for an eviction process compared to a $20 parking fine).

At [150], the court states:

> *"The principles for determining whether a matter is one that a decision maker is bound to consider were authoritatively set out in Minister for Aboriginal Affairs v Peko Wallsend.[64] Mason J (Gibbs CJ and Dawson J agreeing) distilled a number of propositions from decided cases.[65] For the sake of brevity, I will condense those that are relevant in the present context as follows:*

> • *only if a decision-maker is bound to take into account a matter will failure to take it into account be a ground for judicial review;*
>
> • *what factors a decision-maker is bound to consider in making a decision is determined by construction of the statute conferring the discretion – and if not expressly stated, they must be inferred from the subject-matter, scope and purpose of the statute;*
>
> • *even if the decision maker is bound to take a matter into consideration, a failure to take the factor into account will only justify the decision being set aside if it was a factor that could have materially affected the decision; and*
>
> • *it is generally for the decision maker and not the court to determine the appropriate weight to be given to a factor which are required to be taken into account."*

What if VCAT got the facts wrong?

Generally, errors of fact made by a decision-maker cannot be corrected by a subsequent court. Such errors are treated as within the jurisdiction of the administrative decision-maker, and they are entitled to make them as part of their decision. Factual determinations go to the merits of a decision, not to its legality. The exception to this is called a jurisdictional fact. These are facts which enliven the power of the decision-maker to exercise discretion.

During a judicial review the reviewing court may have regard to evidence that was not before the initial decision maker. While it looks like a merits review, such inquiry seeks to determine whether the decision maker had the relevant facts necessary to invoke the powers it used to make the decision.

In *Timbarra Protection Coalition Inc v Ross Mining NL & Ors [1999] NSWCA 8 (9 February 1999)*, Spigelman CJ states the following with respect to jurisdictional fact at [13] states:

> *"The issue of jurisdictional fact turns, and turns only, on the proper construction of the statute: see, e.g., Ex parte Redgrave; Re Bennett (1946) 46 SR (NSW) 122 at 125; 63 WN (NSW) 31 at 33. The parliament can make any fact a jurisdictional fact, in the relevant sense: that it must exist in fact (objectivity) and that the legislature intends that the absence or presence of the fact will invalidate action under the statute (essentiality): Project Blue Sky Inc v Australian Broadcasting Authority (1998) 72 ALJR 841 at 859-861; 153 ALR 490 at 515-517. …*
>
> *Any statutory formulation which contains a factual reference must be construed so as to determine the meaning of the words chosen by parliament, having regard to the context of that statutory formulation and the purpose or object underlying the legislation…*
>
> *Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or nonexistence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts."*

By way of summary, if it can be demonstrably shown that in retrospect VCAT got the facts wrong as it saw them, this is not grounds for an appeal pursuant to section 148 of the VCAT Act, nor is it an entitlement to judicial review. However, if they disregard an essential factual element or do not make a conclusion where such a conclusion is a necessary prerequisite to the exercise of power, then it will be in error as a matter of appear pursuant to section 148 and not of judicial review.

However, in the context of *Burgess*, it is incumbent on a public authority to consider afresh any new (or corrected) facts, and reassess their decision if it is substantially relevant to the reasoning for the decision to evict.

Such subsequent facts may require a public authority to reassess their decisions (may also be factual findings by a court), and this may be evidence that the Judicial Review can consider.

I.e. If there is a determination that a party was involved in an alleged criminal event, and the factual findings of the criminal proceeding were that the tenant was not present, or did not have knowledge.

Demonstrable Reasons

Strictly speaking there is no obligation necessarily to communicate the details of the proper consideration; merely that it has been performed.

The decision must be demonstrable, meaning that it *can* be demonstrated, not necessarily that it must. Obviously, the decision is communicated, but not necessarily the comprehensive analysis of considerations and the weighing process.

Arguably section 38(1) of the Charter should submit to an interpretation of section 7 of the Charter, pursuant to section 32, that meaning of "demonstrably" should mean that it is actually demonstrate (communicated) to the affect person as part of procedural fairness. There is no clear precedent in this regard.

In many complicated assessments, privacy and secrecy FOI exemption principles mean that the only context in which full reasoning can be uncovered is in the course of litigation.

Practically, a letter can be sent which states "after giving proper consideration to the matter…" we have decided to proceed to evict the tenant. Usually, there is more detail than this, but the purpose how the considerations have been scaled against the purpose of the eviction are seldom explained with much specificity.

Importance of Reasons

In *Re Minister for Immigration and Multicultural and Indigenous Affairs [2003] HCA 56; 216 CLR 212; 201 ALR 327; 77 ALJR 1829 (2 October 2003)*, Kirby J emphasises the importance of written reasons being provided by decision makers:, at [105] it states:

> *"Rationale for reasons: The rationale of the obligation to provide reasons for administrative decisions is that they amount to a "salutary discipline for those who have to decide anything that adversely affects others"[56]. They encourage "a careful examination of the relevant issues, the elimination of extraneous considerations, and consistency in decision-making"[57]. They provide guidance for future like decisions. In many cases they promote the acceptance of decisions once made[58]. They facilitate the work of the courts in performing their supervisory functions where they have jurisdiction to do so[59].*
>
> *They encourage good administration generally by ensuring that a decision is properly considered by the repository of the power[60]. They promote real consideration of the issues and discourage the decision-maker from merely going through the motions[61]. Where the decision effects the redefinition of the status of a person by the agencies of the State, they guard against the arbitrariness that would be involved in such a redefinition without proper reasons[62]. By giving reasons, the repository of public power increases "public confidence in, and the legitimacy of, the administrative process"[63]."*

Access to Reasons

- As section 38(1) of the Charter is a statutory requirement, compliance must be manifest in writing and is therefore discoverable. This would include the record of the decision, and all material evidence that was given consideration. This is evidentiary basis of compliance with section 38 and forms that basis of the relevant material to a judicial review.

- It should also name *who* has made the decision, and arguably show consideration as to why any less restrictive alternatives may have been rejected.

If judicial intervention is sought after a possession order, eviction could be nigh immediate. It is therefore necessary to file a section 149 of the VCAT stay with VCAT (noting this is highly unlikely

unless an originating motion is filed in the Supreme Court it is highly unlikely); or, apply to the practice court of the Supreme Court for a stay and enough time to formulate pleadings for the judicial review (noting they *may,* but not necessarily require security for damages for the Director).

Timely access to reasons must therefore be obtained in one of four ways:

- **Direct Request** - Ask for a full explanation of the balancing of rights and for the authority to demonstrate its reasoning. This is not likely to be complied or give a full history and record of all the relevant information and considerations.

  This letter should also request less restrictive options to be considered, and require an explanation as to why any less restrictive options are not appropriate in the circumstances.

- **FOI Request** Public authorities are also covered by the *Freedom of Information Act 1982 (FOI Act)*.

  - Note: A freedom of information request will take at least 45 days, unless extra money is paid to expedite the request. Fee waivers can be obtained. However, if there is any dispute in relation to the release of information, then the process can be extremely lengthy, and it is far more desirable to obtain court orders to compel all relevant documents to be given over. For more information see here)

  - Parties should also give consideration to the access and availability of policies in light section 8 and 9 of the FOI Act. Section 9 in particular, suggests that unless the policy is available, and then it any detrimental effect should be void if that detriment is caused solely by application of *that* unpublished policy.

- **File on a "hunch"** – It is clearly not good practice to file an application without good and clear merit, given the costs and other ethical duties on some lawyers and advocates. However, the primary issue that people seek to redress is eviction, and if the tenant is judgement proof, the potential damage to the tenant may be limited (the possibility whether such legal costs of a failed review would be a debt to the director that is required to be repaid before a new offer of public housing application would be accepted). See also protective costs orders below.

  - Usually the hallmarks of an unlawful decision for the purpose of the Charter, and (and therefore an error in law), is when a public authority radically departs from their own policy, and refuses to account for this departure. For example: if a warrant is sought on a possession order that is paid up, and no previous payment plan has been entered.

  - In this context, there may be some indicators to justify an immediate application, but understandably tenants and advocates alike should exercise serious caution in relation to undertaking such proceedings without a meritorious and proper basis.

- **(Possibly) Summons or Subpoena at VCAT**- It may be possible, if a general application is filed pursuant to section 452, 81 and/or 104 to produce the relevant administrative policies, processes and Charter consideration documents as part of the totality of the rights inherent to a tenant of a landlord is a public authority.

  - VCAT should be able to entertain a general dispute just to obtain a full record of administrative decision. However, it is emphatically clear that VCAT cannot give any relief for the administrative law or section 38(1) Charter dispute (see *Director of Housing v Sudi [2011] VSCA 266 (6 September 2011)*. It is therefore uncertain as to how VCAT might deal with such an application purely to obtain documents not being an FOI request. No such applications have been known to be made.

- There may be issues of relevance to the dispute before VCAT. Arguments may be made in relation to section 32 of the Charter, and identifying the rights of a tenant, include those special administrative law rights and Charter rights pursuant to section 38 when a landlord is a public authority. While the Tribunal is far more preferable than requiring a tenant to file an originating motion with the Supreme Court for judicial review the comment in *Burgess* appears to give little weight to this as a relevant consideration to forum.

See TUV practice note in relation to Summons and for more information from VCAT see here.

Sufficient reasons (when approaching for a judicial review)

The requirement for an administrative decision are likely not be as onerous as those on judicial decision makers, but the principles of natural justice, procedural fairness are well worth considering as being applicable to administrative decision makers, as they would a judicial decision.

In the decision of *Minister for Immigration & Ethnic Affairs v Wu Shan Liang [1996] HCA 6*, the Court set out the following criteria for how a judicial decision should be read. These same principles are likely to inform the lens upon which an administrative decision being challenged on Charter grounds would also be read.

The court held at [24] (headings added by way of summary by the author of this note)

> ***[Read as a whole]***
>
> *1. The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law (77);*
>
> ***[Consider the author & expertise of the decision with respect to the wording]***
>
> *2. This admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, i.e. tribunals, administrators and others (78). This is not to condone double standards between the reasons and decisions of legally qualified persons and others. It is simply to recognise the fact that where, by law, a decision is to be made by a person with a different, non-legal expertise, or no special expertise, a different mode of expression of the decision may follow. It must be taken to have been contemplated by the lawmaker;*
>
> ***[Not be a merits review]***
>
> *3. Specifically, the reviewing judge must be careful to avoid turning an examination of the reasons of the decision-maker into a reconsideration of the merits of the decision where the judge is limited to the usual grounds of judicial review, including for error of law (79);*
>
> ***[Not take into account an irrelevant consideration; or fail to take into account a relevant consideration]***
>
> *4. Nevertheless, the reasons of a decision-maker will usually provide the only insight into the considerations which were, or were not, taken into account in reaching the decision which is impugned. It is therefore legitimate for the person affected, who challenges those reasons, to analyse both their language and structure to derive from them the suggestion that a legally erroneous approach has been adopted or erroneous considerations taken into account or a conclusion reached which is wholly unreasonable in the requisite sense;*
>
> ***[The decision was not unreasonable or in excess of power, with respect to natural justice and administrative law principles]***

> *5. The weight to be given to the material before the decision-maker is, in a case submitted to judicial review, reserved to the decision-maker so long as he or she applies the correct legal test and does not reach a conclusion which is so unreasonable as to authorise review (80). The decision-maker will usually have advantages over the reviewing judge in evaluating evidence and submissions. Those advantages will include the conventional ones of seeing any parties and witnesses who are heard and having time to reflect upon all of the material. But there are additional reasons for restraint and resistance to any temptation to turn a case of judicial review into, effectively, a reconsideration of the merits. Often, the decision-maker will have more experience in the consistent application of applicable administrative rules to achieve fairness to a wider range of people than typically come before the courts;"*

3. Human Rights (Part 2 of the Charter)

Part 2 of the Charter contains the list of rights extracted from Universal Declaration of Human Rights (UDHR). Part 2 and the UDHR are not the same, and general referrals to the UDHR alone are unlikely to be fruitful or productive.

Australia is a dualist nation state (country). This means, that in order for domestic courts and administrative bodies to refer to the UDHR, it must be domestically incorporated by the passing of local legislation through parliament despite having already signed international treaties.

Arguments with respect to the wording from the UDHR are also not highly persuasive unless there are superior court judgements from other countries about that particular word (i.e. International precedence in relation to the meaning of the word "home" or "arbitrary"; see section 32(2) of the Charter).

Relevant Human Rights

The relevant rights human rights from Part 2 in relation to a tenant of a public authority are:

Section 13 – Privacy, Family, Home, and Reputation

"*A person has the right—*

> ***(17)*** *not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and*

(b) not to have his or her reputation unlawfully attacked."

1. In *Director of Housing v Sudi (Residential Tenancies) [2010] VCAT 328 (31 March 2010)*, Bell J makes the observation of the Human Rights contained in the Charter:

> *"Their purpose is to protect and enhance the liberty of the person – the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure people can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society. They protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family and that capacity for communication (by whatever means) with others which is their correspondence, each of which is indispensable for their personal actuation, freedom of expression and social engagement."*

Section 17 –Protection of Families and Children

(see also Convention on the Rights of the Child)

Protection of families and children

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

Example:

> DS v Aboriginal Housing Victoria (Residential Tenancies) [2013] VCAT 1548 (3 July 2012)
>
> This case essentially identifies that a decision to create a tenancy was sufficiently weighted on the basis that if the tenant was not permitted a creation of a tenancy (cf. Cosic and Giotopoulos) the likelihood of the family unit being able to be reunified would be rendered disproportionally interfered with. That is to say, where there is a residual discretion created by the reading of the legislation, section 32 of the Charter, should be applied to protect the family unit in such circumstances.
>
> For more information see here.

Section 10 - Protection from torture and cruel, inhuman or degrading treatment

A person must not be—
(a) subjected to torture; or
(b) treated or punished in a cruel, inhuman or degrading way; or
(c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

In this context, many people who are on bail or have various court orders, may be incarcerated or taken back into custody should they lose their housing. This is therefore a relevant consideration with respect the interaction of the purposes of multiple Acts, such as the *Housing Act 1983*, *Sentencing Act 1991*, and the *Corrections Act 1986*

Section 12 Freedom of Movement

> *Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.*

In some cases, the ability to depart from a rented premises for a period without needing to inform the public authority, go on a holiday, or other absences from the premises may be contested on the basis of section 12 despite a policy or rule adopted by a public authority, and amount to an arbitrary interference. It is however always best practice to comply with reporting policies unless there is a genuine reason or concern in relation to non-compliance. Seek legal advice if this is the case well prior to any such departure.

The nature of the private home and public home in this regard have had little legal exploration in superior courts. In the decision of *Janusauskas v Director of Housing [2014] VSC 650 (17 December 2014).* Her Honour, Justice Emmerton states:

> *"I observe that the decision has very harsh consequences for the applicant in that he loses his home for doing no more than what renters commonly do (at least in the private rental market) when they go on extended holidays. However, given that it was open on the evidence for the Tribunal to find an entitlement to give a notice to vacate and the Court has no jurisdiction to 'remake' this decision on the merits, and given that an appeal would inevitably fail for the reasons set out above, the justice of the situation does not require the grant of leave."*

4. Social Housing: Who is a public authority? (s4 Charter)

While note directly relevant to Burgess, it is important to consider the role of the Burgess decision in relation to social housing, the charter and obligations to provide procedural fairness.

Obviously, the Director of Housing, local Councils and Consumer Affairs Victoria are public authorities for the purpose of the Charter.

However, one of the most complex issues in relation to the Charter is whether or not the Charter applies to community housing, and other forms of social housing.

The matter has not been tested in the Supreme Court and so no clear guidance or definitive answer can be given.

Community Housing – Does Burgess apply to community housing?

In order to determine if Burgess has any application in the community housing sector, it must first be ascertained as to whether community housing provides are public authorities within the meaning of section 4 of the Charter.

If they are deemed to be public authorities for the purpose of the Charter, then *Burgess* will apply to these services. If they are not public authorities, then administrative law principles and the Charter are not binding, and their policies are of no use unless it can be shown that they form terms of the agreement under a private civil contract, which is also subject to the *Australian Consumer Law and Fair Trading Act 2012* (section 185 - unfair terms provisions may be relevant in the context of policies that a tenant relies upon).

It is also worth noting that a determination that the Charter applies to one community housing agency may not necessary mean that the Charter applies to all community housing agencies. This is because the different sources of funding, contractual services agreements, degrees of autonomy and different structures that are adopted

Public authority for the purpose of section 4 of the Charter?

The test in section 4 is extremely complex, and lies at heart of the many disputes of decision making by community housing operators.

Who is a public authority? What is "function of a public nature"?

The relevant parts of section 4 of the Charter states that a public authority is characterised by:

> *"(b) an entity established by a statutory provision that has functions of a public nature; or*
>
> *(c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise);*

But does not include:

(j) a court or tribunal except when it is acting in an administrative capacity; or…"

Relevant consideration to identify "function of a public nature"?

The Charter sets out a non-exhaustive list of factors that may be included in consideration of the question of whether a particular entity constitutes a public authority for the purposes of imposing the Charter obligations.

"(2) In determining if a function is of a public nature the factors that may be taken into account include—

(a) that the function is conferred on the entity by or under a statutory provision;

(b) that the function is connected to or generally identified with functions of government;

(c) that the function is of a regulatory nature;

(d) that the entity is publicly funded to perform the function;

(e) that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State."

Lack of Clarity without determination by Supreme Court

Unfortunately, despite the criteria set out in section 4(2), there is no ability to draw any clear conclusion without making an application to the Supreme Court for a clear determination.

" (3) To avoid doubt—

(a) the factors listed in subsection (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and

(b) the fact that one or more of the factors set out in subsection (2) are present in relation to a function does not necessarily result in the function being of a public nature.

(4) For the purposes of subsection (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.

(5) For the purposes of subsection (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority."

Specific and Relevant Facts

It is highly likely the function and powers under the *Housing Act 1983* will act as significant foundation to determine the connection between the community housing agency and the State in determine whether the community housing agency is serving a public function.

Specifically, Part VIII, Division 8 of the Housing Act, define the powers of the Housing Register in light of the functions of the Housing Act. These powers include a financial power of the Housing Registrar to allocate to registered housing agencies, and in exchange these providers must meet certain requirements as set out by the Registrar. Under the Housing act, the Minister can play an active role in the part of these decisions, and the viability of registered Housing agencies.

Other relevant facts:

- Wording of any contractual service agreements. Some contractual service agreements may be found here, but it is more likely because of the registration scheme under the Housing Act

1983, that the document is not a tendered contract, and such agreement would have to obtained by FOI and be subject to the relevant exemptions contained in the FOI Act).

- Whether decisions have been effectively made by the Department (i.e. Director of Housing leases to the social housing provider).

- Payment, control and movement of monies

- The necessity of the State's reliance on social housing with respect to affordable housing and the purpose of the Housing Act.

As clearly outlined in sections 4 (4) and (5), it is unlikely there will be any resolve on this matter, until a proceeding is determined by the Supreme Court on this issue.

Imposing public law principles in private law spaces

Administrative principles such as natural justice and procedural fairness only apply to public authorities, it was thought that unless there is a statutory instrument that imposes such a requirement on a private body (i.e. hypothetically, a law could require private hospital to interview and afford a patient procedural fairness in determining their eligibility for release).

However, in *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, the Court held that judicial review would not extend to private bodies making decisions simply because the decisions are given force by an enactment.[1] This means that the judicial review is in fact a substantive law derived from empowering enactment. The interaction between concepts of procedural fairness from administrative law and an empowering enactment remains vexed. But it does support that if policies are not subject to administrative principles, then they may be subject to consumer law powers.

"*Datafin* Principle"
The Datafin decision is from a UK decision, called *R v Panel on Take-overs and Mergers; Ex parte Datafin*[1987] QB 815 contemplates the role of good public administration, but more particularly whether the importance of a private decision had such bearing, that there was overwhelming impact of a public nature to the individual and to the public itself, so as to render that decision subject the same principles of public administration law. Ergo, sufficient to apply the principles of administrative law to a private body.

While, it is desirable, and a possible future evolution, there are numerous reasons why this may be inappropriate in the absence of a specific statutory instrument.

In CECA Institute Pty Ltd v Australian Council for Private Education and Training [2010] VSC 552 at [99]:

> *"In my opinion, the Datafin principle represents a natural development in the evolution of the principles of judicial review. Indeed, it is a necessary development to ensure that the principles can adapt to modern government practices. The last 20 years or so have seen a growing tendency by the legislature and the executive to out-source important governmental functions to private organisations. As this trend is unlikely to abate, the Datafin principle is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers which are governmental in nature.[71]*

> *100 In my opinion, in the absence of High Court authority to the contrary, Master Builders is sufficient authority for the applicability of the Datafin principle in Victoria."*

In Ceca, Kyrou J goes on to affirm the possibility of a private body being bound by principles of natural justice, and such doctrine would obviously serve to inform section 4 of the Charter.

> *"[126] In McClelland,[91] Campbell J, after finding that the Burning Palms Surf Life Saving Club was obliged to comply with the rules of natural justice by virtue of contract, made the following comments in obiter:*
>
> *If a decision is arrived at by a private body which, contrary to its own rules, does not accord procedural fairness to a non-member who is affected, it is in theory possible that there may be circumstances where the courts will recognise such a person as having standing to apply for a declaration of the invalidity of the decision, and an injunction against treating it as valid. It would be for the courts to develop, on a case-by-case basis, the circumstances in which such standing should be recognised. Even though the legal basis of the body's right to make a decision is contained in the constitutive documents of the body itself, there is no necessary reason why it should be only members of the body, or people with the benefit of a contractual promise that the body will follow its own required procedures, who can assert the invalidity of the decision. It is a fact of life that a decision of a private tribunal can affect people who are not members, or people who are not bound by contract to observe the decision – and the existence of the private body and of the decisions of its tribunal is a reality which affects people other than by force of a contract with the body. If the body has practical power to affect a plaintiff in a sufficiently serious way, it would be for the courts to recognise in which situations the nature of affectation of the interests of the plaintiff is sufficient to confer standing.*
>
> *For all the conceptual difficulties of the notion of there being a 'right to work', the practical importance of not being deprived of the opportunity to work may well suffice to accord a plaintiff standing to contend that the decision of a private tribunal which denied him or her the opportunity to work was void, and that a declaration of invalidity and injunction should issue.[92]"*
>
> However, in the recent decision, the Courts have shown a genuine reluctance to determine the Datafin principle until it is absolutely necessary. And it would appear that a mere contractual service agreement alone may not be enough to attract judicial intervention.

In *Mickovski v Financial Ombudsman Service Limited & Anor [2012] VSCA 185 (17 August 2012)*, in a joint judgement Buchanan, Nettle JJA and Beach AJA:

> "32 That said, however, the clear implication of the High Court's decision in Neat Domestic Trading Pty Ltd v AWB Ltd[19] and of the observations of Gummow and Kirby JJ in Gould v Magarey[20] is that we should avoid making a decision about the application of Datafin unless and until it is necessary to do so. In this case, we do not consider that it is necessary to do so. For, assuming without deciding that Datafin has some operation in this county, we agree with the judge that it could not have applied in the circumstances of this case. Taken at its widest, it is doubtful that the principle has any application in relation to contractually based decisions[21] and, even if it does, we agree with the judge that the public interest evident in having a mechanism for private dispute resolution of insurance claims of the kind mandated by s 912A is insufficient to sustain the conclusion that FOS was exercising a public duty or a function involving a public element in circumstances where FOS' jurisdiction was consensually invoked by the parties to a complaint."

(See also D'Souza v Royal Australian and New Zealand College of Psychiatrists [2005] VSC 161)

In this context, there little harm in the corollary of other advocacy to argue that the Charter should be considered, and the policies of agencies should be available and should be observed as lawfully binding and more than a token gesture to due process.

Complaints generally in relation to registered social housing agencies may be made to the Housing Registrar for investigation. There is limited power to provide practical redress, but it can have an investigative function. For more information, see here.

Alternative: Policies as Terms

If the principles as set in NEAT state, an alternative cause of action may be to argue that the policy documents as adopted by those housing providers could be enforceable terms of the contract upon which the tenant has a legitimate expectation will be observed and that a departure from those principles, may amount to a breach of contract under section 184 and 185. However, it is unlikely a departure from due process will have the same ability to provide relief as the Supreme Court in setting aside the ultimate decision and requiring it to be remade. Parties may want to consider the injunctive power under section 123 of the VCAT Act. The tribunal in this regard does have jurisdiction and would need to take into account section 32(1) of the Charter.

Importance of Policy as a basis of an Error of Law (Gray's decision)

In *Burgess,* the Court highlighted the legal significance and importance administrative policy. The Court clearly identifies that irrational or overt non-compliance with administrative policy, can amount to an error of law. Macaulay J states at [147]:

> "In Minister for Immigration v Gray,[60] the Full Federal Court (French and Drummond JJ, Neaves J dissenting) observed that if statutory guidelines are not given for the exercise of a discretion which, because of its subject matter or its expected high volume use, should as a matter of justice be exercised consistently in like cases, it could be inferred that Parliament contemplated that the decision maker would develop policies to guide decision making in order to achieve that consistency. Although such policies are not to fetter the exercise of relevant discretion, the Court held that 'within that framework, the existence and content of lawful policy may properly be regarded as a relevant factor which, because it is properly contemplated by the legislature, must be taken into account by' the decision-maker.[61]
>
> 148 The court emphasised that policy guidelines are not to be applied with 'statutory nicety'; to do so would be 'to misunderstand their function' as general guidelines.[62] However,
>
> ...where the existence and content of such a policy is to be regarded as a relevant fact which the [decision-maker] is bound to consider, a serious misconstruction of its terms or misunderstanding of its purposes in the course of decision-making may constitute a failure to take into account a relevant factor and for that reason may result in an improper exercise of the statutory power.[63]"

5. How is an administrative decision to evict made?

The context of each decision will vary based on the events in relation to the purpose to evict, as well as the application of the relevant policy and the circumstances of the tenant and any members who are affected by the decision.

The decision to evict is unlikely to be scrutinised to such extent that if there is *any* departure from a policy that it renders the decision to be in error. It must be substantial that it could alter the outcome.

According to the decision of *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564, the High Court, the court affirms that administrative decision should be assessed as a whole, and not in isolation. Therefore, the considerations under section 38(1) of the Charter are likely also to be treated as a whole in terms of whether the error was sufficient to justify the intervention by the judiciary.

Section 38 of the Charter and the administrative process of eviction

Section 38(1) states:

"*(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.*"

What is proper consideration?
Proper consideration is unfortunately a relative low threshold.

It merely, requires the turning of the mind to the issue and taking into account the relevant information. It is a rare occasion that the conclusion of the turned mind will be in error. It is only bound to give regard to the principles in an administrative decision, not necessary reach a particular conclusion. Ergo, it is not in error to have considered and reach a conclusion. The error cannot be stated that it was not *reasonably* open to the decision maker to reach on the application of the law.

Vis a vis, it is an error if no consideration was given at all, and the error can be constituted by stating that it was not open to the decision maker. Such error can more easily be stated that the decision maker failed to give regard, or take into account a relevant consideration that it was bound to consider.

Tip:
It is procedural fairness that dictate, that a person can see what was taken into account. On this basis, it is necessary for advocates to put as much relevant information about the tenant, the detriment of the eviction, and any subsequent changes about the tenants situation to the authority for consideration. It is also important for advocates to give consideration about whether such information having been put into the public domain may necessitate anonymising or at least a caution to a tenant about the nature of the information that could appear on public record such as a court decision.

Decision 1. The decision to serve a notice to vacate (administrative Decision)

In the decision in *Burgess*, the Court determined that once the possession order has been granted, judicial intervention is no longer possible with respect to revoking the notice to vacate, nor is it with any benefit as it has given been spent to obtain the possession order. This was based on the "Wingfoot principle" (see below).

However, the corollary the Burgess decision indicates that it is possible to apply for judicial intervention to quash both notice to vacate (not on the basis of invalidity under the RTA), but because of the non-compliance with requirements of section 38(1) of the Charter, and administrative law principles. This must however be done prior to VCAT making a Possession Order

In this case, should the possession order have not been made, it may have been possible in Burgess Decision to apply for an Order from the Supreme Court to quash the decision and not serve the notice to vacate in the first place.

One of the grounds to quash the notice would be the failure to take into account the relevant consideration of the rights of any child that might reside with the family that is going to be evicted.

This is not a relevant consideration for VCAT in the making of a possession order under section 250 of the RTA. It is however, a highly relevant consideration with respect to the Charter rights of the child.

Wingfoot Principle

This is derived from the decision of *Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA 43 (30 October 2013).* (For a Summary see here)

This set out, that unless a decision has an ongoing effect, the remedy to quash the decision was not available, and effectively the application was not only without point, but effectively failed to invoke jurisdiction. This was on the basis that an opinion has no continuing legal consequences.

In Burgess the fact that the notice to vacate has been spent to obtain the possession order meant that the quashing of the notice to vacate would have no "*apparent legal effect*" because the possession order had already been brought into existence.

The Court determined that an order for certiorari to quash the decision in relation to the notice to vacate was simply not available.

The legal effect of the notice to vacate was irrelevant and the continuing legal consequence hinged on the decision to purchase the warrant.

Denial of Natural Justice (Two forums for one decision)

Burgess suggests that the imposition of the Charter and public law administrative principles dictates an entitlement to some degree of procedural fairness and natural justice. The difficulty however is the enforceability of these rights and processes must be brought to the appropriate forum, the Supreme Court. In Burgess the Court appears not to consider the impracticalities of access to justice via the Supreme Court as relevant consideration so as to justify the grant of such power to VCAT or inferior courts.

That is to say, VCAT *cannot* provide justice with respect to the administrative decision to serve the notice to vacate, nor the decision to purchase the warrant and allow the eviction. VCAT cannot engage in the public authority's policies, because the Tribunal *cannot* take into account factors that are extraneous to the empowering enactment; specifically, the criteria set out in RTA, and arguably ACLFTA), as per section 319, section 330 and the relevant notice to vacate.

To take into account the relevant policy in their final determination would in fact be in error. It does not however mean these cannot be relevant for the purpose of allowing adjournments to enable the tenant more time to investigate their other rights.

The Supreme Court believes that obstacles imposed by the separation between VCAT and the Supreme Court is not so onerous as prevent parties from engaging in a judicial review. With respect to this bifurcation Macaulay J states at [93]:

> "*In my opinion, however, the so-called practical difficulties are not likely to produce the injustice that the plaintiffs say will occur. And, to the extent that there is an inconvenience and expense of having to litigate different aspects of the same decision in two jurisdictions, the remarks made by Warren CJ in Sudi are, with respect, entirely apposite. Her Honour said[44] that such bifurcation was a necessary consequence of setting up a specialist forum of limited jurisdiction. Any difficulties arising from that bifurcation are the flipside of the policy benefits of a limited jurisdiction, namely the quick, efficient, inexpensive and informal resolution of issues arising within the specialist domain. Relevant to one of the plaintiffs' arguments, her Honour also observed that the bifurcation of the jurisdictions may, in some circumstances, require a court or tribunal to make an assessment of the strength of a party's case in another forum.*
>
> *With those observations in mind, and in view of the means available to a party to have an arguable judicial review heard before a decision in VCAT is made, I reject the plaintiffs' proposition that alleged impracticality and injustice compels a different conclusion.*"

In this context, tenants must advocate for transparency in relation to the reasons for the notice to vacate being served; the reasons sought should go far beyond the stated reason in the notice to vacate as required by section 319 of the RTA; the reason must go further as to identify the purpose of the decision to evict, why less restrictive measures have not been adopted, and to demonstrate that all the relevant Human Rights have in fact been considered prior to the notice to vacate being given.

In *Kioa v West [1985] HCA 81 at [28] & [33],* Mason J gives an apt summary for the principles upon which decision makers should consider as part of the doctrine of natural justice:

> *It is a fundamental rule of the common law doctrine of natural justice … that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given the opportunity of replying to it. … The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.*
> …
> *In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e. in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations."*

Administrative decision correct until set aside by court of a competent jurisdiction.

It is important to observe that Burgess affirms the separation decisions available for VCAT to consider, and those that must be brought before the Supreme Court at [110]:

> *"…the construction of the VCAT Act and the RTA that VCAT was to treat relevant purported administrative decisions as valid unless and until set aside by a court of competent jurisdiction.[49] So, having then exercised its jurisdiction validly, a resulting order made by VCAT requiring a tenant to give possession of premises to a landlord would then take effect according to the terms of the RTA. There is nothing in the RTA to suggest that the legal effect of that order is to be constrained by any arguable invalidity in the Director's antecedent decision."*

While the notice to vacate is spent in the Tribunal, to obtain a possession order, it remains unclear that if the notice to vacate was infected by the failures to comply with natural justice and the Charter, whether this would affect the second decision. It appears the courts by treating them as two separate decisions, are stating the effective the same decision needs to be made; one to put the Director in the position to be able to obtain a warrant, and the second decision to be whether the warrant should be purchased and executed.

The court tended to reject the relationship of an error in the first decision to issue the notice, as being relevant to the decision to execute the warrant. Though, clearly the court made findings in relation to both decisions that it was invalid.

In this regard, if there was an error in the giving of the notice to vacate, and then an interview was done to affirm the decision to evict, the ability to obtain certiorari appears to be in doubt.

Decision 2. The decision to purchase, or allow, a warrant to be executed?

In *Burgess*, the court determined that once the possession order has been made, the second decision of the public authority (that may be subject to judicial intervention and remedy) was the decision to purchase the warrant, and to allow the warrant to be executed. This is a persistent decision that applies up until the time of the warrant being executed. Declaratory relief may be sought afterwards, but has little practical effect apart from demonstrating the unlawful conduct of the authority.

Based on the Wingfoot principles described above, the court considered the possession order was not a process in a series of stages, rather that the decision to purchase and execute the warrant is a discrete decision unto itself. The Court states at [128] of Burgess:

> *"So the step of requesting a warrant may never be required. It is a discrete, supplementary process that may be deployed if the tenant does not vacate after the order is made and if the Director chooses to enforce the order."*

A liminal space: A change of circumstances test, between decision one and decision two

It is essential to look to an Act's purpose and power with respect to a matter of eviction and whether it is clearly states eviction is a last resort. See here for DHHS policy.

What is not clear from the Burgess case is whether the contamination of an error appearing in the decision to give a notice to vacate, is a relevant factor that the DHHS can or should take into account in making the second decision. In light of the presumption of correctness in the absence of any intervention, it is unlikely unless the conduct is apparent to the assessing officer. In this context, independent internal review would be beneficial but it not legally required, nor performed by the Director of Housing as a matter of formal process.

While the Court has drawn the clear conclusion that the decision to obtain a possession order and a decision to affect a warrant are two discrete decisions, the decision to obtain the possession order is clearly used to support the decision to execute the warrant.

In this context, it likely that public authorities would suggest that unless there has been a *significant* change in the circumstance of the tenant since the possession order, the reasons of obtaining of the possession order protects the previous decision. This is not strictly the case, and the decision needs to be remade; this time giving strong consideration not merely to the having of a possession order, but the effect on the person.

New relevant information that may not be before the director may include:

- Any family or carer arrangements
- Any "innocent" co-tenants
- Family law orders in relation to access to children
- Criminal Orders in relation to bail or parole conditions
- Medical conditions such as an updated report on a degenerative condition
- Current mental health reports
- Engagement with support services and/or detox services
- Any of the above in relation to family members, or house hold members

In this context, the introduction of any of this information should be timely, and that this obviously has a bearing in relation to the decision, and the implications for the tenant and any household member who also has their human rights significantly affected by the decision to evict.

Again, it is noted the proper consideration threshold is relatively low, and the public authority is not bound to consider information that has not been brought before it.

Contamination of an error in the decision to issue a notice to vacate

It is unclear whether a possession that was obtained from VCAT in breach of the Charter which failed to afford procedural fairness would infect the decision to go ahead and purchase the warrant.

The Supreme Court may whether such conduct would vitiate the decision to purchase the warrant, or whether because of the inevitable outcome the decision to evict would be immune from infection of the error in first instance.

In this context, it is recommended that if a notice to vacate is served, it is appropriate to try and arrange an interview to engage the Charter and procedural fairness issues raised above.

This should be done well prior to any hearing, and it may be grounds to obtain an adjournment by consent. It is not clear whether VCAT could grant an adjournment on the basis a tenant is seeking to engage their administrative law right to procedural fairness but it certainly can be raised with the member, and section 123 of the VCAT Act should operate as guiding principles.

Meaning Arbitrary

Section 13 states the home must not be arbitrarily interfered with. In this context, in *W B M v Chief Commissioner of Police [2012] VSCA 159 (30 July 2012)*, again Bell J concluded that the right in s 13(a) of the Charter

> *" [105] …extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful.[107]"*

Reference to International Jurisprudence (section 32(2) Charter)

Section 32(2) provides for reference to international jurisprudence when interpreting words of the legislation. This is most commonly, and appropriately, used when referring to international interpretations of the Charter rights, such as mean the of the word "arbitrary", or of "home".

Access to international jurisprudence can be found easily by using *World Legal Information Institute* (www.worldlii.org).

Section 38(1) note applies to particular legal phrases such as "arbitrary interference"; See for example: London Borough of Harrow v. Qazi [2003] UKHL 43 (31 July 2003), but also to the application of substantive law (see Sims v Dacorum Borough Council [2013] EWCA Civ 12 (24 January 2013).

Human Rights and Internal Appeal Process:

Can a decision to evict be internally challenged via independent review (two-tiered internal appeal adopted by the Director of Housing?

It appears not in a formal sense. Formally, the Director's policies are ambiguous (page 10 &11) as it states:

> ***"Matters that cannot be appealed***
> *Matters that cannot be appealed include: rental arrears recovery procedures, such as, orders for possessions, evictions, notices to vacate or legal agreements; or, breaches of the **RTA** or tenancy agreement."*
>
> *The policy states of the Director states:*
>
> **"Human rights**
> *The appeals process is not an avenue of review for the purpose of challenging the decision maker's consideration of the client's circumstances under S.38 of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Charter)". The Appeals Office during the review of an appeal, "as matter of course will look for evidence that the decision maker has considered the possible impact the decision will have on the individual's human rights".*

(See Housing Appeal Policy)

In this context, despite section 38 of the Charter, there is no clear process and the independent-review appeals body that is afforded for some decisions, does not apply to evictions or breach of duty notices.

Thus, in many cases, challenges to administrative decisions about eviction should be attentioned to the Director, and in serious cases directly to the Minister as a matter of ensuring the Minister is aware of the decision in question.

6. Protective Costs Orders

Should parties consider applying for a judicial review via the Supreme Court, it is important to be aware of protective costs orders which are extremely important for access to justice. A protective costs order (**PCO**) effectively caps the legal costs that are recoverable against the applicant. For example, $5,000 recoverable against an application instead of $50,000 or more recoverable if the application is not successful.

This application can be made at any time once a motion has been filed. It is important that it is made as early as possible to provide the best certainty with respect to limiting costs if the application is unsuccessful.

Alternatively, there are also indemnity certificates available pursuant to *Appeals costs Act 1998*. These are not as functional and certain as a PCO.

In the decision of Bare v Small [2013] VSCA 204 (9 August 2013), Hansen and Tate JJA affirm the principles which a predominately contained in Rule 62A 1 of the federal Court rules. (see also Aitken & Others v State of Victoria *[2013] VSCA 28*; Khalid v Secretary, Department of Transport, Planning and Local Infrastructure *[2014] VSCA 115*)

It is important to note the types of decision that are likely to attract a successful PCO application and those that will not. The factors which will be taken into account do not appear to be limited, but will include:

- whether the matter is of a substantial public interest issue and the number of people affected by this
- the applicant's financial resources and ability to pay if they lose
- whether the applicant is likely to abandon the claim on the basis of the economic harm if they lose

- whether the applicant is claiming damages or compensation (if so it's unlikely to receive a PCO unless there is a demonstrable overriding public interest weight)
- the time at which protective costs order was made (it can be at any stage once proceedings are filed and should ideally be done immediately after filing originating documents)
- whether the applicant has a reasonably arguable case
- the costs likely to be incurred by the parties
- the conduct of the parties in the litigation prior to the application for a protective costs order

7. Practical Tips:

1. If a notice to vacate is served, advocates should send a letter requesting a full explanation of the decision on administrative law grounds, and request that *all* relevant considerations taken into by the authority be communicated to the tenant, and the effected persons. An example of such a letter is attached under Schedule 1 of the practice note by way of example.

2. Parties should determine if tenants are willing to compromise (i.e. compliance orders, or other undertakings that may address the likely cause of the notice).

3. All correspondence should be in writing and preferably faxed or emailed as a formal letter.

4. Meetings should have an agenda and outline the purpose of the meetings. It is important to caution tenants that plan to attend alone about the issue of *admission* and *without prejudice* considerations.

5. Parties feeling under pressure should request that they be provided with further time to seek legal advice. Noting the Model Litigant Guidelines.

6. Prior to any meetings parties should inform the other side that they intend to record the interview on a smart phone. Ensure any such record is securely stored.

    - Advice should be sought in terms of admissibility (i.e. negotiations and mediations may be treated on the basis of *without prejudice* meaning it cannot be admitted into court. However, interviews used to discharge the "proper consideration" function of the charter should be recorded as a matter of public record as the basis of what forms an administrative decision). Hence, an agenda is important, and the context of a meeting should be clearly defined well prior to the meeting.

7. If a possession order is to occur, then parties should potentially make a counter claim pursuant to section 452 and section 81 that all relevant documents in relation to the decision to evict and the Charter be provided. This is in light of section 3 of the RTA about *all* the rights a tenant with a public authority as a landlord has, and that the order sought, is an interpretation of *relevance* in light of section 32(1) of the Charter.

8. Once relevant reasons have been obtained, legal advice should be sought from Tenants Union of Victoria, Justice Connect, or Victoria Legal Aid in relation to the merits and utility of a judicial review. It is important to note the resources required for such procedures are intensive, and there is no guarantee any of the above service will be able to render assistance.

9. If a possession order has been made, and the warrant is being contemplated, any changes of circumstances, or personal circumstances not known to the authority (that the client consents to disclosing), should form the basis of a written request to refrain from the warrant being purchase and/or executed.

10. Usually, a secondary interview may be attracted to ensure procedural fairness is observed. Points 5-7 above should again be observed in relation to interviews; however, unless a compelling change or act of clemency is given, then eviction usually proceed along the, parties should consider whether judicial review is available or not.

11. If judicial review is sought, parties should consider filing the originating motions in the Supreme Court and either applying for a section 149 stay with VCAT against the execution of the warrant, or an interim injunction in the practice court of the Supreme Court.

12. Parties seeking to pursue their own resolve may wish to contact the self-representing litigant coordinator (SRL) of the Supreme Court.

If you would like to meet with the SRL coordinator, call 03 9603 9240 to make an appointment. The coordinator's office is in the Supreme Court Registry.

This Practice Note is a guide only and should not be used as a substitute for professional legal advice. If you have a question about this Practice Note or a specific case and you require advice, then you should contact us on **(03) 9411 1444**

Tenants Union Legal Team

Schedule 1. Example Letter of Request to Withdraw Notice to Vacate

The following includes a basic example of a letter requesting an explanation of a notice to vacate being given by the Director of Housing. It is for **example purposes only**. A similar letter may be drafted if a possession order is granted against a tenant, and there are compelling reasons to believe that proper consideration has not been made by the public authority.

If parties wish to use this example, please do so at your own peril. Legal advice should be sought in relation to any use or any tailoring of this document.

***

[date]

[address]

[via fax / email]

To the Director of Housing,

Re Decision to Issue Notice to Vacate & Complaint
Tenant:
Rented Premises:

We refer to the attached notice to vacate. It is requested that the notice to vacate be withdrawn.

1. **Public Authority**

We wish to affirm that you are public authority within the meaning of section 4 of the *Charter of Human Rights and Responsibilities Act 2006* ("**the Charter**"); specifically, that you are an entity established by a statutory provision that has functions of a public nature, or that an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).

2. **Request for explanation of administration decision to serve a notice to vacate**

In accordance with section 38(2) of Charter, we request that you provide *all* relevant evidence of the Directors proper consideration of the tenant, and any other effected parties human rights; specifically section 10, 12, 13, 17 and 20 [delete where applicable].

We note that while the reasons required under section 319 form part of the validity for the purposes of RTA, as you are a public authority, you are bound to give effect to procedural fairness in this process, and in accordance with the decision of *Burgess & Anor v Director of Housing & Anor [2014] VSC 648 (17 December 2014)* and *Kioa v West [1985] HCA 81 at [28] and [33].*

In this context, we seek that the Director outlines the following:

- the reasons for the notice being given
- the purpose that the notice is intended to achieve
- the purpose of the eviction

In the absence of these reasons, we believe the decision by the Director remain arbitrary pursuant to section 13 and 38(2) of the Charter, and in accordance

3. Consideration of third parties

We note that the tenant also has [co-tenants/resident/family members] who live with the tenant. This decision obviously has severe impact in relation to their human rights. We request what consideration that the Director has given to these rights, noting the civil redress against family members or residents is unlikely to be fruitful socially, or economically.

4. Request for documents

We request that you provide all relevant material that the director has relied upon as part of this decision. If the Director maintains that they are not lawfully entitled to provide this information to the tenant, take note that either an FOI request shall be made, or an application pursuant to section 452 of the RTA and 81of the VCAT Act will be made to obtain such documents, so that the tenant may engage their administrative law rights including their entitlement to procedural fairness.

We note that the failure to given sufficient reasons may amount to an error of law.

If these documents are provided in a timely manner, please also consider this letter a formal complaint for the purposes of complaints policy under your Business Management Manual policy document.

5. Request for identification of policy upon which the notice to vacate has been served

In reaching this decision to evict, we seek that the Director name with sufficient particularly the policies upon which the Director has taken into account and applied. This is pursuant to *Minister for Immigration v Gray [1994] FCA 1052,* that a departure from policy may amount to an error of law.

6. Request for name of the party who made the decision to issue the notice to vacate

We note that the notice to vacate has been signed by [insert name]. We seek affirmation that this is the party who has made the administrative decision to issue the notice to vacate, and if it is not the person who authorised the notice to vacate to be served, the relevant parties name be deposed for the purpose of addressing this decision to the relevant delegate of the Director.

7. Proportionality and less restrictive options

We note in accordance with section 7 of the Charter, that a limitation of a human right must be demonstrably justified, in that it is not disproportionate and unjust, as described by *P J B v Melbourne Health & Anor (Patrick's case) [2011] VSC 327 (19 July 2011)*.

We submit that the matter can be remedied by less restrictive means. [delete where applicable]

- Specifically, that this matter could properly be dealt with by a breach of duty notice and/or compliance order on specified terms, for a specified period.
- Specifically, that this matter could be resolved by a financial repayment plan for indemnity or restitution. We note in relation between competing human rights the High Court clearly considers that the *protection afforded to personal or property interests and economic interests because* the common law "values the physical integrity of a person at a level well above the interests of commerce" (see *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 (8 October 2014)*).

It is noted, the "punishment" and deterrence are note purposes of the public authority within the purpose of the *Housing Act 1983*.

8. Request for Interview

In light of the fact that VCAT cannot adjudicate the administrative law aspect of the Director's decision, we therefore request a time be made to enable to tenant an interview for the purposes of procedural fairness.

Please outline if you are willing to have such a meeting, and outline an agenda of all relevant items that will be discussed in this meeting.

If such a meeting is had we request it to be [select where appropriate] an interview on the public record and admissible as evidence in court and tribunal, unless otherwise indicated / or / on a without prejudice to allow parties to negotiate a practical solution.

TAKE NOTE: The tenant proposes to record the interview on a smart phone as a matter of procedural fairness so that they have a record of the matters put to the public authority and the nature of the conduct of the interview.

9. Consent to adjourn if interview cannot be arranged prior to hearing

We note that if there is not sufficient time before any hearing to facilitate such an interview, and for the tenant to obtain legal advice, then the Director should consent to an adjournment of not less than [specify time] as a matter of procedural fairness.

On this basis, we refer to the Model Litigant Guideline which is applicable to the Director, and the principles of procedural fairness.

10. Intention to obtain Possession Order

We seek a determination as to whether the Director is intending on obtaining a possession order and if this decision has formally been made and is without waiver.

11. Intention to purchase and execute warrant if Possession Order granted

We seek a determination as to whether the Director is intending to purchase and execute a warrant and if this decision has formally been made.

12. Preliminary indication of time provided to tenant if a Possession Order is obtained

If the Director is successful in obtain a possession order, and the tenant is unable or unwilling to obtain a judicial review, can the Director indicate the maximum amount of time afforded by the Director if no alternative housing can be allocated.

13. Provision of further documents from client

The tenant now wishes to provide the Director the following information in relation to the tenant and/or any residents or family members: [select and describe where relevant]

- Updated medical records
- Current

14. Hardship – Proportionality

We therefore submit that the ends sought do not necessitate eviction, and that alternative and less restrictive options are available to the Director as a matter resort.

We would like to discuss the Director's proper consideration, so that it is at least apparent the reasoning and what factors have been taken into account to reach such a decision, and whether a less pernicious resolve can be reached.

15. Purpose of the Eviction

It is submitted that if evicted, the tenant is likely to be categorised according to (segment 1, 2, 3) of the Director's waiting list, and will also suffer an arbitrary 12 month ban according to the Director of Housing's own policy.

15.1 Home (section 13)

The tenant has resided in the premises for a period of [years] without incident.

- [insert history of tenancy]

In this regard, it is submitted the matters as alleged in the notice to vacate are relatively isolated and not likely to recur. The tenant has occupied the premises for a number of years, and established more than a mere tenancy, and has a home.

It is the purpose of the *Housing Act 1983* to provide housing for the vulnerable members of the community. The statistical benefit of housing more people that are at the top of the waiting list is a relevant hardship, but one that needs to be scaled against the value of an established home and the hardship. The fact the occupation is identified legally as a tenancy, does not abrogate the Director's consideration of the premises as a home for the tenant.

15.2 Economic Expense of an Eviction

We note the Director shall incur significant costs in re-cleaning the property for new tenants and that it is unlikely that the Director will be able to recover this money if the tenant does not return to the Director of Housing.

Should they return to the Director of Housing, the delay in any recovery will be significant and economically harmful for the Director against any CPI.

15.3 Social and welfare detriment

The tenant is current engaged with the following services and community organizations:

- [insert current agencies]

The tenant has a personal history of:

- [insert any medical conditions, and likely prognosis if stable and if evicted]
- [details of tenant's background and positive growth]

It is submitted that despite the issues, as alleged in the notice to vacate, the likely results of being rendered will be seriously pernicious to their health and wellbeing, and undo many of the positive steps made by the tenant in relation [describe changes in circumstances – i.e. Positive growth through services, drug rehabilitations, stability of mental health – may also wish to refer to section 53 of the *Equal Opportunity Act 2010* with respect to discrimination, if there has been any episodic events].

15.4 Property Detriment (section 20)

The protections of the RTA in accordance with section 384 are limited. It is highly unlikely that the tenant has the financial means, or physical ability to remove their goods and find alternate accommodation. On this basis, it is highly likely the household goods will not be recoverable and cause serious property loss for the tenant and subsequent costs for the Director in relation to cleaning and disposal of these goods.

16. Please respond in writing

Respectfully, we request your response to be in writing, and address each of the above points. If the Director wishes not to make a comment in relation to that point, please indicate "no comment" in relation to the relevant sub headings.

If the Director wishes to arrange an interview as outlined above, please contact [name] on [phone number]. We look forward to your response.

Sincerely,

[organization]
[name| employment title]