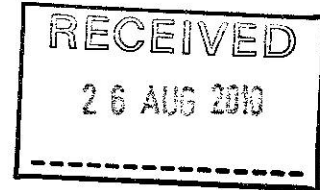


26 August 2010



Mr James Farrell  
PILCH  
Po Box 16013  
MELBOURNE 3001

Dear James,

**RE: Draft VCAT Practice Note – The Fair Hearing Obligation**

I am writing to seek your views in relation to a proposed VCAT General Practice Note dealing with the Tribunal's Fair Hearing Obligation.

The provision of a fair hearing is at the very heart of the Tribunal's obligations to the parties who appear before it, the vast majority of whom are self represented. I intend to take a number of steps to reinforce the obligations of Members, parties and their representatives relating to the provision of a fair hearing. The attached proposed Practice Note is part of that process.

I welcome any comments you may have on the proposed Practice Note. It would be appreciated if any comments are provided by no later than 4pm Friday 24 September 2010.

I look forward to hearing from you.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Iain Ross".

**Justice Iain Ross AO**  
**President**

cc Practice Note – Fair Hearing Obligation

**PRACTICE NOTE – PNVCAT ##  
(Fair Hearing Obligation)**

**ALL LISTS**

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## 1. PREFACE

The Victorian Civil and Administrative Tribunal (VCAT) was established under the *Victorian Civil and Administrative Tribunal Act 1998* (the Act) and began operations on 1 July 1998. Since its inception in 1998 VCAT's purpose has been to provide Victorians with a low cost, accessible, efficient and independent Tribunal delivering high quality dispute resolution.

In 2010, VCAT released a three-year strategic plan, called *Transforming VCAT*. At the core of *Transforming VCAT* is a new vision for the organisation as:

*'an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service'*

The provision of a fair hearing is at the very heart of this new vision.

## 2. ABOUT THIS PRACTICE NOTE

- 2.1. The Rules Committee issues this Practice Note under section 158 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- 2.2. This Practice Note comes into effect on 1 October 2010. It applies to the practice of the Tribunal in exercising its functions under the enabling enactments set out in Schedule 1 of the *Victorian Civil and Administrative Tribunal Rules 2008*.
- 2.3. In any proceeding, the Tribunal may vary the operation of the Practice Note by direction at its discretion.

## 3. DEFINITIONS

In this Practice Note:

**"Rules"** means—*Victorian Civil and Administrative Tribunal Rules 2008*

**"Tribunal"** means—Victorian Civil and Administrative Tribunal established by the *Victorian Civil and Administrative Tribunal Act 1998*.

## 4. WHAT IS THE FAIR HEARING OBLIGATION?

- 4.1. The provision of a fair hearing is at the very heart of the Tribunal's obligations to the parties who appear before it. Sections 97, 98, 100, 101 and 102 of the *Victorian Civil and Administrative Tribunal Act 1998* (the Act) set out some of the Tribunal's obligations regarding the conduct of hearings:

In particular, the Tribunal:

- (i) must act fairly and according to the substantial merits of the case in all proceedings, s.97;
- (ii) is bound by the rules of natural justice, s.98(1)(a);
- (iii) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit, s.98(1)(a); and

- (iv) may conduct all or part of a proceeding by teleconference, video links or any other system of telecommunications, s.100(1);
- (v) must hold all hearings in public unless it directs that a hearing or any part of it be held in private, s 101;
- (vi) must allow a party a reasonable opportunity to call or give evidence question witnesses and to make submissions to the Tribunal, s.102(1).

4.2. The Tribunal has a general duty to ensure a fair hearing. A fair hearing involves the opportunity to put your case – the right to be heard – and have the case determined impartially and according to law.

## **5. WHAT ARE THE OBLIGATIONS OF MEMBERS?**

- 5.1. Members have a responsibility to ensure that all parties receive a fair hearing and that parties and their representatives are treated with courtesy and respect
- 5.2. The provision of a fair hearing requires Members to identify the difficulties experienced by any party, whether due to lack of representation, ethnic origin, religion, disability or any other cause, and find ways to overcome those difficulties and assist them through the Tribunal process
- 5.3. In some circumstances, in order to provide a fair hearing, a Member will have an obligation to intervene in the proceedings for, for example, in order to:
- (i) clarify uncertainty;
  - (ii) identify relevant issues;
  - (iii) ensure that hearings are conducted efficiently and costs are kept to a minimum;
  - (iv) ask a party or a witness questions to elicit information in relation to the relevant issues in the proceeding; and
  - (v) deal effectively with inappropriate behaviour.
- 5.4. Members have a duty to assist parties in order to ensure that they are provided with a fair hearing. The assistance provided by a Member may, depending on the circumstances, include:
- (i) explaining the relevant legislative provisions;
  - (ii) identifying the issues which are central to the determination of the particular proceedings;
  - (iii) asking a party questions designed to elicit information in relation to the issues which are central to the determination of the particular proceedings; and
  - (iv) drawing a party's attention to the relative weight to be given to unsworn as opposed to sworn evidence.
- 5.5. Context is important in assessing the level of assistance to be provided and the extent of member intervention. These matters will depend on the nature of the proceeding and whether the parties are represented. .

## **6. THE DUTY OF THE TRIBUNAL TO ASSIST SELF-REPRESENTED PARTIES.**

- 6.1. Members have a particular responsibility to assist self-represented parties (sometimes referred to as litigants in person) to the extent necessary to ensure a fair hearing. What a Member must do to assist a self-represented party depends on the particular party and the nature of the case. The duty to assist may extend to issues of law as well as procedure and the Member should endeavour to ascertain the true legal character of the claims made.
- 6.2. However, the assistance to be provided to a self-represented party is limited. It is necessary to balance the interests of litigants who represent themselves with the need to afford procedural fairness to other parties, and to ensure that hearings are conducted efficiently and costs are kept to a minimum. All parties have the right to a fair hearing.
- 6.3. A member cannot become the advocate of a self represented party, Members must maintain a proper balance between:
  - (i) assisting those appearing before the Tribunal and enabling them to participate fully; and
  - (ii) the impartiality of the Tribunal.

## **7. WHAT ARE THE OBLIGATIONS OF PARTIES AND REPRESENTATIVES?**

- 7.1. The fair hearing obligation is a shared obligation. Parties and their representatives also have obligations, both to the Tribunal and to each other.
- 7.2. Parties and their representatives must:
  - (i) treat the Tribunal and the other parties/representatives with courtesy and respect;
  - (ii) act honestly in relation to the proceeding and must not knowingly give false or misleading information to the Tribunal;
  - (iii) cooperate with other parties and the Tribunal to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute;
  - (iv) act promptly, comply with all Tribunal directions for the timely resolution of the dispute and minimise delay;
  - (v) use reasonable endeavours to ensure that the costs incurred in connection with the proceeding are reasonable and proportionate to the complexity and importance of the issues and the amount in dispute; and
  - (vi) participate in Alternative/Appropriate Dispute Resolution when directed to do so by the Tribunal and
    - (a) use reasonable endeavours to resolve the dispute by agreement; or
    - (b) if a dispute cannot be wholly resolved by agreement then use reasonable endeavours to resolve any issues that can be resolved by agreement and narrow the scope of the remaining issues in dispute.