

FOLEY'S | LIST

LEGISLATION – *Victorian Civil and Administrative Tribunal Amendment Act 2014* (proposed)

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LEGISLATION – AMENDMENTS TO THE VCAT ACT

Important amendments to the VCAT Act are considered, including that the Tribunal may make orders in relation to the reimbursement of fees, separate from its power to award costs; and that responsible authorities may be invited to reconsider a decision.

The main purpose of the Victorian Civil and Administrative Tribunal Amendment Act 2014 is to enhance the powers and efficiency of the Tribunal and enact a new regime for expert witnesses and expert evidence (s1).

The Act will—

- enable the Tribunal when exercising its review jurisdiction to invite an original decision-maker to reconsider the decision;
- enable the Tribunal to make an order in relation to fees, separate from its power to award costs;
- introduce a legislative scheme for the Tribunal in relation to expert witnesses and their evidence;
- provide a range of mechanical and technical amendments to improve the Tribunal's ability to manage proceedings.

(In outlining the more notable amendments, I have had regard to the explanatory memorandum, as well as the Act.)

The Bill was assented to on 1 April 2014 but at the time of writing had not been proclaimed to commence.

Expert witness

The new definition of expert witness in s.3 is:

“expert witness means a person who has specialised knowledge based on the person’s training, study or experience”



Decision maker may reconsider its decision

New section 51A provides that the Tribunal may at any time in a proceeding for review of a decision invite the decision-maker to reconsider the decision. The decision-maker may affirm, vary or set aside the decision (and see following sub-sections).

Parties may be cease to be a party

New section 60A provides that the Tribunal may order, on its own initiative or on the application of a party, that a person cease to be a party to a proceeding if the Tribunal considers that—

- the person's interests are not, or are no longer, affected by the proceeding; or
- the person is not a proper or necessary party to a proceeding, whether or not the person was one originally.

Fees

In addition to a costs order which the Tribunal may make under section 109, new Division 8A of Part 4 sets out a new power for the Tribunal to make orders in relation to fees. This is a separate power from its power to award costs.

Note that the new section 115A defines fee to mean a fee payable in a proceeding under the Act, the rules, the regulations or an enabling enactment.

That section also clarifies that a party does not include a person who is a party only because the person has intervened or is entitled to intervene in a proceeding, or is a party because of section 83 of the Planning and Environment Act 1987.

The new section 115B provides that the Tribunal may, at any time, make an order that a party to a proceeding —

- reimburse another party the whole or any part of any fee paid by that other party in the proceeding;
- pay, on behalf of another party, the whole or any part of any fee that may be required to be paid in the future by that other party in the proceeding;
- reimburse another party the whole or any part of any fee that may be paid in the future by that other party in the proceeding; and
- an order as to which party must pay the whole or any part of a fee in future in the proceeding

The Tribunal must have regard to matters such as the issues involved in the proceeding; the conduct of the parties; and the result of the proceeding (s.115B(3)).

There is a presumption with respect to proceedings relating to a small claim, or under the Domestic Building Contracts Act, the Owners Corporations Act and the Residential Tenancies Act, that a party who has substantially succeeded against another party in a proceeding to which the section applies is entitled to an order that the successful party be reimbursed the whole of the fees paid by the successful party. (s. 115C)

Principal Registrar Functions

The new section 157A(1) provides that the Tribunal may make rules that provide for certain functions of the Tribunal to be performed by the Tribunal constituted by the principal registrar.

Section 157B provides that the Tribunal constituted by any member may review a decision made by the Tribunal constituted by the principal registrar. The review is to be conducted as a hearing de novo, and may be at the request of a party or on the Tribunal's own initiative.

Expert evidence

A new Schedule 3 is inserted into the Act. New Schedule 3 governs expert witnesses and expert evidence. These provisions are modelled on the approach in the Victorian Civil Procedure Act 2010, but modified to reflect the different nature of Tribunal proceedings and processes.

Second reading speech of the Attorney General, 6 February 2014, Legislative Assembly (extracts)

- Decision maker to reconsider decision.
 - The bill enables VCAT, when exercising its review jurisdiction, to invite an original decision-maker to reconsider the decision under review. This reform is designed to allow the tribunal to bring the decision-maker back into the process, with a view to assisting resolution. The reform is expected to be of particular benefit in proceedings in the planning jurisdiction, where progress towards resolution has been made with the parties, and where the decision-maker may wish to vary its decision or substitute a decision that is acceptable, or more acceptable, to the parties.
 - For example, the power would allow VCAT to formally request that a local council reconsider a decision to grant a permit with certain conditions, thus providing the council itself with the opportunity to consider a proposed resolution to the dispute, rather than having to decide whether or not to authorise council planning officers to agree to possible resolutions during negotiations at VCAT.
- Fees to be met by unsuccessful party
 - The bill also creates a presumption that either the whole or a portion of the VCAT fees incurred in bringing a dispute to VCAT will be met by the unsuccessful party in small consumer claims as well as in owners corporation, domestic building, and residential tenancies disputes, other than residential tenancies disputes where the director of housing is a party. This will provide greater fairness in allocating responsibility for the payment of fees in a proceeding, and will also encourage a party likely to be found at fault to seek to resolve a dispute, thus avoiding or reducing the time and cost incurred by a party with a legitimate claim.
 - The bill provides for the presumption to be displaced if VCAT determines that a different order is appropriate based on the nature of and issues in the proceedings and the conduct of the parties.
 - Where the presumption does not apply, VCAT will have the discretion to order fees having regard to whether a party was successful in the proceedings, the nature of and issues in the proceedings, as well as the conduct of the parties.
- Expert Witnesses
 - The bill also introduces a legislative scheme for VCAT in relation to expert witnesses and their evidence, modelled on the provisions that apply to the courts under the Civil Procedure Act 2010. The scheme being introduced for VCAT has been modified and simplified where appropriate to take account of the different nature of proceedings in VCAT.

- Principal Registrar powers
 - The bill also makes a number of changes to improve internal VCAT administration, such as expanding the rule-making power to give VCAT the flexibility to empower the principal registrar to make certain procedural orders, and to delegate certain functions to appropriately qualified staff where approved by the President. These changes will provide particular benefits to applicants in regional areas, where local registrars and staff will be given authority to make decisions that may have previously required documents to be processed in Melbourne.
 - In all VCAT registries, the change will minimise the need for members to make low-level orders about documents and requests from parties where a request is appropriate for determination by a registrar or appropriately qualified staff member. The tribunal will retain control over which powers may be delegated, and may review a decision at the request of a party or on its own initiative. A registrar will not be able to make any orders finally disposing of a proceeding unless the parties consent.

Julie is a member of the Victorian Bar. She has for many years practised in land development, planning, local government and associated areas. Julie is an experienced VCAT advocate in its many jurisdictions. In addition to private practice, she has worked within local government and a metropolitan water company. She holds a Bachelor of Laws degree (Melbourne University), a Master of Business (Corporate Governance) (RMIT); and is a certified Mediator. Julie can be contacted through Foley's list on 9225 7777, 0412322111 or julie.r.davis@vicbar.com.au.