

**PRACTICE NOTE – PNVCAT 3
(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'

Reinforcing the obligation to provide 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. The purpose of this Practice Note is not to exhaustively state the law concerning the fair hearing obligation, but rather to provide some procedural guidance as to how the obligation may be discharged.

3. DEFINITIONS

In this Practice Note:

"Appropriate Dispute Resolution (ADR)" means—mediation and compulsory conference.

"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 Tribunal has a general duty to ensure a fair hearing, pursuant to s 24 of the *Charter of Human Rights and Responsibilities Act 2006* and various provisions of the *Victorian Civil and Administrative Tribunal Act 1998*. A fair hearing involves the provision of a reasonable opportunity to put your case – the right to be heard – and to have your case determined according to law by a competent, independent and impartial tribunal.
- 4.2. 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)(d); 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).
- 4.3. The Tribunal provides a free interpreter service as part of its obligation to provide a fair hearing. Requests by a party for the provision of an interpreter can be made either in writing or by telephoning the Tribunal. Such requests should be made when lodging an application with the Tribunal or as soon as practicable after being notified of the hearing date.

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, literacy difficulties, ethnic origin, religion, disability or any other cause, and find ways to overcome those difficulties and assist them through the Tribunal process. This may include adopting special measures to facilitate the equal participation of people with attributes protected under the *Equal Opportunity Act 2010*, where they may otherwise be prevented from fully participating in the Tribunal's 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 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;
 - (iv) drawing a party's attention to the relative weight to be given to unsworn as opposed to sworn evidence; and
 - (v) adjourning a hearing in circumstances where it would be unfair to proceed.
- 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, the time available for the hearing 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. For example, greater assistance may be warranted in circumstances where a person may lose substantial freedoms and personal autonomy (such as in the Guardianship List) or potentially be made homeless (such as in the Residential Tenancies List) as a result of Tribunal orders.

The duty to assist may require a Member to endeavour to ascertain the true legal character of the claims made. Members may also refer a self-represented party to a duty lawyer or other provider of pro bono legal services for legal advice.

- 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 Tribunal requires that parties and their representatives participate in its processes in a responsible way in order to assist the Tribunal to provide a fair hearing.

7.2. Parties and their representatives must:

- (i) treat the Tribunal and the other parties/representatives with courtesy and respect at all times;
- (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 ADR when directed to do so by the Tribunal and when engaged in ADR, whether by Tribunal direction or by consent,
 - (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.

7.3. The State of Victoria, its Departments and agencies have an obligation to act as a model litigant.¹ In essence, being a model litigant requires that the State, its Departments and agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and Rules of the Tribunal. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.

7.4. Any communication by a person with the Tribunal in relation to a proceeding must be through the Principal Registrar. A person must not contact a Member of the Tribunal directly in relation to a proceeding.

¹ Victorian Government Solicitor's Office, <http://www.vgso.vic.gov.au>