



## Case Note

### *Director of Housing v Warfa Shire Sudi* [2011] VSCA 666

September 2011

#### What does it mean for me?

This case is of interest to the Department of Human Services, agencies who are involved in proceedings before the Victorian Civil and Administrative Tribunal (VCAT), and public authorities generally.

The Court of Appeal of the Supreme Court of Victoria has made a significant ruling in the case of *Director of Housing v Warfa Shire Sudi*, relating to the role of VCAT in considering human rights issues in matters within its original jurisdiction. It provides important guidance on the way in which decisions of public authorities may be challenged for breach of their obligations under the *Charter of Human Rights and Responsibilities Act 2006*.

#### Background

The case concerned an appeal from a decision of Bell J sitting as President of VCAT.

The respondent and his young son live in a home owned by the Director of Housing (**Director**). The tenancy agreement for the home was originally made with the respondent's mother, but after she passed away the respondent and his son continued to occupy the premises. The Director subsequently applied to VCAT for a possession order of the premises under s 344 of the *Residential Tenancies Act 1997* (RTA).

#### Summary

Section 38(1) of the *Charter Act* provides that it is unlawful for public authorities to act in a way that is incompatible with human rights or, in making a decision, to fail to give proper consideration to relevant human rights.

Section 39(1) governs legal proceedings for breach of these obligations and provides that:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

The Court of Appeal's judgment makes clear that:

- The principal mechanism for challenging decisions of public authorities is through judicial review proceedings.
- While *Charter Act* issues may arise for determination in VCAT proceedings in other ways, the *Charter Act* does not confer upon VCAT a power to conduct a collateral review of a decision of the public authority.
- A separate ground of unlawfulness is required before a person can rely upon unlawfulness based upon a breach of s 38 of the *Charter Act*.

No *Charter Act* issue was directly raised in the VCAT proceeding. Rather, the respondent sought to rely on the *Charter Act* by way of collateral review, seeking to use it as a basis for finding that the Director's application was invalid.

Bell J held that VCAT could determine whether the *Charter Act's* human rights standards applied to the Director, whether the Director's acts or decisions breached those standards, and whether any breach was justified. After determining that the Director's application to evict the respondent and his son amounted to a serious interference with their rights to family and home under s 13(a) of the *Charter Act*, Bell J proceeded to find that the Director failed to establish she had given proper consideration to these rights before making the application, thereby contravening s 38(1) of the *Charter Act*. Consequently, his Honour held that the Director's actions were unlawful, and the application for possession was not a valid application under s 344 of the RTA. The application for possession was dismissed.

The Director appealed the decision.

## What is the issue?

1. Does the RTA confer upon VCAT jurisdiction to undertake a collateral review of an administrative decision in determining an application under the Act?
2. Does s 39(1) of the *Charter Act* confer upon VCAT jurisdiction to undertake a collateral review of an administrative decision in determining an application under the RTA?
3. If the RTA and the *Charter Act* do not confer the power to review the lawfulness of the Director's actions, is this inconsistent with the respondent's right to privacy under s 13(a) of the *Charter Act*? If so, should a declaration of inconsistent interpretation be made under s 36 of the *Charter Act*?

In separate decisions, Warren CJ, Maxwell P and Weinberg JA answered each of these questions in the negative.

## Issue 1: The RTA does not confer a collateral review power on VCAT

Warren CJ held that the provisions of the RTA conferring jurisdiction on VCAT evince an intention for the Tribunal to operate as a mechanism for the quick and inexpensive resolution of disputes, thereby denying it power to collateral review and instead requiring it to treat relevant administrative decisions as valid unless and until set aside by a court of competent jurisdiction (at [34]–[45]).

Similarly, Maxwell P considered that it would be 'wholly inconsistent' with the legislative purpose of the RTA provisions, which heavily circumscribe the scope of VCAT's enquiry, to imply to VCAT a power of collateral review exercisable in possession order proceedings initiated by the Director (at [76]–[86]). Moreover, his Honour stated that the Director's standing to seek a possession order under the RTA, being no different to any other person who claims such an entitlement to do so, points strongly to the exclusion of collateral review of the lawfulness of the Director's actions as a public landlord (at [75]).

Weinberg JA began by noting that in exercising original jurisdiction, VCAT is not a court, but rather a 'hybrid' which discharges a function that resembles the exercise of judicial power, subject to statutory constraints (at [157]–[208]). His Honour then applied the High Court of Australia decision in *Ousley v The Queen*<sup>1</sup> to conclude that VCAT could not conduct 'collateral review of the conduct of a public authority in a case in which the question of unlawful conduct is not directly in issue' (at [263]–[264]). Moreover, Weinberg JA commented that the common law limitations upon collateral review 'suggest that the question of Charter compliance is a matter for judicial review, and nothing less' (at [155]).

## Issue 2: The Charter does not confer a collateral review power on VCAT

Warren CJ stated that because neither the RTA nor the *VCAT Act* confer a power to review the lawfulness of the Director's decisions upon the Tribunal, s 39(1) of the *Charter Act*, which grants the right to seek relief or remedy on a

'ground of unlawfulness' under the *Charter Act*, similarly does not operate to confer such jurisdiction (at [48]). Accordingly, VCAT did not have jurisdiction to consider whether the Director's application was in breach of the *Charter Act* (at [54]).

Likewise, after noting that the operation of s 39(1) of the *Charter Act* was conditional upon the existence of an independent right to seek relief or remedy in respect of a decision of a public authority on the ground that the act or decision was unlawful, Maxwell P stated: 'Since it is not open to the Tribunal to review the lawfulness of the Director's application decision on any of the conventional grounds, it follows that there is nothing on to which s 39(1) can engraft a supplementary ground of unlawfulness' (at [98]).

Weinberg JA held that s 39(1) of the *Charter Act* does not confer upon VCAT any power of judicial review, nor does it expand any power of collateral review VCAT may possess under the common law (at [281]).

### Issue 3: A declaration of inconsistent interpretation pursuant to s 36 of the *Charter Act* should not be made

It was submitted on behalf of Mr Sudi that the restriction upon VCAT determining the *Charter Act* issues was inconsistent with the right to privacy in s 13 of the Charter and that a declaration of inconsistent interpretation should be made. The argument was rejected.

Maxwell P declined to make a declaration of inconsistent interpretation on the basis that VCAT's inability to undertake collateral review under the RTA was a 'procedural or adjectival matter' which did not affect the respondent's substantive right to remedies under ss 38 and 39 of the *Charter Act* (at [105]).

Warren CJ stated that, if VCAT's lack of jurisdiction to review the Director's actions did constitute a limitation of the respondent's s 13(a) *Charter Act* rights, that limitation was demonstrably justified by the policy benefits in maintaining the Tribunal's role as a forum for the

quick, efficient and inexpensive resolution of issues arising under the RTA (at [56]).

Weinberg JA adopted the reasoning of Warren CJ on this point (at [308]). Recognising that there are 'undoubtedly, some practical benefits in having all issues that arise in the course of any legal proceeding determined at the same time, and by the same body' (at [286]), Weinberg J also identified at the potential for wide-ranging collateral review to 'impede, if not derail proceedings that were never intended to be conducted in that way' (at [287]). While emphasising the significance of the problem of protecting the legitimate interests of the homeless, Weinberg J considered that the requirement to seek judicial review in order to set aside the Director's actions is 'hardly likely to be catastrophic' (at [303]).

<sup>1</sup> (1997) 192 CLR 69. In *Ousley*, a majority of the High Court held that while administrative acts are presumptively susceptible to collateral challenge, the grounds upon which any such challenge could be mounted were strictly limited to 'facial' or 'patent' invalidity.

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