VCAT | victorian civil & administrative tribunal

Tribunal Submission – Victorian Law Reform Commission Contempt of Court Consultation Paper

Introduction

The Victorian Civil and Administrative Tribunal (Tribunal) is not a court. The Tribunal's power to deal with conduct that may constitute contempt is provided for in s 137 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).

Many of the issues raised in the Consultation Paper in the context of the Courts, with recommendations for clarification by specific statutory provisions, are equally applicable to the Tribunal. However, the issues that the application of the contempt powers in s 137 of the VCAT Act (Contempt Powers) gives rise to are unique to the Tribunal and need to be considered as part of the review of the law relating to contempt of court.

Issues

Contempt in the face of the court and disobedience contempt

Litigants approach the Tribunal differently than if it were a court and the authority and orders of the Tribunal are not always respected in the same way. The Tribunal deals with a high number of self-represented litigants and a certain proportion of litigants may also have mental health issues. For these reasons, there is a higher likelihood for some litigants to act out against Tribunal members and ignore Tribunal orders, resulting in contempt in the face of the court and disobedience contempt being common at the Tribunal.

Enforcement of orders

An issue for the Tribunal is the inability to enforce its own orders. Under s 121 and 122 of the VCAT Act, a monetary order may be enforced by filing the order in the appropriate court and a non-monetary order may be enforced by filing it in the Supreme Court, respectively.[1] The enforcement process for a non-monetary order, such as in planning matters where there is a refusal to comply, is burdensome and costly for the parties. Parties are often under the misapprehension that by utilising the Contempt Powers, they will have their orders enforced. Parties have difficulty understanding that the Tribunal cannot enforce its orders. A party seeking to utilise the contempt process where there is non-compliance with an order, needs to make the contempt application. The process is cumbersome, slow, complex and costly. A finding of contempt may lead to a fine or imprisonment, however if this does not result in compliance with the order, enforcement action will need to be taken in the relevant court. A clearer, simpler and cheaper process for enforcing Tribunal orders would obviate the need for parties to resort to contempt applications in many cases.

[1] Sections 121 and 122 of the VCAT Act are to be amended by ss 68 and 69, respectively, of the *Justice Legislation Amendment (Access to Justice) Act 2018*, to dispense with certain filing requirements. Tribunal orders will still need to be enforced in the Magistrates', County or Supreme Courts. Sections 68 and 69 are yet to commence and have a default commencement date of 1 July 2020.

Application of the Contempt Powers and procedural fairness

The practical application of the Contempt Powers and the procedures that need to be followed by the Tribunal are cumbersome, unclear, uncertain and complex and involve legislation that is not suited to the Tribunal. For example, under s 137(4) of the VCAT Act, the *Bail Act 1977* applies where a person is brought before the Tribunal after being arrested on a charge of contempt. The Tribunal does not have custodial facilities and the Principal Registrar cannot issue bail, so when an arrest for contempt occurs, it needs to be dealt with at the County Court.

Section 98 of the VCAT Act provides, inter alia, that the Tribunal is bound by the rules of natural justice, however is not bound by the rules of evidence and must conduct proceedings with as little formality and technicality. The Tribunal exercises caution when dealing with contempt in the face of the court, so as not to give rise to any procedural fairness issues.

To provide parties with the opportunity to be heard, where objectionable behaviour or conduct arises in a hearing, the Tribunal will usually adjourn the matter, rather than resort to the use of the Contempt Powers. Referring matters to a presidential or judicial member, as appropriate, may also be utilised to deal with objectionable behaviour or conduct. Often reinforcement by another senior member can diffuse a situation or bring to bear more experience and authority.

The Tribunal makes submissions with respect to questions 12–15, 17, 19, 25–26, 32, 34 and 58–59 in the Consultation Paper.

Question 12 – Is there a need to retain the law of contempt in the face of the court?

Question 13 – If the law of contempt in the face of the court is to be retained, should the common law be replaced by statutory provisions? If so, how should it be defined and what fault elements, if any, should be required?

Yes, the courts and the Tribunal need to have the power to take action against parties engaging in objectionable conduct (such as, the conduct outlined in paragraph 4.9 of the Consultation Paper), so as to maintain their authority and standing.

Whilst ss 137(1)(a)–(e) of the VCAT Act specify the types of conduct that may constitute contempt in the face of the court, s 137(1)(f) is very broad and provides 'do any other act that would, if the Tribunal were the Supreme Court, constitute contempt of that Court.' The two issues that s 137(1)(f) raises for the Tribunal are: what acts constitute contempt in the Supreme Court? How should that be applied within the Tribunal context? It requires the Tribunal to apply the common law. It is also unclear to the litigants what acts will contravene s 137(1)(f). It can be quite difficult, particularly for a self-represented litigant, to understand why the Tribunal has made a finding of guilt for contempt under s 137(1)(f).

For clarity and consistency, the Tribunal supports a statutory framework for contempt that codifies the common law and replaces the Contempt Powers.

Question 14 – If the law of contempt in the face of the court is to be replaced by statutory provisions, should insulting or disrespectful behaviour be included within the scope of the offence?

Insulting or disrespectful behaviour should be included within the scope of contempt in the face of the court, as this is the most efficient and timely mechanism for reinforcing the integrity of the Tribunal and the authority of members, who are performing an essential public function. However, there does need to be a degree of latitude which takes account of the repetition and gravity of the behaviour in the particular circumstances. Warning a litigant that they may be dealt with for contempt, may be counter-productive and can also give rise to safety and security concerns for judges, members, Tribunal staff, parties and legal representatives.

Question 15 – If the law of contempt in the face of the court is to be replaced by statutory provisions, should it be limited to conduct which is directly seen or heard by the presiding judicial officer? In other words, should the underlying test be whether the judicial officer can decide the contempt on the basis of their own observations, without the need to receive evidence from other witnesses?

Contempt in the face of the court should not be limited to conduct that is directly seen or heard by the Tribunal member. There have been occasions at the Tribunal where parties and legal representatives have been abused and intimidated by other parties. For example, in a case under the *Racing Act 1958*, a jockey was being abusive and intimidating during a lunch adjournment. The jockey was not dealt with for contempt by the Tribunal, however faced further disciplinary charges for this behaviour which was heard by the Racing Appeals Disciplinary Board. This behaviour could have been more expeditiously dealt with by the Tribunal, if the Contempt Powers clearly encompassed these circumstances. Parties and legal representatives ought to have the right to seek the sanction of the Tribunal where threats and abuse occur within the confines of the Tribunal, irrespective of whether it is inside or outside the actual hearing room. The question of proof is a separate issue. There may be electronic surveillance available and witnesses and victims may be able to give evidence of verbal abuse or threats made within the Tribunal precinct.

A further example that illustrates the need for the definition of 'contempt in the face of the court' in any statutory provisions to extend beyond the hearing or court room and/or what is directly seen or heard by the presiding judicial officer, occurred in the context of a County Court proceeding. A former Vice President of the Tribunal (who is a County Court judge) had a situation that arose following two separate appeals in the Court involving the same respondent who unsuccessfully appealed against intervention orders. The respondent engaged in the following extremely disturbing conduct:

- Whilst the Judge was delivering directions to a jury, the respondent burst into the Court room yelling abuse at the Judge until the Tipstaff was able to restrain the respondent and escort him from the building.
- A short time later the respondent commenced a protest outside of the Court, until he was persuaded by security to move across William Street where he stood outside the Magistrates' Court, almost continuously for about four months bearing a placard stating that the Judge is a murderer. The respondent engaged passers by to recount his grievances.

The Court sought legal advice as to whether action could be taken to address this situation. Essentially, the advice was that no action could be taken. The conduct was highly offensive and defamatory, and the Court appeared to be powerless to stop it. Ultimately, a member of the public (who contacted the Judge's Associate to express outrage at the situation) conducted his own research and discovered through contacting the City of Melbourne, that the respondent had failed to obtain a permit for the placard. At the insistence of the Council, the respondent was off the street within 24 hours.

Question 17 – Should the procedure for initiating, trying and punishing a charge of contempt in the face of the court be set out in statutory provisions? If so, what should the procedure be? In particular:

(a) Is there a need to preserve the power of the courts to deal with contempt in the face of the court summarily?

(b) Should the process for dealing with a disruption to proceedings be separated from the process for trying and punishing the disruptive behaviour?

(c) Who should try the offence? Should the offence be able to be tried by the judicial officer before whom the offence was committed?

Though the Contempt Powers provide a limited framework for dealing with an alleged contempt, in practice, it is uncertain and complicated. For the Tribunal to prosecute a contempt in the face of the court, the Principal Registrar usually needs to retain and instruct the Victorian Government Solicitor's Office to prosecute the matter. Where there is a failure to comply with a non-monetary order (disobedience contempt), the person in whose favour the order was made, needs to make the application to the Principal Registrar. This process involves lodging an application, filing an affidavit in support and a draft charge.

Under s 137(10) of the VCAT Act the contempt powers are currently only exercisable by a judicial member. Section 137(10) is to be amended by the *Justice Legislation Amendment (Access to Justice) Act 2018* [2] (Access to Justice Act), to empower a presidential member to exercise these powers.

Many acts of contempt are minor, in the sense of being fairly isolated and/or eruptions of anger/abuse which might quickly subside with careful management. Still, such behaviour needs to be 'called out' for what it is and in appropriate cases, warnings given that repeat behaviour will be dealt with summarily for contempt. Judicial and presidential members ought to have, on their own initiative, or the application by another party, the power to deal with contemptuous conduct, whether occurring within or outside the hearing room, including imposing a relevant sanction. Circumstances will dictate whether it may be prudent to order a brief adjournment to enable the offending party to obtain legal advice. Where an offending party is no longer before the Tribunal or has absented themselves prematurely, a judicial member or presidential member ought to have the power to issue a summons for their arrest and to be brought before the Tribunal.

Tribunal members can receive serious threats and other safety and security issues can also arise which require an immediate response to protect the Tribunal. A judicial or presidential member ought to have the power to deal with particularly disruptive, aggressive, and or abusive behaviour when it occurs. There will often be a pattern of escalating bad behaviour and prior warnings given. The offending party must be carefully advised in advance of the consequences of continuing to behave in a particular way.

It should be possible for the member to hold the person in contempt, on the basis of observed behaviour (and assuming no apology or acknowledgement) or on the basis of evidence given by another party or representative of behaviour/comments made which the member has not observed. The range of sanctions available should be extensive, including: imposition of a fine, striking out a claim or defence, summary judgement for the other party, adjournment pending certain conditions being met by the offending party.

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[2] Section 70(2) will amend s 137(10) to replace reference to a judicial member, with a presidential member. Section 70(2) has not commenced and has a default commencement date of 1 July 2020.

Many parties who come before the Tribunal under the *Vexatious Proceedings Act 2014* exhibit extremely aggressive and abusive behaviour toward both the Tribunal and other parties. There have been cases where the litigant's behaviour has reflected a complete contempt for the authority of the Tribunal and a view that they have free reign to behave in this manner without the risk of any consequences.

Consideration should be given to setting out statutory provisions that clarify, specify and simplify the process for prosecuting a charge of contempt in the face of the court for the Tribunal and for parties to initiate. Judicial and presidential members should be able to hear matters where the offending behaviour occurred before them, but there may also be circumstances where it is prudent that the matter be heard by a different member.

Question 19 – Under the current law, does the actual or threatened use of the power to punish for contempt in the face of the court affect certain groups of people unfairly? If so, how should this be addressed?

The Tribunal refers to its comments under '*Issues - Contempt in the face of the court and disobedience contempt*' on p 1.

The fact that the Tribunal frequently deals with vulnerable self-represented litigants, gives rise to the need for greater skill and care by members when handling these complex situations. Self-represented litigants and litigants with mental health issues do not necessarily understand Tribunal protocol and/or that their conduct may be inappropriate. Generally, it is a stressful situation that is new to them and despite that it is more informal than the courts, it can be daunting. Tribunal members hear multiple cases in one day and often they are of limited monetary value. Whilst fines and imprisonment may be appropriate in certain cases (and the sanction of imprisonment should only ever be imposed by a judicial member, and in exceptional circumstances), imposing a fine or term of imprisonment for contempt where a small monetary claim is concerned may not be suitable. Consideration needs to be given to a broader range of penalties that are commensurate with the gravity of the act. For example, provide for the Tribunal to make an order for costs, or impose a short period of exclusion from the hearing.

Question 25 – Is there a need to retain the law of disobedience contempt?

Question 26 – If the law of disobedience contempt is to be retained:

(b) Should the common law of disobedience contempt be replaced by statutory provisions? If so, should it replaced by statutory offence provisions and/or a statutory procedure for civil enforcement of court orders and undertakings?

The law of disobedience contempt should be retained, although there is a need for discretion to allow for consideration of the circumstances surrounding the failure to comply. For example, a failure to comply, with good reason, may not constitute contempt, however where the failure is wilful/deliberate or the offending party has no excuse for failing to comply for a prolonged period, it will constitute a contempt.

As a general rule, disobedience contempt should not be used as an alternative mechanism for enforcing a Tribunal order, however, in particular circumstances, this may be the only recourse available to the beneficiary of the order. In the instance where the offending party has failed to comply without reason for a prolonged period, the beneficiary of the order may have suffered ongoing detriment as a consequence of such failure and not be in a financial position to pursue the offending party in further litigation.

Section 137(1) of the VCAT Act will be amended by s 70(2) of the Access to Justice Act to insert a new s 137(ea) to provide that 'fail to comply with an order of the Tribunal in circumstances where, if the order were an order of the Supreme Court, the failure would constitute contempt of that Court'.[3] The amendment will clarify that non-compliance with an order may constitute contempt, however its practical application may raise further procedural issues, given the informal nature of VCAT proceedings.

Consideration should be given to introducing a new statutory framework for disobedience contempt that replaces the Contempt Powers.

A key issue for consideration when assessing the appropriateness of a statutory offence for non-compliance with a Tribunal order is, who should be empowered to enforce a breach? Without effective enforcement, a statutory offence provision serves limited purpose. There also needs to be a clear and simple process for enforcement. Under s 137(9) of the VCAT Act, a fine imposed for contempt on a person may be enforced as if it were a fine imposed on that person by the Supreme Court on finding them guilty of an offence. In *Kanter v Milroy Investments Australia Pty Ltd*[4], the Tribunal found that the respondent had committed a contempt by breaching an order that the respondent comply with rules of an owners corporation and imposed a $10,000 fine on the respondent. The fine was not paid and the Tribunal had to apply to the Supreme Court to have it enforced. The fine was eventually paid as a result of the enforcement action, however the process for enforcement was unclear, complex, protracted and resource intensive.

As to the question of a statutory procedure for civil enforcement of court orders and undertakings, the Tribunal refers to its comments under '*Enforcement of orders*' on p 1.

Question 32 – Is there a need to retain the law of scandalising contempt?

Yes. The offence should be replaced by statutory provisions which redefine it within a modern context.

Question 34 – In stakeholders' experience, is criticism of the judiciary on social media a problem that should be dealt with by a law such as scandalising contempt or is it best managed outside of the law?

The Tribunal has had several matters arising out of proceedings where parties have used their web page or other social media platforms to make extremely derogatory comments about the Tribunal and members and false accusations concerning particular hearings or decisions. Serious ill-informed criticism, abuse and/or defamatory comments directed at judges and members should not be tolerated and ignored.

In some circumstances, criticism of the judiciary has been most effectively dealt with by the various heads of jurisdiction. either by having a response published or giving media interviews to correct often serious misreporting or misapprehensions. There is always a tension and understandable reluctance for the judiciary to enter the public arena, but it is also properly seen as an educative role. At the same time, no organisation, including the judiciary or police, should ever be immune from intense scrutiny or constructive criticism. Hence, either of the two alternatives may be required, depending upon the nature and circumstances of the publication.

Careful consideration is required as freedom of the press is an issue.

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[3] Section 70(1) has not commenced and has a default commencement date of 1 July 2020.
[4] [2015] VCAT 90.

Question 58 – How many legacy suppression orders with no end date issued by the Supreme, County and Magistrates' Courts are currently in force?

There are likely to be a number of suppression orders made by the Tribunal with no end date, made prior to the commencement of the *Open Courts Act 2013* (OC Act) (1 December 2013), however it may be difficult to identify these. These orders would have been made under the now repealed s 101 of the VCAT Act. Section 166 of the VCAT Act provides for the continued application of an order made under s 101, despite the repeal of s 101.

Question 59 – Should there be provisions in the *Open Courts Act 2013* (Vic), or another statute, which specify the duration of legacy suppression orders? If so:

(a) Should there be a deeming provision in the *Open Courts Act 2013* (Vic), or another statute, which provides that legacy suppression orders are deemed to have been revoked from a particular date, subject only to applications from interested parties to:

i. vary the order?

ii. continue the order for a further specified time?

iii. revoke the order at an earlier date?

(b) Should there be provisions in the *Open Courts Act 2013* (Vic), or another statute, which specify procedures for notification of legacy suppression orders and applications for continuation or revocation of such orders?

The Tribunal deals with many sensitive cases, particularly in the Guardianship, Human Rights and Review and Regulation Lists. To include a deeming provision in the OC Act to revoke suppression orders as proposed, without a corresponding obligation to notify, would unfairly disadvantage affected parties. Considering the administrative difficulty that the Tribunal would have both in identifying the cases where legacy suppression orders were made and in notifying affected parties, the preferable course is for legacy suppression orders to remain in effect, unless an application to vary or revoke the order is made.