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Appealing a VCAT Decision to the Supreme Court

Applicants seeking Review at VCAT of a Council decision often ask if there is any avenue to appeal the decision of VCAT if the matter is determined unfavourably, i.e. can we appeal the decision of VCAT?

The simple answer is 'yes' but 'no'.

Section 148 of the Victorian Civil and Administrative Tribunal Act 1998 (*Appeals from the Tribunal*) provides that a party to a proceeding may appeal an Order of the Tribunal to the Supreme Court, but only on a question of law.

Importantly, the "question of law" restriction is designed to ensure that the Supreme Court does not become the decision maker for matters which have been brought before the Tribunal. To understand the role of the Supreme Court when appealing a VCAT decision it is helpful to consider the following broad roles of each entity:

- VCAT remains the decision maker on any matter bought before it, even if that matter is appealed to the Supreme Court;

- The Supreme Court's role is to ensure that VCAT correctly interprets legislation and acts within its powers. If a VCAT Order is appealed to the Supreme Court and the Court finds that VCAT acted incorrectly the matter will usually be referred back to VCAT for determination and guidance provided on the issue of law under dispute.

The Supreme Court's role is not to look at the planning merits of any case and determine whether a different decision should or could be made. Rather the Supreme Court's role is to ensure that legislation has been correctly interpreted and due legal process followed.

Critically any appeal to the Supreme Court must be on a matter of law pertinent to the subject of VCAT's decision and cannot simply be a perceived error that is immaterial to the decision.

The principles discussed above have been clarified in the decision of the Supreme Court in Hoe v Manningham City Council [2011] VSC 37 which contains the following extract:

3. … The nature of this Court's jurisdiction in an appeal under s.148 of the VCAT Act was recently described by Davies J in Commissioner of State Revenue v STIC Australia Pty Ltd ([2010] VSC 608) where her Honour said:

> *The jurisdiction of the Court to hear an appeal from VCAT is conferred by s.148 of the VCAT Act, which permits an appeal only on a question of law. The right of appeal conferred by s.148 is of a limited nature only. In Osland v Secretary to the Department of Justice, the High Court recently affirmed that the Court's jurisdiction conferred by s 148 to hear an appeal from the Tribunal is enlivened only if there is a question of law, which is not merely a qualifying condition to ground the appeal but which is to constitute the subject matter of the appeal. Parliament, by creating a statutory right of appeal to a party to a proceeding before the Tribunal in the narrow terms of s.148, has disclosed an intention to limit the role of the Court on an appeal from the Tribunal and to limit the capacity of the Court to re-determine facts or re-exercise discretions. The legislative purpose of s.148 is to discourage parties from challenging the correctness of a decision of VCAT, except where legal error is demonstrable. An appeal before the Court under s.148 is not a merits review nor is it an appeal that merely involves a question of law. The matter comes before the Court solely by way of judicial review for the Court to correct errors of law by the Tribunal but not to examine the record of the Tribunal to determine whether some different decision could have been made. As Mason J stated in Minister for Aboriginal Affairs v Peko- Wallsend Ltd:*
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> > *The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.*
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> > *The role of the Court is limited to reviewing the legal limits of the exercise of power. "Merits" review resides with the Tribunal and the Court is not to intervene in an essentially evaluative matter.*
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> *These considerations emphasise the need and importance of an exact identification of the error of law said to enliven and to form the basis of this Court's jurisdiction to hear an appeal. The need to identify a question of law serves as the criteria upon which several policy objectives are achieved through s.148(1) of the VCAT Act.*
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> *It is the means by which finality of litigation by Tribunal decisions is achieved as well as the trigger by which the statutory appellate jurisdiction of this Court may be enlivened. The general policy evinced by s.148(1) is in part to ensure that litigation comes to an end by the decision made by the Tribunal. It is also in part to ensure that its decisions are legally correct but that within its legal domain it will be its decision that will end*

> *the dispute between the parties… It is not part of this Court's appellate jurisdiction to review decisions by the Tribunal which are not legally incorrect.*

So, can you appeal a decision of VCAT – Yes… But only on grounds relating to a 'question of law' that is directly relevant and pertinent to the subject of VCAT's decision. If your appeal to the Supreme Court is successful the matter will be referred back to VCAT for reconsideration. Importantly, a successful Supreme Court appeal will not necessarily result in a change to the effect of the initial VCAT Order.

Applicant's should be aware that it is relatively uncommon for VCAT decisions to be appealed to the Supreme Court, it can be costly and qualified advise from a certified practicing planning lawyer is a must.

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