

## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

#### OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC1090/2022

#### CATCHWORDS

Application for costs made by the first and second respondents against the applicant in reliance of s 75(2) alternatively s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*') where the first and second respondents applied to have the applicant's Points of Claim struck out under s 75(1) of the *VCAT Act* and the parties subsequently sought orders by consent that the Points of Claim be struck out in its entirety pursuant to s 75(1) of the *VCAT Act* 'without an adjudication on the merits'.

<b>APPLICANT</b>	Robyn Rowena Ford
<b>FIRST RESPONDENT</b>	Owners Corporation SP 24717
<b>SECOND RESPONDENT</b>	645 Toorak Road Pty Ltd ACN 636 136 260
<b>THIRD RESPONDENT</b>	Robyn Sherwin
<b>FOURTH RESPONDENT</b>	Jejana Pty Ltd ACN 127 708 301
<b>WHERE HELD</b>	In chambers
<b>BEFORE</b>	D Kim, Member
<b>HEARING TYPE</b>	Costs application on the papers
<b>DATE OF ORDER</b>	5 September 2023
<b>CITATION</b>	Ford v Owners Corporation SP 24717 (Owners Corporations) (Costs) [2023] VCAT 1032

#### ORDER

1. The first and second respondents' applications pursuant to s 75(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) are dismissed.
2. The parties' costs, including costs in respect of and incidental to the applicant's Points of Claim dated 20 January 2023 are otherwise reserved and to be determined at the conclusion of the proceeding.
3. For the purposes of any application for costs in respect of the matters raised in the preceding paragraph, the parties have liberty to rely on the submissions and affidavit material that they have already filed on the issue of costs.

D Kim  
Member

## REASONS

### THE COSTS APPLICATION

- 1 The applicant is a joint registered proprietor of one of the residences (being unit 2) and an accessory lot (being lot 15) of the land situated on Plan of Subdivision SP024717Q ('PS').
- 2 The first respondent, Owners Corporation SP 24717 ('OC'), is the OC in respect of the common property.
- 3 The second to fourth respondents are registered proprietors of the various units and accessory lots on the land and are members of the OC.
- 4 The first and second respondents (collectively the 'Respondents') each seek costs against the applicant under s 75(2), alternatively s 109, of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*'), due to the applicant's points of claim dated 20 January 2023 ('first POC') being struck out by the order of the Tribunal made on 22 May 2023 ('Order').
- 5 Subsequent to the Order, the applicant has filed a new points of claim dated 2 June 2023 ('new POC') and the respondents have filed points of defences in response.
- 6 Prior to considering how I ought to determine the Respondents' applications for costs, it is necessary that I provide a detailed but non-exhaustive background to the applications. The background that I have provided includes a summary of the various costs submissions made by the parties and is organised into three parts as follows:
  - a. matters prior to the hearing on 22 May 2023;
  - b. the hearing on 22 May 2023 when the Order was made; and
  - c. matters subsequent to the hearing on 22 May 2023 up until the Respondents provided their final submissions as to costs.
- 7 In these reasons, I have not delved into the substance of all the documents that the parties have filed in the costs applications. They include various submissions and affidavit material. The totality of the documents runs into hundreds of pages. Whilst I have considered all the documents, for the reasons I have provided, it is neither necessary for me to specifically refer to nor address these documents other than to the extent I have done so.

### RELEVANT BACKGROUND

#### Matters prior to the hearing on 22 May 2023

- 8 By application dated 29 July 2022, the applicant issued this proceeding against the OC, primarily seeking orders under ss 33 and 34D of the *Subdivision Act 1988* (Vic) ('Act') for the alteration of lot liability and entitlement of the PS of the OC.

- 9 By order of the Tribunal made on 14 September 2022, the Tribunal, among other things, required the applicant to provide a points of claim which set out the basis of the application. The Tribunal also allowed for any member of the OC to be joined as a party to the proceeding.
- 10 On or about 20 January 2023, the applicant filed her first POC. The only named respondent in the first POC was the OC. The first POC set out the applicant's allegations against the OC and the relief she sought from the Tribunal. The document was prepared by the applicant's solicitors and contained, among other things, the following allegations:
- a. On 1 April 2005, the original accessory lots (as indicated in the PS) for unit 2 (owned by the applicant) and unit 5 (owned by another member of the OC) were transferred to each other so that the accessory lots for unit 2 (being lots 9 and 12 according to the PS) were transferred to unit 5, and the accessory lot for unit 5 (being lot 15 according to the PS) was transferred to unit 2.
  - b. Despite the transfer, there had been a failure to alter the lot entitlement and liability resulting in an unequal lot entitlement and liability of lots for the members.
  - c. On 8 November 2021, the OC held a special general meeting ('SGM') where a motion was put forward regarding a revision of unit lot entitlements for units 2 and 5. The proposed resolution was stated as ('Proposed Resolution'):

To revise the Unit Lot Entitlements between Unit 5 and Unit 2 on Plan of Subdivision No SP24717Q by means of effecting a transfer of '2 Units of Entitlement['] from Unit (Lot) 5 reducing Lot Entitlements to 196 to Unit (Lot) 2 increasing Lot Entitlements to 198, thereby returning it to its underpinning principle of "Justice and Equity".<sup>1</sup>
  - d. The motion failed to receive unanimous resolution. Out of the six lot owners, three owners (which included the second respondent) voted against the Proposed Resolution.
- 11 Under the first POC, the applicant sought, among other things, relief under s 34D of the Act for:
- a. the OC to apply to the Registrar of Titles to alter the lot entitlement or lot liability of the PS in accordance with the schedule prepared by Humphries Land Surveying Pty Ltd, being Appendix 3 to the Expert Witness Report of Mr Humphries dated 10 November 2022;<sup>2</sup> and

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<sup>1</sup> First POC, [9].

<sup>2</sup> Ibid [A].

- b. the Tribunal to consent on behalf of the members of the OC to the registration of an amendment to the PS as sought.<sup>3</sup>
- 12 On or about 17 February 2023, the second and third respondents filed their points of defence ('2<sup>nd</sup> & 3<sup>rd</sup> Respondents' POD'). The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' POD alleged, among other things, that:
- a. The SGM was 'held at a time when the requirements of section 27F(4) of the Act, on which the applicant relies, were not extant or operative'.<sup>4</sup>
  - b. It was 'erroneous to allege that section 27F(4)(a) [of the Act] in and of itself, requires historical plans of subdivision to be amended vis-à-vis lot liabilities'.<sup>5</sup>
  - c. The Proposed Resolution 'did not ventilate the question of amendment to the lot liabilities on the Plan and the Tribunal is therefore not empowered to make orders of this nature under section 34D(6) of the Act'.<sup>6</sup>
  - d. The 'Tribunal should decline to exercise its discretion to grant relief under section 34D(6) of the Act'.<sup>7</sup>
  - e. The requirements under ss 34D(3)(a) or (b) or (c)(i), (ii) and (iii) of the Act had not been met as:<sup>8</sup>
    - i. At the SGM, the owner of lot 1 and accessory lot 14 was not present and did not vote, and the owner of lot 6 and accessory lots 13 and 16 (erroneously identified as 'lot 14' at paragraph 19(m)(ii) of the defence) had abstained from voting.<sup>9</sup>
    - ii. Changing the entitlements as sought would not bring economic or social benefits in the manner required.<sup>10</sup>
- 13 The schedule to the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents' POD named the first to fourth respondents as parties to the proceeding.
- 14 On 22 February 2023, the parties appeared before the Tribunal at a directions hearing where the Tribunal made the following orders:
- a. The second to fourth respondents were joined as respondents to the proceeding.

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<sup>3</sup> Ibid [E].

<sup>4</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Respondent's POD, [17(h)], [19(h)].

<sup>5</sup> Ibid [17(i)], [19(i)].

<sup>6</sup> Ibid [17(l)], [19(i)].

<sup>7</sup> Ibid [17(m)], [21(b)], [22(d)].

<sup>8</sup> Ibid [19(m)], [21(a)], [22(c)].

<sup>9</sup> Ibid [19(m)(i)], [19(m)(ii)].

<sup>10</sup> Ibid [19(m)(iii)].

- b. The second and third respondents were given leave to apply for summary dismissal of the proceeding under s 75 of the *VCAT Act* by 29 March 2023.

15 By order of the Tribunal made on 10 March 2023, the first respondent was also given leave to apply for summary dismissal of the proceeding under s 75 of the *VCAT Act*.

16 The hearing of any applications under s 75 of the *VCAT Act* was subsequently listed for 22 May 2023 ('s 75 applications').

17 By a ballot dated 26 March 2023 circulated by the applicant ('Ballot'), the applicant sought a further resolution ('Second Proposed Resolution'). The Second Proposed Resolution that was put to vote was as follows:

Owners Corporation Plan No. SP024717Q resolved by unanimous resolution within the meaning of section 95 of the Owners Corporations Act 2006 to alter the Plan of Strata Subdivision SP024717Q by registering the Owners Corporation Schedule prepared by Humphries Land Surveying ... and to execute any document necessary to give effect to this unanimous resolution.<sup>11</sup>

18 On or about 27 March 2023, the first respondent filed its 'Strike Out Submission' dated the same ('1<sup>st</sup> Respondent's 27 March 2023 Submissions'). Despite the document being titled as a 'Strike Out', in accordance with the order of the Tribunal made on 10 March 2023 giving the OC leave to apply for a summary dismissal, the first respondent sought for the proceeding to be dismissed under s 75 of the *VCAT Act*.<sup>12</sup>

19 Among other things, the OC submitted:

- a. Although the applicant sought an order from the Tribunal to have the existing lot entitlements and liabilities altered under s 34D of the Act, the applicant had failed to meet the pre-conditions under that section in that:<sup>13</sup>

- i. The members had not voted on the proposed action sought as pleaded by the applicant.<sup>14</sup> In fact, no unanimous resolution had been attempted for the proposed action.<sup>15</sup>
- ii. Section 34D(3)(c)(i) of the Act had not been satisfied as there was no member or group of members owning more than half of the total entitlement who opposed the action.<sup>16</sup>
- iii. Section 34D(3)(c)(ii) of the Act had not been satisfied as all other members had not consented to the proposed action.<sup>17</sup>

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<sup>11</sup> See Notice of ballot to owners corporation lot owners dated 26 March 2023, exhibited in 'RF-3' to the Affidavit of Robyn Rowena Ford affirmed on 18 May 2023.

<sup>12</sup> 1<sup>st</sup> Respondent's 27 March 2023 Submissions, [7], [40].

<sup>13</sup> Ibid [5]–[6].

<sup>14</sup> Ibid [6(a)].

<sup>15</sup> Ibid [12].

<sup>16</sup> Ibid [6(a)].

<sup>17</sup> Ibid [6(b)].

- b. The applicant's application was 'misconceived and bound to fail'.<sup>18</sup>
- 20 By application dated 29 March 2023, the second respondent sought to have the proceeding summarily dismissed, or alternatively struck out, pursuant to s 75 of the *VCAT Act*, on the basis that the proceeding was 'misconceived and lacking in substance' ('2<sup>nd</sup> Respondent's 29 March 2023 Submissions').<sup>19</sup> In support of the application, the second respondent filed the Affidavit of Morris Snider affirmed on 29 March 2023.
- 21 The second respondent raised two grounds for its s 75 application, which were:
- a. The proposed action to alter the PS as sought by the applicant according to the first POC had never been put by resolution to the OC members and therefore the Tribunal could not make orders pursuant to s 34D of the Act consenting to the action on behalf of the members.<sup>20</sup>
- b. The applicant had failed to meet the threshold requirements under ss 34D(3)(c)(i) and (ii) of the Act where one member at the SGM had abstained from voting, and another member had not attended the meeting and did not cast a vote.<sup>21</sup>
- 22 In addition, the second respondent referred to the Ballot dated 26 March 2023 and submitted, among other things, that:<sup>22</sup>
- a. The ballot did not address the deficiencies in the first POC and irrespective of the outcome of the Ballot, the applicant would be 'required to replead her Claim and start again, which would be tantamount to a striking out of her pleading, in any event'.
- b. The Ballot represented 'an implied admission by conduct that the applicant's Claim, as ...[was] framed, ...[was] misconceived and hopeless,' and the applicant had 'considered her position and realised its hopelessness' and she was 'attempting to "get ahead" of this Application'.
- 23 In response to the 1<sup>st</sup> Respondent's 27 March 2023 Submissions and the 2<sup>nd</sup> Respondent's 29 March 2023 Submissions, the applicant filed its outline of submissions dated 21 April 2023 ('Applicant's 21 April 2023 Submissions'). Among other things, the applicant submitted that:
- a. Since the issuing of the second respondent's s 75 application, there had been a further ballot (being the Ballot) which affected the two grounds on which the second respondent relied upon.<sup>23</sup>

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<sup>18</sup> Ibid [7].

<sup>19</sup> 2<sup>nd</sup> Respondent's 29 March 2023 Submissions, [1]–[2].

<sup>20</sup> Ibid [4(a)].

<sup>21</sup> Ibid [4(b)].

<sup>22</sup> Ibid [36]–[38].

<sup>23</sup> Applicant's 21 April 2023 Submissions, [2].

- b. Although there was no unanimous resolution in favour of the Second Proposed Resolution, the second respondent had voted in favour of the Second Proposed Resolution when it had voted against the Proposed Resolution.<sup>24</sup>
- c. There was no longer any basis for the first ground of the s 75 application as the proposed amendments to the PS had been the subject of the Ballot and the requirement for there to have been a vote on the proposed alteration to the PS had been satisfied.<sup>25</sup>
- d. There was no longer any basis for the second ground of the s 75 application as the second respondent's second ground relied on the composition of the votes at the first ballot (in respect of the Proposed Resolution) and the composition of the votes were different for the Ballot in respect of the Second Proposed Resolution. Accordingly, the second respondent's ground was 'now redundant as the applicant no longer [sought] to rely on the results of the first ballot but [sought] to rely on the results of the second ballot'.<sup>26</sup>
- e. The applicant relied on the results of the Ballot for the purposes of satisfying s 34D(3)(c) of the Act and as the votes from the Ballot stood, the applicant was unable to satisfy the conditions of s 34D(3)(c) of the Act,<sup>27</sup> and '[i]f the second respondent had voted against the resolution in the [Ballot], as it had done in the first ballot, the requirements of s. 34D(3)(c) would have been satisfied'.<sup>28</sup>
- f. The fact that the second respondent voted against the Proposed Resolution the subject of the first ballot but in favour of the Second Proposed Resolution 'was a contrivance' by the second respondent 'to seek to ensure that the applicant [would] not be able to satisfy the requirements of s. 34D(3)(c)',<sup>29</sup> and was not a bona fide exercise of its power to vote.<sup>30</sup> The second respondent had also opposed the alteration to the PS as evidenced by the filing of its points of defence.<sup>31</sup> The applicant further submitted that the second respondent's exercise of the power to vote was for an improper purpose and was what the law considers as 'a fraud on the power',<sup>32</sup> and that the applicant's amended points of claim

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<sup>24</sup> Ibid [4].

<sup>25</sup> Ibid [6].

<sup>26</sup> Ibid [8].

<sup>27</sup> Ibid [9].

<sup>28</sup> Ibid [10].

<sup>29</sup> Ibid [11].

<sup>30</sup> Ibid [12].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid [15]–[24].

would allege that the second respondent ‘engaged in a fraud on the power’ when it exercised its power to vote on the Ballot.<sup>33</sup>

- g. The applicant’s claim was ‘not absolutely hopeless and it should not be struck out’.<sup>34</sup>

24 On 18 May 2023, the applicant provided the Respondents with a proposed amended points of claim which marked changes to the contents of the first POC. The proposed amended points of claim included additional allegations, particularly in respect of the Ballot, and an additional prayer for relief against the second defendant regarding the same. The proposed amended points of claim was accompanied by an affidavit from the applicant affirmed on 18 May 2023. In referring to the upcoming hearing of the s 75 applications listed for 22 May 2023, the body of the applicant’s affidavit focused on the events relating to the Ballot and the proposed amended points of claim.

### **The hearing on 22 May 2023**

25 On 22 May 2023, the only parties who appeared before the Tribunal were the applicant, the second respondent and the third respondent. All three parties were represented by lawyers. Those parties, among other things:

- a. Confirmed that all parties to the proceeding had agreed for the first POC to be ‘struck out in its entirety pursuant to s 75(1) of the Victorian Civil and Administrative Tribunal Act 1998 without an adjudication on the merits’,<sup>35</sup> for the applicant to be given an opportunity to replead her points of claim; and the parties to be given an opportunity to apply for costs.
- b. Provided to the Tribunal minutes of proposed consent orders signed by the parties.

26 In response, on 22 May 2023 the Tribunal made the Order, which was by consent. The Order:

- a. Struck out the first POC ‘in its entirety pursuant to s 75(1) of the Victorian Civil and Administrative Tribunal Act 1998 without an adjudication on the merits’, using the precise wording that the parties had sought. Under the ‘Notes’ section of the Order, the Tribunal stated that at the hearing, the representatives of the applicant and the second and third respondents had ‘Confirmed that as the parties had agreed for the Points of Claim to be struck out in its entirety, the applicant is to replead its Points of Claim’.
- b. Gave the applicant leave to file and serve a new Points of Claim by 2 June 2023.
- c. Gave the respondents the opportunity to file their Points of Defence and any Counterclaim by 23 June 2023, with the

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<sup>33</sup> Ibid [23].

<sup>34</sup> Ibid [25].

<sup>35</sup> See minutes of proposed consent orders signed by the parties.



applicant having the right to file and serve any Points of Reply and Defence to Counterclaim by 14 July 2023.

- d. Gave the first and second respondents until 2 June 2023 to file and serve submissions as to costs and any affidavit in support.
- e. Gave the applicant until 16 June 2023 to file and serve submissions and affidavit material in response.
- f. Gave the first and second respondents until 30 June 2023 to file and serve reply submissions.
- g. Provided that the question of costs would be determined 'on the papers'.

### **Matters subsequent to the hearing on 22 May 2023**

- 27 On or about 2 June 2023, the applicant filed the new POC. The substance of the new POC was in essence the same as the contents of the proposed amended points of claim that the applicant had previously provided the Respondents.
- 28 By email from the second respondent's solicitors to the Tribunal on 2 June 2023, the second respondent provided its submissions on costs (undated) ('2<sup>nd</sup> Respondent's 2 June 2023 Submissions'). The second respondent also filed the Affidavit of Robert Sutherland McKay affirmed on 2 June 2023.
- 29 The 2<sup>nd</sup> Respondent's 2 June 2023 Submissions included the following submissions:
  - a. The application for costs was made under s 75(2) and s 109 of the *VCAT Act*.<sup>36</sup>
  - b. The applicant's claim as set out in the first POC relying on the Proposed Resolution which was voted on at the SGM was 'misconceived from the beginning and had no tenable basis in fact or law'.<sup>37</sup> The two grounds that the second respondent relied upon were those that which were raised in the 2<sup>nd</sup> Respondent's 29 March 2023 Submissions, as mentioned above.<sup>38</sup>
  - c. The second respondent had made an open offer to the applicant under s 112 of the *VCAT Act* 'to withdraw her claim and for each party to bear their own costs', which had been rejected by the applicant.<sup>39</sup>
  - d. The second respondent had made a second open offer to the applicant for the parties to consent to an order dismissing or

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<sup>36</sup> 2<sup>nd</sup> Respondent's 2 June 2023 Submissions, [1].

<sup>37</sup> Ibid [3].

<sup>38</sup> Ibid [4].

<sup>39</sup> Ibid [5]–[6].

striking out the first POC with costs to be paid on a standard basis, which the applicant rejected.<sup>40</sup>

- e. The applicant had conceded that she no longer relied on the events of the SGM but rather on the outcome of the Ballot for the purposes of her amended claim under s 34D(3)(c) of the Act.<sup>41</sup>
- f. The second respondent made a third open offer for the parties to consent to the applicant repleading her claim provided that she paid the second respondent's costs fixed at \$12,000.00, which was rejected by the applicant.<sup>42</sup>
- g. By the proposed amended points of claim, the applicant had 'disavowed' and 'abandoned' her claim for relief based on the outcome of the SGM.<sup>43</sup> The applicant had surrendered and disavowed all reliance on the Proposed Resolution and this was 'a capitulation by the applicant in the realisation that her case [in respect of the Proposed Resolution] was misconceived from the outset...'.<sup>44</sup> In turn, the proposed amended points of claim was a brand new case regarding the Ballot which raised new issues for determination.<sup>45</sup>
- h. The Tribunal's power under s 75(2) of the *VCAT Act* to order that a party to pay another party an amount of compensation was broad and unfettered.<sup>46</sup>
- i. In respect of s 75(2) of the *VCAT Act*, the second respondent had incurred 'costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding'.<sup>47</sup> It contended that an order that the first POC be struck out in its entirety without an adjudication on the merits was 'sufficient to engage the Tribunal's power under s 75(2) [of the *VCAT Act*]'.<sup>48</sup>
- j. Had 'the Tribunal been required to rule on the merits of the applicant', the Tribunal would have found that the relief sought by the applicant under ss 34D(1)(a) and (b) of the Act, based on the allegations in the first POC, was misconceived.<sup>49</sup>
- k. Alternative to s 75(2) of the *VCAT Act*, the Tribunal ought to order costs under s 109(2) as:

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<sup>40</sup> Ibid [7].

<sup>41</sup> Ibid [8].

<sup>42</sup> Ibid [9].

<sup>43</sup> Ibid [10]–[11].

<sup>44</sup> Ibid [19].

<sup>45</sup> Ibid.

<sup>46</sup> Ibid [13]–[14].

<sup>47</sup> Ibid [13].

<sup>48</sup> Ibid [17].

<sup>49</sup> Ibid [18].

- i. the applicant's case in the first POC was 'misconceived and had no tenable basis in fact or law', in reliance of s 109(3)(c) of the *VCAT Act*.<sup>50</sup>
  - ii. The second respondent made three open offers, two of which were made before the s 75 application was filed, presumably in reliance of s 109(3)(e) of the *VCAT Act* in addition to s 112 of the *VCAT Act*.<sup>51</sup>
  - iii. The proceeding effectively needed to start again based on a new case, which was a relevant consideration under s 109(3)(d).
  - iv. The applicant's 'claims in the proceedings were complex and expensive to respond to, which had prejudiced the second respondent', which was a relevant factor under s 109(3)(d).<sup>52</sup>
- I. The second respondent sought costs on an indemnity basis or alternatively 'on the standard basis to be taxed in default of agreement'.<sup>53</sup> Further, if the Tribunal was not inclined to make a costs order at this stage, the respondent sought an order that costs be reserved, with liberty to rely on its submission at the conclusion of the hearing.<sup>54</sup>
- 30 By email from the first respondent's representative to the Tribunal on 6 June 2023, the first respondent provided its submissions on costs dated 4 June 2023 ('1<sup>st</sup> Respondent's 4 June 2023 Submissions').
- 31 The 1<sup>st</sup> Respondent's 4 June 2023 Submissions included the following submissions:
- a. Its application for costs was made pursuant to s 75(2) of the *VCAT Act* and alternatively under s 109(2) of the *VCAT Act*.<sup>55</sup> However, the 'the focus' of the first respondent's submissions was 'on section 75(2)'.<sup>56</sup>
  - b. In respect of s 75(2) of the *VCAT Act*, it submitted that because the Order stated that the first POC was struck out in its entirety 'pursuant to s 75(1) of the [*VCAT Act*] without an adjudication on the merits', and as an order to dismiss or strike out a proceeding (or part of a proceeding) under s 75(1) can only be made if the proceeding is frivolous, vexatious, misconceived or lacking in substance, or if it is an abuse of process, even though there had been no adjudication on the merits, the applicant had 'capitulated

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<sup>50</sup> Ibid [20].

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid [21]. See also Affidavit of Robert Sutherland McKay affirmed on 2 June 2023.

<sup>54</sup> Ibid [21].

<sup>55</sup> See 1<sup>st</sup> Respondent's 4 June 2023 Submissions, [1].

<sup>56</sup> Ibid.

and conceded' that the requirements under s 75(1) had been satisfied.<sup>57</sup>

- c. There was no need to 'establish the merits of the strike out given that the strike out order [had] been conceded'.<sup>58</sup>
- d. It therefore submitted that as the Order referred to s 75(1) of the *VCAT Act* in striking out the first POC, under s 75(2) of the *VCAT Act*, the Tribunal had the power to order the applicant to pay compensation to the first respondent for costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.<sup>59</sup>
- e. Although the first respondent's representative in the proceeding, Mr Louey (OC Manager), was not a lawyer, under s 75(2) of the *VCAT Act*, the Tribunal had the power to compensate the first respondent for Mr Louey's fees as he was a professional advocate.<sup>60</sup>
- f. In respect of s 109 of the *VCAT Act*, as Mr Louey was a professional advocate, the first respondent was entitled to costs for his fees in the proceeding.<sup>61</sup>
- g. Subsequent to the applicant filing the first POC, the first respondent had repeatedly informed the applicant 'of the shortcomings of her points of claim and the potential cost consequences'.<sup>62</sup>

32 Together with the 1<sup>st</sup> Respondent's 4 June 2023 Submissions, the first respondent filed the Affidavit of Julian Christopher Louey affirmed on 6 June 2023. Mr Louey's affidavit primarily dealt with the costs that Mr Louey deposed that he had charged the OC and those that the OC sought to recover as costs in respect of the s 75 application.

33 Subsequently, by submissions dated 16 June 2023, the applicant provided her submissions in response to the Respondents' submissions on costs ('Applicant's 16 June 2023 Submissions').

34 The applicant submitted, among other things, that:

- a. The Tribunal did not make a finding that the proceeding was 'frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process' and the Order was made without an adjudication on the merits.<sup>63</sup>

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<sup>57</sup> Ibid [4].

<sup>58</sup> Ibid.

<sup>59</sup> Ibid [5].

<sup>60</sup> Ibid [10].

<sup>61</sup> Ibid [13]–[15].

<sup>62</sup> Ibid [21].

<sup>63</sup> Applicant's 16 June 2023 Submissions, [2]–[3].

- b. Section 75(2) of the *VCAT Act* only applies where an order has been made under s 75(1),<sup>64</sup> and as there has been no adjudication on the merits of the s 75 applications, the Tribunal should exercise its discretion not to make an order for compensation under s 75(2).<sup>65</sup>
- c. The applicant denied that she conceded that the first POC was frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process, and the Order did not record such a concession.<sup>66</sup>
- d. The first respondent had sought costs for the period from 14 November 2022 to 19 May 2023 when the first POC was filed on 20 January 2023. Accordingly, if costs were allowed, it should not include costs for the period prior to the filing of the first POC.<sup>67</sup>
- e. The costs claimed by the first respondent were for costs of the proceeding and not limited to those occasioned by the strike out of the first POC.<sup>68</sup>
- f. An order striking out a points of claim was not an order striking out the proceeding.<sup>69</sup>
- g. If the applicant had failed to seek consent of the lot owners before she made her application under s 34D(2)(a) of the Act that, in and of itself, did not mean that the claim had no tenable basis in law.<sup>70</sup>

35 Subsequently:

- a. The first respondent filed its Points of Defence dated 23 June 2023 to the new POC ('1<sup>st</sup> Respondent's new POD').
- b. The second respondent filed its Points of Defence dated 28 June 2023 to the new POC ('2<sup>nd</sup> Respondent's new POD').
- c. The third respondent filed its Points of Defence dated 28 June 2023 to the new POC ('3<sup>rd</sup> Respondent's new POD').

36 Further:

- a. By submissions dated 30 June 2023, the first respondent provided its responses to the Applicant's 16 June 2023 Submissions ('1<sup>st</sup> Respondent's 30 June 2023 Submissions').

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<sup>64</sup> Ibid [7].

<sup>65</sup> Ibid [8].

<sup>66</sup> Ibid [10].

<sup>67</sup> Ibid [11].

<sup>68</sup> Ibid [12].

<sup>69</sup> Ibid [13], referring to the case of *Martin v Fasham Johnson Pty Ltd* [2008] VSC 289.

<sup>70</sup> Ibid [18]–[20] referring to *Conroy v Owners Corporation Strata Plan 30438* [2014] VCAT 550 in comparison with *RN Saines Pty Ltd v Owners Corporation PS304164A* [2022] VCAT 441.

- b. By submissions dated 30 June 2023, the second respondent provided its responses to the Applicant's 16 June 2023 Submissions ('2<sup>nd</sup> Respondent's 30 June 2023 Submissions').

37 The 1<sup>st</sup> Respondent's 30 June 2023 Submissions included submissions that:

- a. An order is made under s 75(1) of the *VCAT Act* when the Tribunal considers that 'in it is opinion' the proceedings or any part of the proceedings is frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process.<sup>71</sup>
- b. The Order was made 'without adjudication on the merits because the [Order was] made by consent', and the purpose of the Order was 'to spare the parties and the Tribunal the time and cost associated with a hearing on the merits', in circumstances when the parties agreed that an order was appropriate.<sup>72</sup> The Order was made by consent, which 'obviated the need for reasons'.<sup>73</sup>
- c. At its highest for the applicant, the Order meant that the Tribunal had 'not specifically determined whether the points of claim were frivolous, vexatious, misconceived or lacking in substance or otherwise an abuse of process, but nevertheless ordered that at least one of the necessary criteria is applicable'.<sup>74</sup> It is not entirely clear from the submissions as to what the one criteria was, but it appears that it was the reference to s 75(1) in the Order.
- d. The first respondent rejected the applicant's proposition that as the Order struck out the first POC without an adjudication on the merits, this meant that none of the categories under s 75(1) could apply.<sup>75</sup> By this submission, the respondent appears to have submitted that the reference to s 75(1) in the Order must mean that at least one of the categories (although the respondent did not specify which actual category or categories that the Tribunal was deemed to have found to apply) applied.
- e. As the Order did not record that the applicant was not conceding that the first POC was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process, the applicant had made a 'textbook concession' in that she had conceded that the first POC fell within the categories under s 75(1).<sup>76</sup>
- f. The respondent disagreed with the reference in the Order to 'costs of and incidental to the two s 75 applications'.<sup>77</sup> I find this submission perplexing as the reference was included in the Order

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<sup>71</sup> 1<sup>st</sup> Respondent's 30 June 2023 Submissions, [2].

<sup>72</sup> Ibid [4].

<sup>73</sup> Ibid [11].

<sup>74</sup> Ibid [5].

<sup>75</sup> Ibid [6].

<sup>76</sup> Ibid [7].

<sup>77</sup> Ibid [12].

at the parties' request on 22 May 2023 and as recorded in the signed minutes of proposed consent orders provided by the parties.

- g. Mr Louey was a professional advocate and his costs were costs which were recoverable under s 75(2) and s 109 of the *VCAT Act*.<sup>78</sup>

38 The 2<sup>nd</sup> Respondent's 30 June 2023 Submissions included submissions that:

- a. The Tribunal did not need to determine the adequacy or otherwise of the vote at the SGM to determine that the applicant's claim was misconceived.<sup>79</sup>
- b. There was no unanimous resolution at the SGM which was a requirement under s 34D(1)(a) of the Act.<sup>80</sup> The applicant had abandoned her claim in reliance of the Proposed Resolution.<sup>81</sup>
- c. The applicant had 'capitulated' by consenting to orders striking out the first POC, and if the applicant could have relied on the Proposed Resolution, she would not have convened the Ballot and the Second Proposed Resolution would not have been put to vote.<sup>82</sup>
- d. The applicant had rejected multiple open offers from the second respondent which put the respondent at considerable costs and expense, and which were relevant in respect of ss 75(2) and 109 of the *VCAT Act*.<sup>83</sup>

39 I now address the two underlying issues that I must determine, which are:

- a. Whether or not I ought to award the Respondents compensation by way of the costs sought pursuant to s 75(2) of the *VCAT Act*.
- b. Whether or not I ought to award the Respondents costs pursuant to s 109 of the *VCAT Act*.

### **SHOULD THE FIRST AND SECOND RESPONDENTS BE AWARDED COMPENSATION UNDER S 75(2) OF THE VCATACT?**

40 Section 75 of the *VCAT Act* relevantly states:

#### **Summary dismissal of unjustified proceedings**

- (1) At any time, the Tribunal may make an order summarily dismissing or striking out all, or any part, of a proceeding that, in its opinion—
  - (a) is frivolous, vexatious, misconceived or lacking in substance; or
  - (b) is otherwise an abuse of process.

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<sup>78</sup> Ibid [16].

<sup>79</sup> 2<sup>nd</sup> Respondent's 30 June 2023 Submissions, [5].

<sup>80</sup> Ibid [6].

<sup>81</sup> Ibid [10].

<sup>82</sup> Ibid [7].

<sup>83</sup> Ibid [8].

- (2) If the Tribunal makes an order under subsection (1), it may order the applicant to pay any other party an amount to compensate that party for any costs, expenses, loss, inconvenience and embarrassment resulting from the proceeding.

- 41 For the following reasons, I am not satisfied that I ought to exercise my discretion and award the Respondents compensation pursuant to s 75(2) of the *VCAT Act*, and I dismiss the Respondents' applications under s 75(2) of the *VCAT Act*.
- 42 First, as the words of s 75 indicate, the Tribunal cannot make an order for compensation under s 75(2) unless the Tribunal has made an order under s 75(1), based on 'its opinion' that the proceeding is of a nature which satisfies one or more of the categories under ss 75(1)(a) and (b). It stands to reason that any opinion formed by the Tribunal for the purposes of s 75(1) would require the Tribunal to consider the merits of the proceeding. In this regard, I reject the second respondent's contention that an order that the first POC be struck out in its entirety without an adjudication on the merits was 'sufficient to engage the Tribunal's power under s 75(2)'.<sup>84</sup>
- 43 What follows from the operation of ss 75(1) and (2) is that in order for the Tribunal to make an order for strike out or dismissal under s 75(1), the Tribunal must, at the time of making that order and not retrospectively, form an opinion that the proceeding is frivolous, vexatious, misconceived, lacking in substance or is otherwise an abuse of process.
- 44 In the present situation, there was no opinion formed by the Tribunal when it ordered the first POC to be struck out.
- 45 Secondly, I reject the first respondent's contention that just because the Order states that the first POC was struck out 'pursuant to s 75(1)' of the *VCAT Act*, that it follows that the Tribunal can now, for the purposes of s 75(2), find that the proceeding, at the time the Tribunal made the Order, was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process. Such a submission ignores the fact that the underlying premise in making the Order was that it was made 'without an adjudication on the merits'. This was at the parties' request. The Tribunal adhered to that request. In order for me to now make a finding as to the merits (or lack thereof) of the proceeding for the purposes of s 75(2), I would have to disregard the phrase 'without an adjudication on the merits' completely.
- 46 Thirdly, as the Tribunal did not actually make any findings under s 75(1) of the *VCAT Act*, just because the Order refers to s 75(1) of the *VCAT Act* (without specifying which category or categories under ss 75(1)(a) and (b) were satisfied), that does not mean that the Tribunal had, or is deemed to have, made any findings under s 75(1). Such a submission relies on a fictitious event, in that there was no hearing of the substance of the s 75 applications and no findings made by the Tribunal at the hearing based on the

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<sup>84</sup> 2<sup>nd</sup> Respondent's 2 June 2023 Submissions, [17].



submissions. The submission simply ignores the reality of what occurred at the hearing on 22 May 2023.

- 47 Fourthly, where there is tension or conflict in the Order between the reference to s 75(1) of the *VCAT Act* and the fact that the first POC was struck out ‘without an adjudication on the merits’, the tension or conflict must be resolved in favour of upholding the reality that there was no adjudication on the merits.<sup>85</sup>
- 48 Fifthly, the parties did not mention at the hearing on 22 May 2023 that the applicant had conceded that the proceeding was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process. The applicant neither made such a concession at the hearing nor was such a concession recorded in the Order. Indeed, at the hearing on 22 May 2023, the parties did not request the Tribunal to make any findings or form any opinions about that the merits of the applicant’s claim.
- 49 Sixthly, subsequent to the hearing on 22 May 2023, by the Applicant’s 16 June 2023 Submissions, the applicant expressly denied that she had conceded that the first POC was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process.<sup>86</sup>
- 50 Finally, even if the applicant had all but conceded as submitted by the Respondents, as I have mentioned, what is required under s 75(1) of the *VCAT Act* is that the Tribunal must have formed an opinion to that effect. It is also somewhat inconsistent that given that all parties consented to have the first POC struck out ‘without an adjudication on the merits’, that the parties are in dispute as to whether the Tribunal can now determine the merits. The fact that the Order refers to s 75(1) does not detract from the fact that the Tribunal cannot, under s 75(2) of the *VCAT Act*, now determine whether, hypothetically, if it had been asked by the parties to go back in time to determine the merits of the proceeding under s 75(1), it would have determined that issue in favour of the Respondents.
- 51 If it is not already clear, I wish to make it clear that in dismissing the Respondents’ applications under s 75(2) of the *VCAT Act*, the Tribunal has not made any findings, or formed any opinion, as to whether or not, at the time of the s 75 applications, the proceeding was frivolous, vexatious, misconceived, lacking in substance or was otherwise an abuse of process. In turn, the applicant should not take the dismissal to mean that the Tribunal has found that the proceeding, as articulated in the first POC, was meritorious.
- 52 Further, my dismissal of the applications under s 75(2) should not be construed to mean that the Tribunal has found that the Respondents ought not

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<sup>85</sup> Granted that the parties may not have been aware of the tension in requesting such an order, if a party had known at the time of the hearing on 22 May 2023, that party ought to have informed the Tribunal of the issue rather than remaining silent. This case may serve as a reminder to parties to consider carefully what orders they seek from the Tribunal and the ramifications of doing so before requesting the Tribunal to make orders by consent.

<sup>86</sup> Applicant’s 16 June 2023 Submissions, [10].

to be entitled to costs at all. An application for costs under s 109 of the *VCAT Act* is not constrained by the requirements under s 75(1).

- 53 As the Respondents have sought costs in the alternative under s 109 of the *VCAT Act* (which is under Division 8 of the *VCAT Act*), I now turn to the Respondents' pursuit of costs under s 109.

**SHOULD THE FIRST AND SECOND RESPONDENTS BE AWARDED COSTS UNDER S 109 OF THE VCAT ACT?**

- 54 Section 109 of the *VCAT Act* relevantly states:

**Power to award costs**

- (1) Subject to this Division, each party is to bear their own costs in the proceeding.
- (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
- (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—
  - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
    - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
    - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
    - (iii) asking for an adjournment as a result of (i) or (ii);
    - (iv) causing an adjournment;
    - (v) attempting to deceive another party or the Tribunal;
    - (vi) vexatiously conducting the proceeding;
  - (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
  - (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
  - (d) the nature and complexity of the proceeding;
  - (e) any other matter the Tribunal considers relevant.

- 55 The power to award costs under s 109 of the *VCAT Act* is discretionary and in order for the Tribunal to exercise its discretion, the Tribunal must find that in the circumstances, 'it is fair to do so'. The matters stated in s 109(3) are those that the Tribunal has regard to in determining whether it is fair to award costs.

- 56 Despite the submissions from the Respondents, I do not consider that it would be fair to exercise my discretion and order costs against the applicant under s 109 of the *VCAT Act* at this stage of the proceeding. However, neither do I consider it appropriate to dismiss the Respondents' applications for costs. Rather, I consider that the appropriate course that I ought to adopt is that the issue of costs under Division 8 of the *VCAT Act*, which includes any consideration under s 112 of the *VCAT Act*, be reserved and determined at the conclusion of the proceeding. My decision is based on the following reasons:
- a. As it stands, the Tribunal has not made any findings about the merits of the allegations in the first POC and I do not consider that it would be appropriate to do so at this interlocutory stage.
  - b. When one compares the allegations contained in the first POC with the new POC, what can be observed is that substantively (leaving aside matters such as dates, the headers and paragraph numbering), save for two exceptions, the new POC contains the same allegations that are contained in the first POC, including the reference to the SGM and the Proposed Resolution, as well as further allegations and requested relief.
  - c. The first exception to this is the deletion of the phrase 'in respect of which the Applicant seeks the Tribunal's consent' contained in paragraph 24(a) of the first POC, which no longer exists at paragraph 30(a) of the new POC, being the corresponding paragraph.
  - d. The second exception is that in paragraph 24(b) of the first POC it is alleged that 'all other members of the owners corporation present at the Special General Meeting held on 8 November 2021 consented to the proposed action'. In contrast, in paragraph 30(b) of the new POC, it is alleged that 'all other members of the owners corporation present at the SGM consented to the Proposed Resolution'.
  - e. In respect of the second exception, I do not consider that anything turns on the changes as the applicant still alleges the events of the SGM and the Proposed Resolution. That is, the substance of the initial allegation in the first POC remains unchanged in the new POC.
  - f. In respect of the first exception, on one view the deletion could mean that the applicant no longer seeks to rely on the Proposed Resolution. However, this must be contrasted with the fact that the new POC:
    - i. otherwise maintains the same allegations in respect of the Proposed Resolution;

- ii. not only has the same relief sought in the first POC but includes additional relief in respect of the Ballot and the Second Proposed Resolution (separately to the Proposed Resolution); and
- iii. in paragraph 31, alleges that the applicant's reliance on the Ballot is a further or alternative basis to her previous allegations which focus on the SGM and the Proposed Resolution. Paragraph 31 of the new POC states (with my emphasis in bold type):

**Further and or alternatively**, by reason of the result of the Ballot and by reason of the conduct of the second respondent alleged below the applicant is now unable to satisfy the conditions of s. 34D(3)(c) of the *Subdivision Act 1998* ...

- g. In response to the new POC, the first to third respondents have filed the 1<sup>st</sup> Respondent's new POD, the 2<sup>nd</sup> Respondent's new POD, and the 3<sup>rd</sup> Respondent's new POD, respectively.
- h. In their respective new points of defences, each of the first to third respondents have responded to the applicant's allegations in respect of the Proposed Resolution. For example:
  - i. In respect of the 1<sup>st</sup> Respondent's new POD, the first respondent denies the applicant's allegation that the effect of the Proposed Resolution was to alter the PS to reflect lot entitlement and liability as intended and makes positive allegations.<sup>87</sup> The first respondent has also included some of its submissions in respect of the s 75 application in the 1<sup>st</sup> Respondent's new POD,<sup>88</sup> albeit that they are not in direct response to the applicant's allegations in the new POC regarding the Proposed Resolution.
  - ii. In respect of the 2<sup>nd</sup> Respondent's new POD, the second respondent now alleges, among other things, that it was entitled to make the s 75 application where the applicant's claim based on the first POD was 'misconceived'.<sup>89</sup>
  - iii. In respect of the 3<sup>rd</sup> Respondent's new POD, the third respondent makes specific allegations regarding the Proposed Resolution and the operation of ss 27F and 34D(6) of the Act in respect of that event.<sup>90</sup>
- i. Given these matters, and despite the submissions in the Applicant's 21 April 2023 Submissions that she relied on the

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<sup>87</sup> 1<sup>st</sup> Respondent's new POD, [12].

<sup>88</sup> Ibid, for example, [22]–[23].

<sup>89</sup> 2<sup>nd</sup> Respondent's new POD, [36(l)].

<sup>90</sup> 3<sup>rd</sup> Respondent's new POD, [23(b)(vii)]–[23(b)(ix)].

results of the Ballot,<sup>91</sup> I am not satisfied that the applicant has wholly or outrightly abandoned or disavowed her reliance on the outcome of the SGM, nor has she made the concession as the Respondents allege. Whether or not, ultimately, the applicant's reliance has any merit or is in some way undermined by her actions subsequent to the filing of the first POC, and whether any of her actions undermine her claim under the new POC, in my view, these matters will be best dealt by the member who will finally hear the dispute.

- j. Indeed, should I now determine the merits or strengths of the applicant's claim as set out in the first POC, including whether or not her claim was tenable in fact or in law, I would be effectively determining whether or not parts of the new POC (which maintain the allegations in the first POC) are to be struck out or dismissed, particularly when the parties are expected to give evidence and make submissions at the final hearing.
- k. I acknowledge that there are countervailing factors to simply reserving costs. Under s 109 of the *VCAT Act*, the Tribunal can make an order for costs without considering the merits of the case, including based on any previous offers made by a party to another party, and whether a party's conduct has prolonged the conclusion of the proceeding.
- l. Notwithstanding that there are countervailing factors, there are overriding obligations on the Tribunal as set out under ss 97 and 98(1) of the *VCAT Act*. Section 97 requires that the Tribunal to 'act fairly', which includes an obligation to provide procedural fairness, and 'according to the substantial merits of the case in all proceedings'. Section 98 relevantly states that the Tribunal is 'bound by the rules of natural justice' and that it 'may inform itself on any matter as it sees fit' when coming to its decisions.
- m. As demonstrated by the allegations that the applicant maintains in her new POC (where considerable portions of the new POC mirror the allegations in the first POC) and the first to third respondents' points of defences, the outcome of the SGM is, at least on the face of the 'pleadings', still an issue that the applicant seeks to agitate at the final hearing. Given this, it would not be appropriate that I deal with such matters now. Should I do so, I may put the member who will ultimately hear and determine this proceeding in a very difficult position where the member may be impeded or restricted by my findings. This in turn may undermine the proper administration of justice and the Tribunal's ability to determine the matter in a way which is consistent with the operation of ss 97 and 98 of the *VCAT Act*. The member who will

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<sup>91</sup> Applicant's 21 April 2023 Submissions, [8].

finally determine the issues in dispute, in light of the full evidence that the parties will present, will need to make various findings and will be best placed to determine the issues raised by the respondents and to consider any applications for costs pursuant to Division 8 of the *VCAT Act*, including any offers made in reliance of s 112 of *VCAT Act*.

- 57 Given the above considerations, I will order that the question of costs in respect of and incidental to the first POC be reserved to be determined at the conclusion of the proceeding, with liberty given to the parties to be able to rely on submissions and affidavit material that they have filed to date.
- 58 Given my decision, it is inappropriate that I deal with other issues raised by the Respondents, such as whether or not the first respondent is entitled to seek from the applicant costs in respect of Mr Louey's fees.

### **CONCLUSION**

- 59 For the reasons I have provided, I dismiss the first and second respondents' applications under s 75(2) of the *VCAT Act* and otherwise reserve costs with liberty given to the parties to rely on their submissions and affidavit material at the conclusion of the proceeding.

D Kim  
**Member**