

# ALERT

22 JULY 2014

## Victorian Court of Appeal holds that VCAT is a 'court' for the purposes of section 8 *Commercial Arbitration Act 2011* (Vic)

On 1 July 2014, the Victorian Court of Appeal handed down a decision in *Subway Systems Australia Pty Ltd (Subway Systems) v Ireland* [2014] VSCA 142 – which, in contrast to almost all previous authority, found that the Victorian Civil and Administrative Tribunal (VCAT) could be characterised as a court in limited circumstances.

### Facts

The Irelands brought an application in VCAT against Subway Systems for breach of a lease and franchise agreement, under which the Irelands conducted a Subway business at a suburban shopping centre. The franchise agreement included an arbitration clause that required the parties to resolve all disputes under the agreement by arbitration.

Subway Systems argued that the matters in dispute were within the scope of the arbitration clause and, therefore, the proceeding should be stayed or dismissed by force of section 8 of the *Commercial Arbitration Act 2011* (Vic) (CAA), which provides:

A court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests...refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The interpretation of this provision and, specifically, whether VCAT could be considered a 'court' in this context, was the primary issue in dispute.

### Findings

A majority of the Court of Appeal (Maxwell P and Beach JA, Kyrou AJA dissenting) held that VCAT does fall within the definition of a court in this context and, as a consequence, s 8 of the CAA applies to VCAT.

The case turned on the statutory interpretation of s 8, which enacts the Model Law on International Commercial Arbitration (**Model Law**), as adopted by the United Nations Commission on International Trade Law (**UNCITRAL**).



President Maxwell held that, in interpreting s 8, 'very great weight' must be given to the intention of the drafters of the Model Law, and to the importance of 'uniformity of interpretation'. His Honour held that taking a 'functional approach' to the definition of a court would accord with the drafter's intention to prohibit parties who had agreed to an arbitration clause from taking the dispute into the adjudicative processes of the state, which included the processes of VCAT. On that basis, his Honour held (and Justice Beach agreed) that the proceeding should be referred to mediation in accordance with s 8 of the CAA.

In his Honour's dissenting judgment, Justice Kyrou relied on the omission of the Model Law's definition of 'court' from the CAA as evidencing an intention that it should not apply to the CAA. As a consequence, his Honour applied the 'ordinary rules of statutory interpretation' and found that VCAT could not be characterised as a court when interpreted in accordance with the common law and the purpose and other provisions of the CAA. In addition, his Honour held that even if the Model Law's definition applied, VCAT is not a body or organ of the judicial system of Victoria to which that definition would apply.

## Impact

This decision appears to strengthen the enforceability of arbitration clauses in Victorian contracts, because it prevents parties from litigating in circumstances where they have agreed to resolve disputes through arbitration. As a consequence, it is important that all parties are fully aware of their rights and obligations flowing from such an arbitration agreement, which can be invoked at the request of either party.

However, this decision relates to the specific provisions of the CAA only, and is unlikely to have any broader impact on VCAT's jurisdiction or operation in other areas of law. As is acknowledged by the Court of Appeal, a significant body of authority has held that VCAT cannot generally be characterised or regarded as a court, and this decision does not appear to alter the substance of that authority.

**Author:** Bianca Quan, Senior Associate, Julian Grant, Trainee

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**For more information please contact:**

**Leneen Forde**, Partner

Phone (direct) **+61 3 9608 2243**

Mobile **+61 417 165 315**

Email [l.forde@cornwalls.com.au](mailto:l.forde@cornwalls.com.au)