



## Property & Probate

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## Subway Systems Australia v Ireland [2013] VSC 550 (18 October 2013) Croft. J

### Abstract

*The Supreme Court of Victoria has ruled that VCAT is not a court for the purposes of s.8 of the Commercial Arbitration Act ("CAA"). S.8 of the CAA compels a 'court' to uphold arbitration agreements and stay any proceeding before it where an arbitration clause is operative.*

### Background

The Respondents were franchisees of Subway by agreement with the franchisor *Subway Systems Australia* ("SAA") and lessors of their Subway Restaurant under a separate occupancy agreement with an "affiliate" controlled by SAA, *Subway Realty* ("SR"). An arbitration clause in the franchise agreement purported to compel arbitration in the event of a dispute under *either* agreement. The agreements and the practice of both SR and SAA allegedly vested complete control of lease negotiations with SR. After a relocation of Doncaster Shopping Town food court, during which the Respondents' Subway store was temporarily removed, the Respondents expected to be relocated by SR and SAA but were not. They sought relief from both SAA and SR for consequential loss of business.

The initial occupancy agreement was titled a "licence" and purported in its terms to grant no more than a mere licence as opposed to the exclusive possession determinative of the existence of a lease. VCAT ruled it was in fact a lease and thus subject to the exclusive dispute resolution regime under the *Retail Leases Act*, 2003 ("RLA"). This alone is a matter of some significance for hundreds of Australian and, in particular, Subway franchisees with similar 'licences'. That decision was not, however, appealed. VCAT also held itself not to be a court within s.8 of the CAA. SAA alone appealed this decision.

The outcome threatened by a successful appeal was that SAA could compel private arbitration while leaving SR in VCAT. The Respondents contended that the franchise agreement was so integrated with the retail lease as to attract the operation of s.94(3) of the RLA which extends that act's operation not just to leases but to "agreements" between parties to a retail lease dispute. In addition they contended that the control by SAA of SR and express agency of SR meant that SAA was in fact principal and privy to the conceded lease agreement anyway and thus also bound by the RLA. Both arguments failed. The decision that VCAT was not a court was upheld.

The significance of the decision is ably stated in SAA's contentions of the dangers of VCAT being found not to be a court for the purposes of the CAA. These were cited by Justice Croft.

*"51. The effect of excluding VCAT from the compulsory operation of section 8(1) of the CAA is significant. A party to an arbitration agreement who commences proceedings in breach of the agreement in the Supreme Court, County Court or Magistrates' Court will be the subject of a compulsory stay under s 8(1) of the CAA. However, if the party commenced proceedings in VCAT, the proceeding would not be stayed under section 8.*

52. Accordingly, the construction adopted by the Tribunal below would allow parties to commercial disputes to avoid the effect of the CAA, as proceedings commenced in VCAT instead of arbitration would not be mandatorily stayed.

53. VCAT has a very wide jurisdiction in relation to commercial disputes under sections 182-184 of the Australian Consumer Law and Fair Trading act 2012 (Vic) (previously the Fair Trading Act 1999). Almost all commercial disputes can be heard by VCAT by invoking the Australian Consumer Law.

54. If 'court' in the CAA does not include VCAT, any party to (practically) any commercial dispute could bring it before VCAT, notwithstanding a promise in the contract to arbitrate all disputes.

55. This reduces significantly the enforceability of arbitration agreements in a commercial context. That result would be plainly at odds with the purpose of the CAA as set out in s 1AC. The CAA ought be, indeed must be, interpreted to achieve its paramount object: s 1AC(3)."

Justice Croft disagreed stating, *inter alia*:

*It is quite consistent with the provisions of the CAA, in my view, that Parliament intended the possibility of VCAT's broad jurisdiction being exercised untrammelled by any mandatory provisions in favour of arbitration such as those contained in s 8(1) of the CAA at [40].*

It is noteworthy that His Honour is an author of leading texts on both retails leases and arbitrations.