

VCAT Exposed

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a Member of

MEG – Malvern East (Residents) Group

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Division 7—Hearings

- **97. Tribunal must act fairly**

The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.

- **98. General procedure**

(1) The Tribunal—

(a) is bound by the rules of natural justice;

Source: VCAT Act 1998

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Natural Justice is about the concept of fairness (...)

There are **two primary rules**:

- (...) A person whose interests will be affected by the decision should be given a hearing **before** that decision is made (my emphasis)
- (...) The decision maker must be unbiased. If a person has **preconceived opinions**, a vested interest or personal involvement in a matter, they should not attempt to settle that matter (my emphasis)

(Source: www.vu.edu.au/library.)

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Members of the Tribunal are not subject to direct discipline by other persons, apart from extreme cases where the President believes that there may be grounds for removal of the member from office. This degree of immunity from direct discipline, except in extreme cases, is necessary to maintain the independence of members so that they can, and can be seen to, administer justice independently and impartially.

Section 23(5) of the VCAT Act 1998 essentially provides that a member may only be removed from office if the member:

- has been convicted of an indictable offence ..., or
- has become incapable of performing, or
- has neglected to perform, the duties of office, or
- is unfit to hold office because of misconduct.

(Source: VCAT's Complaint Protocol)

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**VCAT MEMBERS ARE
UNTOUCHABLE**

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'Members of the Tribunal are nonetheless accountable by reason of the public nature of their work, the requirement that they give reasons for their decisions and the right given to parties to proceedings to seek the leave of the Supreme Court of Victoria to challenge the decisions if there has been an error of law.

(Source: VCAT's Complaint Protocol)

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No external or independent body reviews and assesses the decisions, performance and behaviour of individual members or of VCAT as a whole.

**VCAT MEMBERS ARE
UNACCOUNTABLE**

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Who applies to the VCAT Planning and Environment list?

In 2004-2005:

Objectors: 29% of all adjudicated cases

Developers: 71% of all adjudicated cases

In 2005 – 2006:

Objectors: 25% of all adjudicated cases

Developers: 75% of all adjudicated cases

WHY SUCH IMBALANCE?

(Source: 2004-2006 statistics – VCAT)

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THE SPIN

- 'In the case of appeals by permit applicants against a council refusal, some 64% were fully or partly successful, down from 72% the previous year.
- 'By contrast, in the case of appeals by objectors, some 70% were fully or partly successful, up from 60% the previous year'

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THE REALITY

In 2004-2005:

Objectors were successful 14.3% of the time in fully reversing a permit authorisation given by Councils. (73 times out of 510 adjudicated cases).

Developers were successful 53.4% of the time in obtaining a permit following a Council's refusal or delay in granting one. (473 times out of 886 adjudicated cases).

(Source: 2004-2006 statistics – VCAT)

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THE REALITY

In 2005-2006:

Objectors were successful 8.9% of the time in fully reversing a permit authorisation given by Councils. (39 times out of 437 adjudicated cases).

Developers were successful 56% of the time in obtaining a permit following a Council's refusal or delay in granting one. (543 times out of 970 adjudicated cases).

(Source: 2004-2006 statistics – VCAT)

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In 2004-2005, developers were

3.7 times more likely than objecting residents to have it all their way at VCAT.

In 2005-2006, developers did even better: they were

6.3 times more likely than objecting residents to win outright at VCAT

Could such blatant bias explain why developers make more use of VCAT than residents?

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Timely Reminder...

Natural Justice is about the concept of fairness (...)
There are **two primary rules**:

1. (...) A person whose interests will be affected by the decision should be given a hearing **before** that decision is made (my emphasis)
2. (...) The decision maker must be unbiased. If a person has **preconceived opinions**, a vested interest or personal involvement in a matter, they should not attempt to settle that matter (my emphasis)

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VCAT'S 'NATURAL JUSTICE' COMES
MORE NATURALLY TO DEVELOPERS
THAN OBJECTING RESIDENTS.

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Melbourne 2030

Policy 5.2.: Recognise and **protect** cultural identity, neighbourhood character and sense of place

(my emphasis)

... Rescode and other planning requirements will be used to ensure **protection** of existing valued urban and neighbourhood character.

(my emphasis)

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VCAT's 2005 SCORECARD

- In the 2005 calendar year, VCAT decisions favoured developers 63.1% of the time
- Elected Councils' decisions were respected only 37.9% of the time
- Elected Councils' decisions were reversed 53,1% of the time, and varied 9% of the time

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IS IT A GOOD LAW, IS IT A GOOD PROCESS
THAT ALLOWS

**UNELECTED,
UNACCOUNTABLE,
UNTOUCHABLE**

PERSONS TO REVERSE, AT WHIM, THE LEGALLY-
MADE DECISIONS OF DEMOCRATICALLY
ELECTED LOCAL GOVERNMENT – WITHOUT
REALISTIC RECOURSE ?

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Let us not forget that each time a Council refuses to grant a permit to a developer citing e.g.:

Neighbourhood character, excessive bulk and size, adverse impact on nearby residents or environmental detriment to the area, they are acting

**IN OUR NAMES, WITHIN THE LAW AND
WITHIN THEIR POWERS.**

**In whose name is VCAT really acting
when it reverses such decisions?**

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THE IMPACT OF THIS SCANDALOUS SYSTEM:

- WHITE-ANTING OF THE PLANNING PROCESS AT LOCAL GOVERNMENT LEVEL.
- BLATANT DENIAL OF NATURAL JUSTICE FOR COUNCILS AND RESIDENTS
- MOCKERY OF THE PRINCIPLE OF EQUALITY BEFORE THE LAW
- UNDERMINING OF THE STANDING OF THE TRIBUNAL AND THE RULE OF LAW IN THE EYES OF THE COMMUNITY

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What is required to re-establish public trust:

1. The restoration of the Planning Powers of Elected Local Councils.
2. A transparent and rigorous Code of Conduct for VCAT Members, enforced through regular external audits.
3. Transcripts of hearings to be publicly available without vetting or editing by VCAT Members.
4. An independent VCAT Ombudsman to receive and deal with complaints.
5. An accessible Appeals Panel

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IN THE MEANTIME...

- WE MUST KEEP FIGHTING THE VCAT BULLDOZER AND THOSE WHO DRIVE IT
 - AND MAKE SURE RESIDENTS COME FIRST WITHIN COUNCILS' PLANNING DEPARTMENTS.
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What Follows are Statistics showing outcomes by VCAT Member and by Council for the calendar year 2005.

They expose individual Member bias as well as the bias of the organisation as whole.

They show that winning at VCAT is also a lottery depending on the Member you get.

Justice and fairness have nothing to do with it.

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OUTCOMES BY MEMBER IN DESCENDING ORDER OF PRO-DEVELOPER BIAS

| VCAT Member | Member's Background | Total Decisions | Favours Developer | Against Developer | Pro- Developer % |
|------------------------|--------------------------------|----------------------------|------------------------------|------------------------------|---------------------------------|
| Richard Walter | Town Planner | 12 | 11 | 1 | 91.7% |
| Sylvia Mainwaring | Industrial Chemist | 54 | 47 | 7 | 87.0% |
| Michael Read | Town Planner/Architect | 29 | 25 | 4 | 86.2% |
| Jane Monk | Town Planner | 18 | 15 | 3 | 83.3% |
| Vicki Davies | Town Planner | 18 | 14 | 4 | 77.8% |
| Russell Byard | Lawyer | 30 | 23 | 7 | 76.7% |
| Desmond Eccles | Town Planner | 77 | 58 | 19 | 75.3% |
| Richard Horsfall | Lawyer | 39 | 29 | 10 | 74.4% |
| Howard Terril | Engineer | 62 | 46 | 16 | 74.2% |
| Ian Marsden | Town Planner/Economist | 32 | 23 | 9 | 71.9% |
| Gerard Sharkey | Engin./T-Planner/Acc. | 81 | 58 | 23 | 71.6% |
| Jeanette Rickards | Lawyer | 41 | 29 | 12 | 70.7% |
| Megan Carew | Town Planner | 40 | 28 | 12 | 70.0% |
| Peter O'Leary | Town Planner | 95 | 66 | 29 | 69.5% |
| Anthony Quirk | Engineer | 40 | 27 | 13 | 67.5% |

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| VCAT Member | Member's Background | Total Decisions | Favours Developer | Against Developer | Pro-Developer % |
|--|----------------------------|------------------------|--------------------------|--------------------------|------------------------|
| Philip Martin | Lawyer/Town Planner | 51 | 33 | 18 | 64.7% |
| Sam Cimino | Town Planner | 59 | 38 | 21 | 64.4% |
| Helen Gibson | Lawyer | 15 | 9 | 6 | 60.0% |
| Christina Fong | Town Planner | 107 | 64 | 43 | 59.8% |
| Nicholas Hadjigeorgiou | Town Planner/Engineer | 59 | 35 | 24 | 59.3% |
| Tonia Komesaroff | Lawyer | 27 | 16 | 11 | 59.3% |
| Laurie Hewet | Town Planner | 83 | 49 | 34 | 59.0% |
| Anthony Liston | Town Planner | 53 | 30 | 23 | 56.6% |
| Tracey Bilston-McGillen | Town Planner | 33 | 17 | 16 | 51.5% |
| Margaret Baird | Town Planner | 94 | 43 | 51 | 45.7% |
| John Bennet | Town Planner | 73 | 33 | 40 | 45.2% |
| Mary-Ann Taranto | Town Planner | 50 | 22 | 28 | 44.0% |
| Rachel Naylor | Town Planner | 69 | 24 | 45 | 34.8% |
| Aggregate of 8 other Members with less than 10 decisions | Various | 39 | 22 | 17 | 56.48% |
| VCAT TOTAL | | 1480 | 934 | 546 | 63.1% |

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OUTCOMES BY MEMBER IN DESCENDING ORDER OF CONTEMPT FOR COUNCIL DECISIONS

| VCAT Member | Member's Background | Total Decisions | Council Decision Set Aside/ Reversed | Council Decision Changed/ Varied | Council Decision Affirmed/ Confirmed | Democracy Contempt Index % |
|------------------------|----------------------------|------------------------|---|---|---|-----------------------------------|
| Jane Monk | Town Planner | 18 | 14 | 2 | 2 | 88.9% |
| Sylvia Mainwaring | Industrial Chemist | 54 | 39 | 6 | 9 | 83.3% |
| Michael Read | Town Planner/Architect | 29 | 23 | 1 | 5 | 82.8% |
| Peter O'Leary | Town Planner | 95 | 56 | 19 | 20 | 78.9% |
| Richard Walter | Town Planner | 12 | 8 | 1 | 3 | 75.0% |
| Desmond Eccles | Town Planner | 77 | 51 | 6 | 20 | 74.0% |
| Nicholas Hadjigeorgiou | Town Planner/Engineer | 59 | 32 | 11 | 16 | 72.9% |
| Anthony Quirk | Engineer | 40 | 25 | 4 | 11 | 72.5% |
| Ian Marsden | Town Planner/Economist | 32 | 21 | 2 | 9 | 71.9% |
| Gerard Sharkey | Engin./T-Planner/Acc. | 81 | 47 | 10 | 24 | 70.4% |
| Sam Cimino | Town Planner | 59 | 36 | 5 | 18 | 69.5% |
| Richard Horsfall | Lawyer | 39 | 23 | 4 | 12 | 69.2% |
| Jeanette Rickards | Lawyer | 41 | 24 | 4 | 13 | 68.3% |

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| | | | | | | |
|--|---------------------|-------------|------------|------------|------------|--------------|
| Laurie Hewet | Town Planner | 83 | 39 | 17 | 27 | 67.5% |
| Tonia Komesaroff | Lawyer | 27 | 16 | 2 | 9 | 66.7% |
| Russell Byard | Lawyer | 30 | 19 | 0 | 11 | 63.3% |
| Anthony Liston | Town Planner | 53 | 28 | 5 | 20 | 62.3% |
| Tracey Bilston-McGillen | Town Planner | 33 | 14 | 5 | 14 | 57.6% |
| Vicki Davies | Town Planner | 18 | 10 | 0 | 8 | 55.6% |
| Rachel Naylor | Town Planner | 69 | 26 | 10 | 33 | 52.2% |
| Philip Martin | Lawyer/Town Planner | 51 | 26 | 0 | 25 | 51.0% |
| Christina Fong | Town Planner | 107 | 51 | 3 | 53 | 50.5% |
| Megan Carew | Town Planner | 40 | 20 | 0 | 20 | 50.0% |
| Howard Terril | Engineer | 62 | 29 | 0 | 33 | 46.8% |
| John Bennet | Town Planner | 73 | 31 | 3 | 39 | 46.6% |
| Mary-Ann Taranto | Town Planner | 50 | 19 | 4 | 27 | 46.0% |
| Margaret Baird | Town Planner | 94 | 36 | 5 | 53 | 43.6% |
| Helen Gibson | Lawyer | 15 | 4 | 0 | 11 | 26.7% |
| Aggregate of 8 other Members with less than 10 decisions | Various | 39 | 19 | 4 | 16 | 58.9% |
| TOTAL VCAT | | 1480 | 786 | 133 | 561 | 62.1% |

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| Council | Total Decisions | Council Decision Affirmed /Confirmed | Council Decision Set Aside /Reversed | Council Decision Changed/ Varied | Democracy Contempt Index | Decision Favours Developer | Decision Against Developer | Pro-Developer % |
|----------------|------------------------|---|---|---|---------------------------------|-----------------------------------|-----------------------------------|------------------------|
| Alpine | 1 | 0 | 0 | 1 | 100.0% | 1 | 0 | 100.0% |
| Ballarat | 10 | 2 | 5 | 3 | 80.0% | 5 | 5 | 50.0% |
| Banyule | 76 | 24 | 47 | 5 | 68.4% | 48 | 28 | 63.2% |
| Bass Coast | 23 | 7 | 11 | 5 | 69.6% | 12 | 11 | 52.2% |
| Baw Baw | 4 | 1 | 2 | 1 | 75.0% | 1 | 3 | 25.0% |
| Bayside | 60 | 21 | 34 | 5 | 65.0% | 39 | 21 | 65.0% |
| Benalla Rural | 3 | 2 | 1 | 0 | 33.3% | 1 | 2 | 33.3% |
| Boroondara | 128 | 46 | 74 | 8 | 64.1% | 90 | 38 | 70.3% |
| Brimbank | 9 | 3 | 5 | 1 | 66.7% | 6 | 3 | 66.7% |
| Campaspe | 3 | 1 | 1 | 1 | 66.7% | 1 | 2 | 33.3% |
| Cardinia | 14 | 9 | 5 | 0 | 35.7% | 5 | 9 | 35.7% |
| Casey | 29 | 12 | 16 | 1 | 58.6% | 15 | 14 | 51.7% |
| Colac-Otway | 7 | 3 | 2 | 2 | 57.1% | 3 | 4 | 42.9% |
| Corangamite | 3 | 1 | 1 | 1 | 66.7% | 1 | 2 | 33.3% |
| Dandenong | 1 | 0 | 1 | 0 | 100.0% | 1 | 0 | 100.0% |

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|--------------------|-----------------|--------------------------------------|--------------------------------------|----------------------------------|--------------------------|----------------------------|----------------------------|-----------------|
| Darebin | 45 | 28 | 16 | 1 | 37.8% | 31 | 14 | 68.9% |
| East Gippsland | 6 | 5 | 0 | 1 | 16.7% | 1 | 5 | 16.7% |
| Frankston | 32 | 7 | 22 | 3 | 78.1% | 24 | 8 | 75.0% |
| Gannawarra | 1 | 1 | 0 | 0 | 0.0% | 0 | 1 | 0.0% |
| Glen Eira | 41 | 13 | 22 | 6 | 68.3% | 27 | 14 | 65.9% |
| Glen Iris | 2 | 0 | 0 | 2 | 100.0% | 2 | 0 | 100.0% |
| Glenelg | 2 | 1 | 1 | 0 | 50.0% | 1 | 1 | 50.0% |
| Golden Plains | 4 | 3 | 1 | 0 | 25.0% | 2 | 2 | 50.0% |
| Greater Bendigo | 7 | 7 | 0 | 0 | 0.0% | 5 | 2 | 71.4% |
| Greater Dandenong | 17 | 6 | 10 | 1 | 64.7% | 12 | 5 | 70.6% |
| Greater Geelong | 59 | 21 | 35 | 3 | 64.4% | 38 | 21 | 64.4% |
| Greater Shepparton | 11 | 7 | 3 | 1 | 36.4% | 4 | 7 | 36.4% |
| Hepburn | 13 | 5 | 7 | 1 | 61.5% | 8 | 5 | 61.5% |
| Hobsons Bay | 41 | 10 | 27 | 4 | 75.6% | 28 | 13 | 68.3% |
| Hume | 7 | 1 | 5 | 1 | 85.7% | 2 | 5 | 28.6% |

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|----------------|------------------------|---|---|---|---------------------------------|-----------------------------------|-----------------------------------|------------------------|
| Indigo | 6 | 3 | 2 | 1 | 50.0% | 1 | 5 | 16.7% |
| Kingston | 30 | 9 | 18 | 3 | 70.0% | 21 | 9 | 70.0% |
| Knox | 35 | 11 | 24 | 0 | 68.6% | 24 | 11 | 68.6% |
| La Trobe | 5 | 3 | 0 | 2 | 40.0% | 1 | 4 | 20.0% |
| Loddon | 2 | 1 | 1 | 0 | 50.0% | 2 | 0 | 100.0% |
| Macedon Ranges | 25 | 5 | 19 | 1 | 80.0% | 20 | 5 | 80.0% |
| Mannigham | 36 | 17 | 15 | 4 | 52.8% | 20 | 16 | 55.6% |
| Mansfield | 1 | 0 | 0 | 1 | 100.0% | 0 | 1 | 0.0% |
| Maribyrnong | 22 | 15 | 7 | 0 | 31.8% | 11 | 11 | 50.0% |
| Maroondah | 31 | 9 | 22 | 0 | 71.0% | 22 | 9 | 71.0% |
| Melbourne | 21 | 9 | 9 | 3 | 57.1% | 14 | 7 | 66.7% |
| Melton | 13 | 4 | 9 | 0 | 69.2% | 9 | 4 | 69.2% |
| Mildura | 4 | 1 | 3 | 0 | 75.0% | 2 | 2 | 50.0% |
| Mildura Rural | 5 | 1 | 3 | 1 | 80.0% | 2 | 3 | 40.0% |
| Mitchell | 7 | 5 | 1 | 1 | 28.6% | 4 | 3 | 57.1% |

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| Council | Total Decisions | Council Decision Affirmed /Confirmed | Council Decision Set Aside /Reversed | Council Decision Changed/ Varied | Democracy Contempt Index | Decision Favours Developer | Decision Against Developer | Pro-Developer % |
|----------------------|-----------------|--------------------------------------|--------------------------------------|----------------------------------|--------------------------|----------------------------|----------------------------|-----------------|
| Moira | 5 | 3 | 2 | 0 | 40.0% | 2 | 3 | 40.0% |
| Monash | 61 | 22 | 37 | 2 | 63.9% | 44 | 17 | 72.1% |
| Moonee Valley | 70 | 14 | 54 | 2 | 80.0% | 54 | 16 | 77.1% |
| Moorabool | 11 | 7 | 4 | 0 | 36.4% | 5 | 6 | 45.5% |
| Moreland | 39 | 16 | 17 | 6 | 59.0% | 22 | 17 | 56.4% |
| Mornington Peninsula | 52 | 23 | 24 | 5 | 55.8% | 35 | 17 | 67.3% |
| Mount Alexander | 6 | 3 | 3 | 0 | 50.0% | 4 | 2 | 66.7% |
| Murrindindi | 9 | 3 | 4 | 2 | 66.7% | 2 | 7 | 22.2% |
| Nillumbik | 27 | 12 | 11 | 4 | 55.6% | 14 | 13 | 51.9% |
| Northern Grampians | 3 | 1 | 1 | 1 | 66.7% | 1 | 2 | 33.3% |
| Port Phillip | 36 | 11 | 20 | 5 | 69.4% | 28 | 8 | 77.8% |
| Pyrenees | 1 | 1 | 0 | 0 | 0.0% | 1 | 0 | 100.0% |
| Queenscliffe Borough | 3 | 2 | 1 | 0 | 33.3% | 1 | 2 | 33.3% |
| South Gippsland | 6 | 2 | 2 | 2 | 66.7% | 1 | 5 | 16.7% |
| Southern Grampians | 1 | 0 | 1 | 0 | 100.0% | 1 | 0 | 100.0% |

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| Council | Total Decisions | Council Decision Affirmed /Confirmed | Council Decision Set Aside /Reversed | Council Decision Changed/ Varied | Democracy Contempt Index | Decision Favours Developer | Decision Against Developer | Pro-Developer % |
|-------------------|------------------------|---|---|---|---------------------------------|-----------------------------------|-----------------------------------|------------------------|
| Stonnington | 58 | 28 | 25 | 5 | 51.7% | 35 | 23 | 60.3% |
| Strathbogie | 3 | 2 | 1 | 0 | 33.3% | 2 | 1 | 66.7% |
| Surf Coast | 17 | 5 | 11 | 1 | 70.6% | 6 | 11 | 35.3% |
| Towong | 1 | 0 | 0 | 1 | 100.0% | 0 | 1 | 0.0% |
| Wangaratta Rural | 1 | 1 | 0 | 0 | 0.0% | 0 | 1 | 0.0% |
| Warrnambool | 4 | 3 | 0 | 1 | 25.0% | 1 | 3 | 25.0% |
| Wellington | 4 | 2 | 0 | 2 | 50.0% | 2 | 2 | 50.0% |
| West Wimmera | 1 | 0 | 0 | 1 | 100.0% | 0 | 1 | 0.0% |
| Whitehorse | 41 | 15 | 24 | 2 | 63.4% | 27 | 14 | 65.9% |
| Whittlesea | 20 | 6 | 13 | 1 | 70.0% | 16 | 4 | 80.0% |
| Wodonga | 3 | 1 | 1 | 1 | 66.7% | 2 | 1 | 66.7% |
| Wyndham | 6 | 3 | 1 | 2 | 50.0% | 1 | 5 | 16.7% |
| Yarra | 60 | 25 | 25 | 10 | 58.3% | 39 | 21 | 65.0% |
| Yarra Ranges | 28 | 10 | 16 | 2 | 64.3% | 20 | 8 | 71.4% |
| Yarriambiack | 1 | 0 | 1 | 0 | 100.0% | 1 | 0 | 100.0% |
| Total VCAT | 1480 | 561 | 786 | 133 | 62.1% | 934 | 546 | 63.1% |

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