



4 May 2016

By email: vcatfees2016@justice.vic.gov.au

Director
Dispute Resolution
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Department of Justice and Regulation
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Victorian Civil and Administrative Tribunal (Fees) Regulations 2016

The Consumer Action Law Centre (Consumer Action) welcomes the opportunity to provide input to the Victorian Civil and Administrative Tribunal (Fees) Regulations (**VCAT Fees**) Review. Our submission relates primarily to two of the questions for comment, namely:

- Whether the move towards a divisional fee structure as opposed to a list based fee structure is desirable; and
- Whether the small claims threshold of \$10,000 should be increased.

Summary of recommendations

- VCAT applications should not attract a fee for a specified set of low income Victorians.
- A no fee policy should be extended to other low income Victorians not in receipt of a health care card.
- Regardless of the value of their claim, health care card recipients should not be required to pay any VCAT fees or charges.
- Should VCAT raise the small claims limit above \$10,000, an independent evaluation and review process should be undertaken to assess the mix of legal based decision making and informal processes, to ensure an appropriate mix of the two is being achieved.
- VCAT should relax restrictions on parties being represented in a dispute, particularly in cases where an individual applicant is challenging a business that is familiar with the VCAT process or is represented by a solicitor.

Our comments are detailed more fully below.

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About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

General comments

In recent years, accessing VCAT has become more expensive, time consuming and more complicated. The result seems to be a downward trend in the number of applications to VCAT, particularly applications by individuals for disputes under \$10,000.

This drop indicates that Victorians are now less able to access justice, and businesses engaging in unfair and unlawful practice are less likely to be held to account. This creates detriment for individual consumers but also makes markets less competitive for everyone—businesses who invest in treating customers fairly and lawfully are at a competitive disadvantage to those businesses who provide a substandard product, and promote it with dishonest and unfair sales tactics.

We recognise that the Department of Justice is taking into account past concerns about the affordability of VCAT and we generally support the preferred option outlined in the Regulatory Impact Statement (**RIS**) that will simplify and lower standard fees for Victorians seeking redress. Our primary concern is that costs of applying to VCAT remain prohibitive, particularly for low income Victorians seeking redress against a trader.

The Department will also be aware that our submission to the *Victorian Access to Justice Review* (the **ATJ Review**) commented in detail about VCAT accessibility, which dealt in part with VCAT fees (prior to the release of this RIS). Our full response Term of Reference 4 is attached as an **Appendix**.

Fees

Zero fees for low income applicants needs to be a policy consideration

Consumer Action's submission to the ATJ Review argued that there should be no aversion to setting the application fee at zero, particularly for low income applicants. The RIS claims that should there not be any application fee, it would be highly likely that VCAT would become a first port of call for disputes because the service would be free, having a flow on effect on the number of applicants. There is simply no evidence supporting this theory.

External dispute resolution (**EDR**) schemes are free for all consumers, and always have been. EDR schemes have processes for rejecting applications which are outside of their terms of reference, but they certainly do not grind to a halt because of unmanageable levels of vexatious claims. In fact, EDR suffers from the opposite problem—our clients often don't realise free EDR schemes exist, and frequently take their disputes to inferior, expensive, but well-promoted services like 'credit repair' companies when they could get a better service for free at EDR.

In New South Wales, the NSW Civil and Administrative Tribunal (**NCAT**) has allowed \$5 'concession' applications since 2005, with no escalation of unmeritorious applications. There is nothing in the 2006 or 2007 annual reports of the Consumer, Trader and Tenancy Tribunal (CTTT, NCAT's predecessor tribunal handling consumer matters) indicating any rise associated with the introduction of a \$5 concession fee. While applications did increase significantly in the 2006-07 financial year, there is nothing in that year's annual report attributing this rise to reduced fees. For example, the five per cent rise in applications to the Tenancy list (which received 77 per cent of all applications) in that year was 'mainly attributable to applications made by the

Department of Housing'.¹ And while there was a 14 per cent increase in 2006-07 to the General list (which received 10 per cent of all applications), the annual report notes that the number of applications received in 2006-07 was still lower than in any year from 1999-2003.²

As a community legal centre specialising in consumer law, it is our observation that very few individuals want to take a dispute to VCAT. The theory that falling prices drives demand only really applies to products that people want to buy, and almost nobody wants to take a dispute to a court or tribunal. Going to VCAT is an unfamiliar, stressful and extremely time consuming process for our clients. Lowering application fees makes VCAT affordable, but does not make the process any more enjoyable.

We accept that reducing application fees may lead to some isolated vexatious applications that would not otherwise be made. But increasing fees to prevent a small number of unmeritorious cases is a disproportionate response if it also bars access to thousands of reasonable claims.

Recommendation: VCAT applications should not attract a fee for a specified set of low income Victorians

Fees waivers

We recognise that the Department has consulted on the issue of fees prior to the issuing of this RIS and we broadly welcome the approach of offering lower fees to individuals.

We particularly welcome the recognition that health care card holders, who are some of the lowest income Victorians and are particularly at risk of not accessing VCAT, will have no cost attached to going to VCAT under the preferred proposal.

Other low income Victorians should have fee waivers extended to them, regardless of whether they have a health care card or not.

Centrelink recipients may have greater access to health care cards by virtue of being already a welfare recipient, but there are other groups who are severely disadvantaged who should also not be required to go through the complex, cumbersome and somewhat opaque process of applying for a waiver. This includes, for example asylum seekers living in the community, who have limited access to concessions in general, and international students. Other eligible people would be those receiving assistance from a financial counsellor, community legal centre or legal aid, as those clients will also by definition (or assessment) be considered as very low income or subject to special disadvantage.

Recommendation: Extension of no fee policy to other low income Victorians not in receipt of a health care card

We also question why the application of a waiver or a concession would be limited to cases under \$10,000 (or whatever the small claim threshold becomes). A health care card recipient has been assessed as having a low income, yet this limitation would prevent their ability to access VCAT should they have a dispute with a trader for more than the small claim threshold. The value of a dispute with a trader has no direct relation to their current income or the subsequent affordability of VCAT for that person.

Recommendation: Regardless of the value of their claim, health care card recipients should not be required to pay any VCAT fees or charges

¹ Consumer Trader and Tenancy Tribunal *Annual Report 2006-07*, page 20.

² Op cit, p 22

The RIS suggests that the introduction of an affordable Concession Fee should result in fewer people relying on a fee waiver³, and that the safety net hardship criteria mean a further reduction or fee waiver is still available to those who receive the concession rate.

The underlying policy settings should drive accessibility, therefore cost recovery is inappropriate to low income Victorians. As we argued in detail in our submission to the ATJ Review, waiver applications are complex, time consuming, resource intensive for little apparent benefit, and are decided on a cases by case basis with an overriding ability for VCAT to use its discretion to grant or deny a waiver without giving a clear explanation for how that discretion is exercised.

The most efficient way to remove confusion and double handling in the fee decision making process is to make the cost free for individual applicants, or like NCAT in NSW, set the concession fee to a nominal amount which would effectively remove the need for a waiver program.

Small claims threshold

We agree that a rise in the small claims threshold from \$10,000 would be helpful for many of our clients in pursuing their claims. Raising the threshold would help protect clients from the risk of having costs awarded against them at VCAT's discretion, which can be a very serious risk for our clients who are typically very low income earners. We believe this is a substantial disincentive to seeking redress.

At the same time, small claims are often resolved in a less formal process that doesn't always appear to give primacy to the Australian Consumer Law in resolving a dispute. Similarly, written reasons for a decision are rare in a small claim. This means the decisions of a member are not publicly known or subject to the scrutiny of someone with legal expertise.

We appreciate that written reasons for each decision may not be realistic. However to have confidence in the quality of the decisions made under the Australian Consumer Law, evaluations must be built into the process. Consumer Action, for example, uses reflective practice methodology as a quality control and continual improvement tool.

A poor outcome that needs to be anticipated and managed would be forcing complainants toward a negotiated outcome when a legal decision of a member would be their preferred outcome—particularly as the amounts will be potentially up to the value of \$25,000. There needs to be some independent oversight of VCAT's approach to resolving claims to ensure that legal merit of a case is the key consideration, rather than achieving a quick and informal resolution.

Recommendation: Should VCAT raise the small claims limit above \$10,000, an independent evaluation and review process should be undertaken to assess the mix of legal based decision making and informal processes, to ensure an appropriate mix of the two is being achieved.

Representation by an agent

Individuals are only allowed to be represented by an agent (for example, a lawyer) in 'exceptional circumstances' in the Civil Claims List.⁴ The amount under dispute in a small claim could rise significantly under this change, and the stakes could be effectively much higher for those in a dispute, making legal representation appropriate.

VCAT's policy about allowing legal representation and advocates to attend on clients should be changed. It is certainly appropriate for VCAT to prevent parties being legally represented to ensure VCAT is user-friendly, avoids excessive legalism and avoids creating power imbalances between parties who can afford

³ RIS p61

⁴ VCAT, Preparing for a hearing in the Civil Claims List, p 2.

https://www.vcat.vic.gov.au/system/files/preparing_for_a_hearing_in_the_civil_claims_list_1.pdf

representation and those who cannot. However, rules need to be flexible enough to allow legal representation where to do so would actually correct a power imbalance, or improve efficiency.

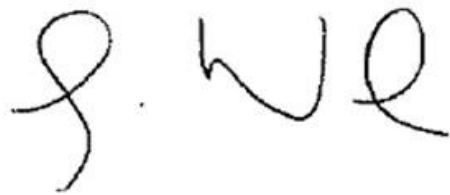
Recommendation: VCAT should relax restrictions on parties being represented in a dispute, particularly in cases where an individual applicant is challenging a business that is familiar with the VCAT jurisdiction or is represented by a solicitor.

Please contact Sarah Wilson, Senior Policy and Campaigns Officer on 03 9670 5088 or at sarahw@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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