15 February 2013

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

Regulations Officer, Courts Policy
Strategic Policy and Legislation
Department of Justice
GPO Box 4356
Melbourne VIC 3000

Dear Sir/Madam,

Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal Fees Regulations

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Department of Justice's Regulatory Impact Statement (**RIS**) for the proposed Victorian Civil and Administrative Tribunal (the **Tribunal**) Fees Regulations.

In summary, we submit that:

- the RIS fails to give appropriate weighting to the impact of increased application fees on access to justice;
- insufficient analysis has been undertaken in relation to the other assessment criteria proposed by the RIS;
- the RIS has not considered the impact of large fee increases on competition and market outcomes;
- the RIS is unclear about the scope of the proposed fees for alternative dispute resolution;
- the RIS has not considered alternative fee models that might address concerns about access to justice; and
- improvements could be made to fee waiver processes.

Consumer Action's primary recommendation is that Option 1 of the RIS (fees retained at existing levels) should be the approach adopted, and any new fees regulations should be based on that approach. Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

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RIS fails to give appropriate weighting to access to justice

Objective of the Tribunal

In the second reading speech for the Victorian Civil and Administrative Tribunal Bill 1998 (Vic), then Attorney-General Jan Wade stated that one objective in implementing this new tribunal was to "improve access to justice for all Victorians"[1]. The bill was to further the State Government's priority "to ensure that both the public and business community, including people living and working in rural Victoria, will benefit from improved access to civil justice services which are relevant, responsive and efficient"[2].

The Tribunal's important role in improving access to justice has been consistently recognised throughout its history. For example, in the 2009 *President's Review of VCAT*, the first finding was that the Tribunal has generally improved access and equitable outcomes.[3] As outlined below, we're concerned that the RIS has not sufficiently considered the impact of the proposed fee regulations on access to justice.

It appears to us that a determining factor for the proposal to increase Tribunal fees is to ensure cost-recovery from users of the Tribunal accords more closely with cost recovery from users of the courts, such as the Magistrates' Court of Victoria. For example, the RIS compares cost recovery and Government appropriations as a percentage of court and tribunal expenditure.[4] The RIS also states that the policy justification of the proposed regulations is to achieve appropriate user contribution to the costs of all civil disputes, across courts and tribunals.[5]

We note first that the Tribunal actually has a far lesser proportion of Government appropriations compared to other courts, so it is not clear to us why there may be a need to reduce Government appropriations further in favour of user contributions. Secondly, and more fundamentally, we think the comparison with courts is flawed. As highlighted above, the objective of the Tribunal is to be a cheap alternative to courts. In terms of small claims, it appears the purpose of the Tribunal (including its costs and legal representation rules) is to take small civil claims outside the court system, resulting in more efficient, informal and less expensive justice outcomes. This point has not been considered adequately by the RIS—it is inappropriate to compare user contributions across courts and tribunals for this reason.

In our view, a more sensible comparison is between the Tribunal and industry-based dispute resolution or ombudsman schemes, which were established to resolve civil disputes between consumers and regulated industries. These include the Financial Ombudsman Service, the

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[1] Parliament of Victoria, Hansard, Victorian Civil and Administrative Tribunal Bill, Second Reading, (9 April 1998), available at: http://tex.parliament.vic.gov.au/bin/texhtmlt?form=jVicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=20778&activity=Second+Reading&title=VICTORIAN+CIVIL+AND+ADMINISTRATIVE+TRIBUNAL+BILL&date1=9&date2=April&date3=1998&query=true%0a%09and+%28+data+contains+'VCAT'%0a%09and+data+contains+'Bill'+%29.

[2] As above.

[3] Hon Justice Kevin Bell, *One VCAT: President's review of VCAT*, 30 November 2009, p 24, available at: http://www.vcatreview.com.au/images/president's_review_of_vcat_report.pdf

[4] Department of Justice, *Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal Fees Regulations*, January 2013, p 38-39.

[5] As above, p 42.

Credit Ombudsman Service, the Telecommunications Industry Ombudsman and the Energy and Water Ombudsman Victoria. These schemes are established to be an alternative to expensive legal action for both consumers and industry, and have been hailed as one of the primary successes to improve consumer justice in Australia.[6] The schemes operate under agreed benchmarks, the first of which is accessibility—this involves the schemes having 'no cost barriers'.[7] While we do accept that there are differences between the Tribunal and these schemes, and that there is some justification for user contribution to Tribunals, we submit that it is a poor outcome for consumers to have vastly different costs applied to access to justice depending upon whether a trader is regulated or not.

Impact of application fee increases

Consumer Action is particularly concerned about the impact of the proposed increase to application fees in the Civil Claims List. This list is the one which is most regularly used by consumers who have contacted our service for advice or assistance to resolve a dispute with a trader.

In particular, we submit that increasing the application fee from $38.80 to $160.40 (an increase of 300 percent in real terms) will make access to the Civil Claims List prohibitive for many current users. For example, a consumer with a claim of $1000 or less is more unlikely, in our view, to take his or her matter to the Tribunal if a $160.40 application fee is required. Such a fee cuts 20 percent from any amount he or she could be awarded, if successful. This, coupled with the effort of putting together his or her claim, and taking time off work to attend the Tribunal, is likely to be enough to discourage consumers from bringing relatively small claims.

Case study #1

The client was born in Columbia, and came to Australia in 2008 on a student visa to study English. At the time we provided him with legal assistance, he was allowed to work only 20 hours a week, had an income of $430 a week after tax, and had no fixed address. The client wanted to undertake work experience to assist him in finding work in his area of expertise, graphic design, but this was very difficult. A particular company offered placements in fields of interest for a fee. The client paid $2000 to this company, believing they would provide him with a placement in pre-press design. As the client didn't have this money, he had to borrow it from a friend. Instead of providing him with the opportunity of relevant work experience in his field, however, the company placed him in an unpaid role packing boxes and doing mailroom work, in which he worked for 55 hours over the next three months.

We assisted the client in applying to VCAT for a refund of the $2000 fee, arguing the company had behaved unconscionably, misled our client about what it would do for him, and had unfair contract terms in its agreement. The client paid the $37.70 VCAT application fee. He was not eligible for a fee waiver, because as an international student he had no rights to government concessions or Centre-link benefits. His income was slightly above the threshold for the alternative income test based fee waiver. Ultimately, his claim was successful and he was awarded the amount of $2000. This client said that if the application fee was $160 rather than

[6] Jenni Mack, *Speech: 50 years of consumer rights—how far have we come?* Address to ACCC Consumer Congress, 15 March 2012, available at: http://consumersfederation.org.au/50-years-of-consumer-rights-how-far-have-we-come/

[7] Department of Industry, Science & Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes*, available at: http://www.anzoa.com.au/National%20Benchmarks.pdf

$37, he may have struggled to pay the fee because he was earning so little money. He may not have been able to afford to pursue his claim and hold the company accountable, despite believing that he had a strong case.

The RIS itself models indicative levels of behavioural response to the fee increases. It models a 10 percent reduction in demand and a 25 percent reduction in demand. However, it appears that this modelling is done so as to determine the impact on the level of revenue recovered through fees, not in response to any concern about consumers not accessing justice.

We note that cost increases in some lists of the Tribunal may be more appropriate, and have less of an impact on access to justice. For example, lists such as the Major Cases List, where users pay to have cases expedited, or the Planning List, which is largely utilised by developers and other corporate entities which are capable of absorbing increased fees, are very different to everyday consumers who seek to use the Tribunal to resolve a dispute with a trader. As outlined further below, the RIS does not adequately consider the impacts on different classes of Tribunal users when analysing the proposals' impact on access to justice.

Weighting of access to justice as criterion for assessment in the RIS

The RIS states that an appropriate contribution from VCAT users is one which "ensures that user fees do not prevent access to justice for users".[8] However, the RIS identifies access to justice as only one of the criteria by which the changes to fees should be assessed. It also identifies the following criteria:

- equity between court users and taxpayers;
- equity between different groups of court users;
- transitional considerations; and
- impact on VCAT service levels.

Below we provide comments on the RIS's analysis of each of these criteria.

We submit that access to justice should be given greater weighting compared to the other criteria listed in the RIS. As drafted, the RIS makes calculations on the basis that each criterion holds an equal value. In our view, access to justice should be a more serious consideration for decision-makers considering proposals to increase Tribunal fees.

We note that the Victorian Charter of Human Rights states that:

> "Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination."[9]

and that:

> "A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing."[10]

[8] Above n 4, p 35.
[9] *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 8(3).
[10] As above, section 24(1).

These provisions not only provide for fundamental rights but reflect the importance of access to justice as a principle of a fair society, and that this principle extends to the civil legal system. In our view, if an individual cannot access justice to due the prohibitive costs involved, it limits their ability to gain the protection of the law, and to have their proceeding decided in a fair and public hearing before the Tribunal, potentially breaching the promise of the Charter. Given this, we think that much greater weighting should be applied to access to justice in the calculations performed by the RIS.

Other assessment criteria in RIS

Equity between court users and taxpayers

It appears that a determining factor for the proposal to increase Tribunal fees is a "more equitable sharing of costs between court users and taxpayers". We agree that a level of cost recovery from court users is appropriate. However, we do not agree that the Tribunal's level of cost recovery should be increased from 14 percent to a level of 45 percent because this is a "level similar to that proposed for the court jurisdictions".

Notwithstanding that the proposal for the Civil Claims List actually suggests a cost recovery of over 65 percent (rather than 45 percent) (which is discussed further below), it is our view that the Tribunal should be differentiated from other Courts. As outlined above, the Tribunal is designed to be a cheap and accessible *alternative* to court, so it is not clear why cost recovery should be comparable—indeed, this objective of the Tribunal indicates that there is significant public benefit in encouraging users to seek redress through the Tribunal rather than the more expensive courts system.

Further, as table 3.3 of the RIS suggests, about half of the Tribunal's funding source comes from various trust funds rather than Tribunal fees or appropriations. For a number of these funds—such as the Residential Tenancies Fund which is made up of tenant's bonds—potential users are contributing to the cost of the Tribunal. The existence of the trust funds also means that the government is saving on expenditure for the Tribunal compared to other courts.

We also feel that the RIS has failed to acknowledge that taxpayers are also consumers as well as potential users of the Tribunal, and there is a public benefit in having the Tribunal available to all taxpayers. While they may not use the Tribunal in a given year, the availability of accessible and efficient access to justice is a significant benefit that appears not to have been considered sufficiently in the development of the RIS.

Equity between different groups of court users

As noted above, it is proposed that cost recovery from users for the Civil Claims List will be in the vicinity of 65 percent, while the overall cost recovery for the Tribunal is proposed to be closer to 45 percent. While we accept and support that some lists should remain fee free (i.e., the Human Rights Division), it does not appear to us that the preferred proposal promotes equity between different groups of court users.

For example, in relation to consumer and trader disputes, application and other fees impact these parties differently—an issue that the RIS fails to consider. For consumers, an application fee is a sunk cost—given that the Tribunal generally operates on a no-costs basis, there is very limited prospect of a consumer recovering this cost. For traders, any fees involved in

participating in the Tribunal are likely to be considered business costs and thus be tax deductible.

This has a number of implications. First, this difference in treatment may result in a power imbalance impacting on negotiation of a fair outcome. As described above, large costs in taking action can have a significant bearing on decision-making for consumers, while this may not be the case for industry. Second, the fact that businesses can deduct legal expenses effectively means that business pay a smaller contribution towards the publicly funded legal system than do other litigants. It has been recommended that court fees should be amended so that costs for businesses to access the public civil justice system should be higher than fees charged to other users, because of the tax deductibility of legal expenses for businesses. This recommendation has not been widely adopted. In our view, this inequity needs to be redressed so that non-business individual litigants do not bear a disproportionate burden of funding our legal system.

Transitional considerations

The RIS states that "ideally, fees would be charged on the basis for the costs of each of the activities undertaken by VCAT"[11] but that "VCAT does not collect cost data that would allow for fees to be set accordingly".[12] Noting this, the RIS notes that there is merit in ensuring the size of any short-term changes is limited, in order to avoid disruption caused by further changes to fees.

We agree with this concern, but believe that to ensure better transparency, public accountability, and fairness, the government should wait until a proper cost assessment has been made based on reliable data collected from the Tribunal before proceeding with proposals to amend fees. We endorse the RIS's approach to this issue, but are concerned that it is not a determining factor in a final decision about whether to proceed with the regulations.

Impact on service levels

We note the long delays and inefficiencies that our clients have experienced at the Tribunal. The current waiting time for a hearing in the Civil Claims List is approximately six months or more. We and others have raised concerns regarding a tendency of the Tribunal to promote alternative dispute resolution where there may be a public interest in obtaining a decision to inform future disputes.[13] It is our opinion that if fee increases are implemented, VCAT must show an improvement in its services, including greater efficiency—we think there may be opportunities to explore how simple civil disputes could be resolved at an earlier point. It is not clear to us that increasing fees from users won't mean a consequent decrease in funding from appropriations, resulting in a zero sum game in terms of service levels. If that is the case, we do not see how the various options in the RIS that result in increased user charges can be said to be beneficial and score positive results on the multi-criteria analysis.

[11] Department of Justice, *Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal Fees Regulations*, January 2013, p2

[12] As above.

[13] Mary Anne Noone, "ADR, Public Interest Law, Access to Justice: the Need for Vigilance", (2011) 37 *Monash University Law Review* 1.

Impact on market outcomes

We are disappointed that the RIS has not considered the impact of the availability of the Tribunal on the functioning of competitive markets in Victoria. In our view, the ability to resolve disputes cheaply, efficiently and quickly contributes to efficient and competitive market outcomes, and that any reduction in access caused by an increase to application fees will negatively impact market outcomes.

The Productivity Commission has supported this in its statement that "redress arrangements...should be accessible, procedurally fair, proportionate, timely and accountable, have no major gaps in coverage and be run efficiently".[14] It has made the case that allowing market misconduct to occur without redress can be anti-competitive in that it gives legally non-compliant traders an anti-competitive advantage over those that do comply. The Productivity Commission also states that:

> "Redress processes have positive and adverse incentive effects:
>
> - They serve an enforcement role in their own right, pushing up the cost of, and thereby deterring, 'bad' behaviour by business.
> - ...
> - Expensive redress systems...favour parties with deep pockets (usually business) ...
> - They provide incentives for public disclosure of complaints, which helps regulators to identify rogue traders and systemic problems that might require legislative or other responses.
> - They provide efficient insurance by reducing consumer risk when engaging with suppliers whose reputation is inherently uncertain (such as for experience goods or for new, smaller firms). Confident consumers are more likely to be willing to shift their demand to new suppliers, aiding innovation and competition in its own right.
> - Accessible and cheaper redress mechanisms can divert complaints from more costly ones".[15]

This final point is particularly important because, as outlined below, if consumers seek to resolve civil disputes in the courts rather than the Tribunal (for example, due to the prospect of a favourable costs order), then this is likely to be more costly to the state compared to if the consumer sought to resolve their dispute through the less-costly Tribunal.

Fees for alternative Dispute Resolution

The proposed regulations impose a new fee of $305.70 per full day for alternative dispute resolution (**ADR**). In our view, the RIS insufficiently explains when and how this fee might be charged. While the proposed definition of 'alternative dispute resolution' is limited to where a member or mediator of the Tribunal is to be present (and thus we assume the fee will not be charged for the majority of civil claims where parties are asked to resolve matters prior to hearing on their own), Consumer Action has been involved in some small claims which have involved mediation.

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[14] Productivity Commission, *Review of Australia's Consumer Policy Framework—Inquiry Report 45 (volume 2)*, April 2008, available at: http://www.pc.gov.au/projects/inquiry/consumer/docs/finalreport, p 192.
[15] As above, page 193.

For example, we recently acted for a consumer who had a dispute with a provider of storage services. While it was listed for a hearing, the parties were approached by a Tribunal staff member prior to any hearing before a Member and asked whether they would consent to mediation. The mediation involved a staff member of the Tribunal and lasted one hour. While we acknowledge that there is a cost to the Tribunal to conduct mediation, we do not believe that any additional fee should be charged in this instance where a fee would not be charged if the matter went to hearing. We note that hearing fees are limited to the Major Cases List and other complex cases.

Furthermore, although the civil claims likely to be bought by our clients tend to be below the threshold for compulsory ADR (that is, $10,000), the point remains that such a cost is prohibitive, and further seems unduly punitive given that the Tribunal encourages parties to use ADR as a means of resolving disputes efficiently and saving money.

Alternative options not considered

In our view, there are a range of alternative options that could better address some of these issues, particularly in relation to access to justice, which have not been considered by the RIS. For example, we believe that a more graduated fee structure in the Civil Claims List may address some of our concerns. We note that the proposed application fee for a $10,000 to $100,000 claim is $502.50 by 2015. In our view, this fee is far more proportionate given the amount of the claim claimed. We suggest that fees for claims under $10,000 could be arranged as follows: a low application fee for claims under $1,000, a medium application fee for claims between $1,000 and $5,000, and a larger application fee for claims between $5,000 and $10,000.

This approach would mean that the application fee was not as significant a disincentive for those applicants making claims for small amounts. It would also be a more fairly balanced mechanism in terms of the 'user-pays' principle, as claims of greater amounts are likely to be more complex, and therefore more time consuming for the Tribunal.

Fee waivers

We are strongly supportive of the Tribunal's approach to fee waivers. In our view, the fee waiver application for concession card holders is very simple and can operate to ensure that access to justice is maintained for those with concession cards. Despite this, we have had experience where access to this fee waiver has been difficult. Below is a case study from January 2013 provided by Footscray Community Legal Centre (FCLC) where an eligible concession card holder was denied access to a fee waiver. Consumer Action has had similar experiences and while these have been resolved when complaints have been made internally within the Tribunal, we are concerned about the consumers without representation that may not know that they can complain about fee waiver decisions.

Case study #2
A client attended FCLC in relation to a dispute with a trader from whom she had purchased a $3000 sofa set. The client is a single mother of refugee background whose sole source of income is from Centrelink benefits. The funds for the goods were obtained through loans from 2 different community agencies. The client is paying off these loans from her Centrelink income

every fortnight.

The client wanted repairs completed to the goods and was advised by the trader to drop the goods off at their store so that these repairs could be completed. The trader kept assuring the client that repairs would be completed but then, after a few weeks, they informed the client that the goods would no longer be repaired and that the items had to be picked up or would be disposed of. The client was then served with a Notice of Intention to dispose.

FCLC assisted client to lodge an application urgently with the Tribunal on 22 January 2013 so that trader would not dispose of goods. An Application for Waiver of Fees for Concession Card Holders and a copy of client's concession card was also submitted.

Client's application for fee waiver was rejected by the VCAT by letter dated 25 January 2013. When the Tribunal was contacted, the FCLC were advised that it is now common procedure that Applications for Waiver of Fees for Concession Card Holders are routinely rejected. FCLC were advised that the client could either pay the application fee of $38.80 or submit a completed Application for Waiver of Fees by reason of Financial Hardship which requires the completion of a financial profile.

The time required to complete such a profile is not cost effective so the FCLC has paid for the cost of the application fee for the client.

We submit that the process for accepting applications for fee waivers for concession card holders should be reviewed to ensure that there is a proper basis before any application is rejected.

Further to this, it appears that the fee waiver based on the grounds of low-income may lack effectiveness. In addition to the concern raised by FCLC about the costs involved in completing the application, the threshold for 'low income' is very low. A single person must earn less than $362 per week, and an individual with a partner and dependants must earn less than $754 per week to be considered for this ground.[16] These amounts are lower than the weekly income tests to qualify for a Low Income Health Care Card[17] and it thus appears that thresholds do not extend eligibility beyond those that are eligible for a Health Care Card.

We believe that should the proposed fee increases be implemented, the low income threshold should be made more generous. It is our view that the fee increases will be prohibitive for those on low incomes, and in order to combat this, the income test for a fee waiver should be expanded to allow those on higher incomes (whilst still remaining relatively low) access to a fee-waiver. We also think that the process for applying for fee waiver for low income earners, including the requirements of the application form, should be simplified.

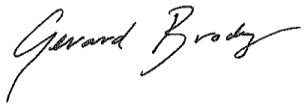
Additionally, we note that there is a low take up of fee-waivers at the Tribunal in general—the

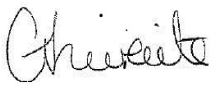
[16] VCAT Waiver of Fees Guidelines. P2: http://www.vcat.vic.gov.au/sites/default/files/fee_waiver_guidelines.pdf
[17] The maximum gross income to qualify for a low income Health Care Card is $486 per week for a single person with no children, or $843 for a couple: http://www.humanservices.gov.au/customer/enablers/centrelink/low-income-health-care-card/income-test

RIS notes that there is 'only relatively limited use of these powers'[18]. In our view there must be greater promotion of this option to applicants, especially if fee increases are implemented. If potential applicants on low-incomes are not made aware of this option, then the Tribunal may become a forum only utilised by higher income earners who are more able to meet the financial costs involved in making an application. In our view this would be contrary to the original objective of ensuring that the Tribunal is accessible.

Please contact Cathy Thwaite on 03 9670 5088 or at cathy@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
CONSUMER ACTION LAW CENTRE





Gerard Brody
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[18] Department of Justice, *Regulatory Impact Statement for proposed Victorian Civil and Administrative Tribunal Fees Regulations*, January 2013, p78.