



12 June 2009

By email: review@vcatreview.com.au

President's Review
VCAT
Level 1, 55 King Street
Melbourne Vic 3000

Dear President

Submission to VCAT President's Review

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to make a submission to the Victorian Civil and Administrative Tribunal (**VCAT**) President's Review in response to the March 2009 Consultation Paper, "*The role of VCAT in a changing world*". We apologise for the delay in making our submission.

Consumer Action is strongly supportive of the existence and operation of VCAT. VCAT provides a important alternative access point to the formal justice system for many Victorians, including lower income Victorians, in contrast to the more expensive, time-consuming and formal (or intimidating) traditional courts. In particular, the general provision in the *Victorian Civil and Administrative Tribunal 1998* (Vic) (the **VCAT Act**) that each party should bear its own costs, unless special circumstances exist (s.109), removes one of the most significant barriers to a person pursuing their legal rights through legal action, namely, the risk of an adverse costs order if the dispute is not resolved in their favour.

We consider that there are ways in which VCAT could further improve its operation and practices to ensure it meets its goals of providing efficient, low-cost and informal access to high-quality dispute resolution and decision-making for Victorians. In our view, improving the transparency of VCAT decision-making and operations, and better recognising and dealing with imbalances of power between parties to a dispute, are significant challenges currently facing VCAT.

Below we set out more detailed comments about these and other aspects of VCAT's operations. We endorse the submission made by the Federation of Community Legal Centres (Vic) Inc to the VCAT President's Review, and our comments below are provided in support of, and supplementary to, the comments made in that submission.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice

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in Australia. As such, we are a regular user of the Civil Claims List and Credit List at VCAT and have also represented consumers in the Domestic Building List.

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.

Transparency

Consumer Action believes there are several ways in which VCAT could benefit from improvements to the transparency of its operations and individual decisions made by Member(s).

Written reasons

We support the general provision in the VCAT Act that written reasons for VCAT decisions are not required to be produced as a matter of course (s.117). This is sensible given that many VCAT matters will be relatively straight-forward and the production of written reasons both slows down the making of individual decisions and requires resources more generally to be diverted to the task of producing written reasons ahead of the hearing of applications.

However, the provision of written reasons for a final order can be important for several reasons. For example, written reasons enable parties to assess whether they are satisfied with a VCAT decision and/or whether they should consider an appeal. Producing written reasons from time to time also ensures that VCAT Members bring some discipline to the task of making decisions by enabling external scrutiny of their decision-making. It also enables comparisons to be made between the reasons relied upon by different VCAT Members, facilitating consistency of decision-making. It is therefore appropriate that the VCAT Act recognises the benefits of written reasons by allowing parties to request that written reasons be provided.

Parties bringing or defending a claim at VCAT are often unlikely to be aware of their right to request written reasons. The VCAT Act generally requires such a request to be made within 14 days of the giving of oral reasons for an order, which typically occurs at the time the VCAT Member makes their order at the conclusion of a hearing or other process at VCAT. For some matters, including small claims in the Civil Claims List and all matters in the Credit List, a party has less time to make a request for written reasons, being required to make the request *before or at the time of* the giving or notification of the decision in the proceeding. It is reasonable to expect that an individual who would like written reasons for a decision might not realise that they will not be forthcoming automatically, and might then lose their right to request written reasons.

We therefore recommend that VCAT adopt processes to ensure parties are informed of their right to request written reasons and by when they must make such a request. At present, this advice is contained in reasonably dense written materials provided to parties. We recommend that VCAT Members also be required to advise parties orally at the beginning and end of hearings.

However, in our practical experience, if a party does request written reasons for a decision before an order is made, current typical practice is that the VCAT Member will reserve their final order until they have time to produce written reasons, whereas if only oral reasons are required

many orders are made on the day. This practice effectively forces a party to choose between a timely outcome and a transparent one. It is also incongruous given that, in matters where a party can request written reasons up to 14 days after the giving of oral reasons, if a party were simply to wait until a day or two after an order with oral reasons were made to make their request for written reasons, the order would be made and written reasons provided in a more timely fashion. We therefore strongly encourage VCAT to ensure that timely requests for the provision of written reasons do not delay the making of orders where this is not appropriate.

Publication of data and information

VCAT currently produces little public information in the form of data and statistics about its overall operations and decisions made in the various Lists. The information that is published, such as overall application numbers, is published once a year in VCAT's annual reports.

Information such as the number of matters in which one party is unrepresented and the number of orders which are appealed is simply unavailable for public comment and scrutiny. This does not enable appropriate consideration of the fairness, efficacy and quality of VCAT decisions. We therefore recommend that such data be publicly reported on a regular basis, for example twice yearly. This data should be reported per List rather than in overall aggregated form, given the significant differences in the nature and operations of each VCAT List.

Recognising and handling power imbalances

In some cases the parties to a dispute will not come to VCAT on an equal footing. Individuals may be at a disadvantage compared with a better resourced party or a party more familiar with VCAT or court processes. Individuals can also be at a disadvantage due to factors such as limited English language skills, age, a disability or mental illness. Further, if an individual has already had difficult dealings with the party against which they have brought a dispute, for example they allege bullying or racial harassment, they may feel uncomfortable or intimidated when placed in a situation which requires them to deal with that party, particularly during a mediation.

We are concerned that such power imbalances between parties are not recognised appropriately by VCAT and processes are not in place to counter-act their influence in how outcomes may be arrived at. The goal of equal access to justice does not mean that it is fair to assume all parties come to VCAT equally prepared and should be treated the same, on the contrary, it requires VCAT to implement measures to facilitate equal access.

In some cases, this may require VCAT to allow legal representation for a party in a matter in which legal representation might not ordinarily be necessary. VCAT should develop processes for identifying such matters, including disputes in which allegations of harassment or bullying have been made or disputes against repeat players at VCAT.

This is particularly important in mediations, which by their nature encourage people to settle claims. In our experience, when matters are referred to mediation claimants often feel under significant pressure to settle their claim, even if the settlement offer being made does not provide any recognition of their legal rights. Once an application has been made to VCAT, VCAT holds responsibility for resolving that dispute, whether done through mediation or a legal determination

of the parties' rights. We consider that allowing matters to be resolved through settlements at mediation without any independent assessment of the fairness or appropriateness of that settlement does abdicate that responsibility somewhat. We therefore strongly recommend that VCAT implement a process for identifying matters in which it will undertake its own assessment of the proposed settlement before making final orders in the matter.

We also strongly recommend that VCAT implement a continuous professional development program for its Members and mediators that includes training on identifying potential power imbalances between parties and appropriate techniques for addressing such problems. Such training should also include education on the experiences of vulnerable or disadvantaged groups in our community, to foster a better understanding of why some individuals may feel vulnerable or may behave differently to others in certain situations.

Finally, on a more tangible level, parties waiting for a mediation or hearing are generally required to wait in the same physical premises, in near vicinity to one another. While this will generally be suitable, there are some matters in which this is problematic, for example in matters in which one party has already behaved aggressively towards another party and their presence may be intimidating. We suggest that VCAT consider adopting a procedure to enable parties to request a separate physical waiting area where appropriate.

Civil Claims List

We note that there are now significant delays in this List between the filing of an application and an initial hearing date. We consider that these delays must be tackled as a matter of urgency.

One problem we have observed that tends to draw out civil claims is the lack of willingness of VCAT Members to continue with a hearing if the defendant to the claim does not appear for the hearing. If a defendant does not appear at the hearing date and time (without prior notice), often one or more adjournments are made to give the defendant time to make an appearance. Individual applicants may have incurred significant costs by taking leave from work or travelling large distances and may have psychologically prepared themselves for a hearing. The adjournments place them at a significant disadvantage relative to the party who does not appear. If it is assumed that proper notice has been made by VCAT of the hearing date, it is unclear why adjournments should be made in such circumstances. This is especially the case when one considers that an individual could alternatively make a civil claim to the Magistrates' Court, where they could expect a sooner hearing date and judgment in default if the defendant does not appear. Further, there is a process for a defendant to notify VCAT ahead of time if they are unable to attend a proposed hearing date and time.

We understand the desire to accord fairness to all parties by trying to ensure they have an opportunity to be heard at a hearing, but we suggest this could be better achieved by adjustments to processes ahead of the hearing date, rather than allowing parties to delay civil claims proceedings simply by not appearing at the hearing without prior notice. This is a particular problem in the Civil Claims List, where we suggest claimants are more likely to be individuals who are inherently at a power disadvantage in taking legal action against a better resourced trader or business.¹

¹ Traders with civil claims for debts tend to pursue these claims through the Magistrates' Court rather than VCAT.

We recommend that VCAT develop and adopt a default order process for civil claims disputes in which the defendant, without prior notice, does not appear at a hearing.

Domestic Building List

We have had some limited experience of acting for consumers in the Domestic Building List, although we have not acted for a consumer in any domestic building matter in the past year.

In a submission we made to the Senate Economics Committee inquiry into Australia's mandatory Last Resort Home Warranty Insurance scheme last year, we noted (and remain of the view) that the complex nature of building disputes renders the Domestic Building List of VCAT a more expensive and legalistic forum for dispute resolution than was originally intended. Legal representation is the rule not the exception (although not unreasonably given the complexity of the matters), highly expert and technical evidence is required and costs orders are not uncommon. The increasingly 'court-like' nature of this VCAT forum results in financial and psychological disincentives to consumers to pursue legitimate claims, which is only exacerbated by the fact that legal costs are not recoverable under home building warranty insurance even if ultimately successful.²

In one case mentioned in that submission we noted, amongst other concerns, the dispute had lasted four years, with proceedings in VCAT drawn out (primarily because of non-compliance by the builder with VCAT directions) and expensive. VCAT ultimately made an order in favour of our client for \$63,666 in damages plus \$7,639.92 in interest, but independent costing of our legal services showed that over \$88,000 in costs were incurred in relation to the matter and as the builder did not satisfy the VCAT order, our clients would need to seek to wind up the builder's company before they could make a claim on their Home Building Warranty Insurance (estimated to cost an additional \$4,000 - \$15,000), which claim would not cover legal costs.

Further, VCAT attempts to mediate many domestic building disputes that come to it for resolution; small claims under \$15,000 are automatically listed for a hearing but standard claims, which make up a large proportion of applications, are referred to mediation (within 6-8 weeks of lodgement).³ This is not an unreasonable practice in isolation, but the context is that many domestic building disputes in Victoria already go through a conciliation process before an application to VCAT is made. The Building Advice and Conciliation Victoria (**BACV**) service, administered by Consumer Affairs Victoria and the Building Commission, accepts complaints about domestic building services and attempts to resolve them through conciliation. BACV receives many more domestic building disputes than VCAT, for example, in 2007-08 it received 1,818 requests to conciliate a dispute and finalised 1,721 matters, with 18% or 310 of these cases reported as unresolved.⁴ Complainants in cases that cannot be resolved through conciliation to their satisfaction are usually given information about their ability to seek resolution

² Consumer Action, *Inquiry into Australia's Mandatory Last Resort Home Warranty Insurance Schemes*, Submission to Senate Economics Committee, 16 April 2008, available at: www.consumeraction.org.au/publications/Submissions.php.

³ Victorian Civil & Administrative Tribunal, *Annual Report 2007-2008*, p24.

⁴ Consumer Affairs Victoria, *Annual Report 2007-2008*, October 2008, pp37-38.

of their complaint through VCAT.⁵ While many of the domestic building applications made to VCAT will not be matters previously taken to BACV, many others will be. For consumers in these cases, the referral of their dispute to further mediation may simply entail unnecessary further attempts at alternative dispute resolution, when legal determination of the dispute is now required.

Last year's VCAT Annual Report did not report data on proceedings in this List in the same manner as the previous year and contained less overall information about domestic building matters as a whole.⁶ However, we note that cases seem to be taking longer to be resolved, despite a drop in the overall number of domestic building applications as well as a drop in the proportion of those applications that were standard or complex claims compared with an increase in small claims.⁷ These trends suggest the problems described above continue to grow.

That said, the situation in Victoria remains preferable to the situation in other States that do not have a lower-cost tribunal to deal with consumer-builder disputes, such as South Australia, where a consumer must navigate an even more difficult and expensive path through the traditional court system, including a greater risk of an adverse costs order if unsuccessful. We strongly support the retention of VCAT jurisdiction to hear and determine domestic building disputes. However, it is clear that improvements must be made, even if the current problems are not entirely of VCAT's own making.

Consumer Action recommends that VCAT should only refer domestic building complaints to mediation if they have not been through the BACV service first or, if they have been at BACV, the applicant is asked whether they would like to attempt mediation.

We also suggest that there is room for VCAT to revisit its procedures generally with regard to domestic building disputes and consider ways in which to expedite the process, especially for standard claims (and small claims where relevant). For example, given that domestic building matters often involve technical expert evidence about building works, which tends to further draw out proceedings, VCAT could consider whether it might be useful to retain a pool of independent, VCAT-hired building experts to provide evidence in domestic building disputes, rather than requiring opposing parties to produce such evidence, which can be costly and time-consuming, and also requires the Member to decide which evidence to prefer. The costs of using such experts could be apportioned upon final orders being made.

Credit List

Consumer Action has been very supportive of VCAT's role as sole jurisdiction in Victoria for the hearing of consumer credit disputes. With the impending transfer of consumer credit regulation to Commonwealth legislation, VCAT's jurisdiction in this area will cease. We therefore do not make detailed comments regarding the operation of the List. However, we do wish to raise two important issues.

⁵ See, eg, Consumer Affairs Victoria, 'When Things Go Wrong', *Consumer Affairs Victoria website*, www.consumer.vic.gov.au/CA256EB5000644CE/page/Building+%26+Renovation-When+Things+Go+Wrong?OpenDocument&1=40-Building+%26+Renovation~&2=60-When+Things+Go+Wrong-&3=-

⁶ Victorian Civil & Administrative Tribunal, *Annual Report 2006–2007*, pp22-23; Victorian Civil & Administrative Tribunal, *Annual Report 2007–2008*, pp24-25.

⁷ Victorian Civil & Administrative Tribunal, *Annual Report 2007–2008*, p25.

First, we have some significant concerns with the manner in which mediation has been deployed in consumer credit disputes at VCAT. Applications by consumers are referred to mediation as a matter of course, even in cases where it is inappropriate. For example, applications for a variation to repayment arrangements on the grounds of hardship are made because a debtor has been unsuccessful in trying to negotiate a hardship variation with their creditor. Not only is a referral to mediation going to prolong this unproductive negotiation process, it fails to recognise the significant disadvantage of the debtor as the party with no bargaining power and substantial risk, and the fact that costs continue to accrue on their debt while negotiations continue.

As another example, many consumer credit applications made by debtors, as opposed to creditors, are made against non-mainstream creditors such as fringe lenders which tend to be repeat players at VCAT and are less likely to have strong compliance culture or reasonable procedures for dealing with customer problems. These factors are not considered in a blanket policy to refer all matters to mediation.

It is unclear the extent to which these concerns with the mediation process in the Credit List will disappear once the Credit List is wound up or whether similar problems may emerge in other Lists. We therefore strongly recommend, again, that VCAT implement processes for identifying and addressing potential power imbalances between parties in matters before it, and implement a continuous professional development program for Members and mediators that includes training on identifying potential power imbalances between parties, appropriate techniques for addressing such problems and education on the experiences of vulnerable or disadvantaged groups.

Second, VCAT has developed valuable expertise and experience in hearing and resolving consumer credit disputes that we are concerned may simply be lost once responsibility for hearing consumer credit disputes is vested in different judicial fora, for example the Federal Court. Consumer Action urges VCAT to ensure its experience is communicated to the new jurisdictions and would support any formal attempts by VCAT to, for example, convene workshops or consultations relating to the transmission of this expertise.

Other issues

We would strongly support the adoption of a streamlined fee waiver application process by VCAT. As a comparison, we note that the New South Wales Consumer, Trader & Tenancy Tribunal has a pensioner and student concession category for application fees, which an applicant is automatically eligible for in certain circumstances, including if they hold a Centrelink Pension or Health Care Card. We suggest that VCAT could develop a process whereby applicants could prove eligibility for a fee waiver in a simple fashion such as reporting their Health care card number, rather than being required to complete a more complex form.

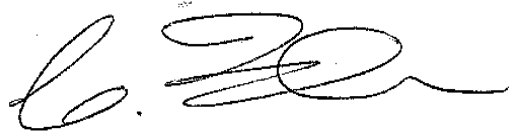
Thank you again for the opportunity to provide input into this important review of VCAT. Please contact Nicole Rich on 03 9670 5088 if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

A handwritten signature in black ink, appearing to be 'N. Rich', written in a cursive style.

Nicole Rich
Director – Policy & campaigns

A handwritten signature in black ink, appearing to be 'C. Tikotin', written in a cursive style.

Celia Tikotin
Director – Legal Practice