

**The Loddon Campaspe Community Legal Centres submission in relation to the Victorian Government's Regulatory Impact Statement – Victorian Civil and Administrative Tribunal (Fees) Regulations 2013**

The Loddon Campaspe Community Legal Centre (LCCLC) welcomes the opportunity to respond to the State Government's Regulatory Impact statement in relation to fee-increases in the Victorian Civil and Administrative Tribunal (VCAT).

The Loddon Campaspe Community Legal Centre is a program of the Advocacy & Rights Centre Ltd based in Bendigo. Since 2005, it has operated as a generalist community legal centre and provided legal advice and assistance to people living in the Macedon Ranges, Mount Alexander, Central Goldfields, City of Greater Bendigo, Loddon and Campaspe shires. Loddon Campaspe Community Legal Centre works within a community development framework and seeks to improve access to justice, safeguard human rights and confront structural disadvantage.

LCCLC is one of three Community Legal Services that has an agreement with Consumer Affairs Victoria (CAV) to assist vulnerable and disadvantaged clients whose consumer matters CAV have not been able to resolve through conciliation. The Advocacy and Rights Centre has been providing this service since July 2012.

LCCLC assists clients with civil claims, domestic building disputes, motor car trader disputes and retirement villages disputes. The vast majority of our clients' claims are under \$10,000; most of our clients' claims are less than \$1,000. Our service first tries to resolve matters by negotiation. If negotiation is unsuccessful we then assist our clients to prepare their VCAT application. We draft a succinct summary of the client's claim and the legal basis for it – this summary is usually less than one page long. We also advise clients about the evidence they will need at VCAT and attach these to their application. In most cases, our clients self-represent at VCAT. In some circumstances, for example where a client has particular disadvantage or vulnerability, we seek leave to appear on behalf of the client. We also advise clients whose matters we consider have little legal merit against the further pursuit of those matters.

We submit that the proposed fee increase in the Small Claims, Domestic Building, Motor Car Traders and Retirement Villages Act list:

- (1) Is not justified on the basis of increased complexity of VCAT matters;
- (2) disproportionately favours efficiency over equity;
- (3) is inconsistent with VCAT's purpose;
- (4) does not consider the wider economic context of consumer matters; and
- (5) underestimates the dampening effect such an increase will have on applications

## (1) Complexity justification

One of the main justifications for increasing fees in VCAT is that VCAT is now hearing more complex matters and that the time and expertise required dealing with these matters needs to be reflected in the users fees. This assessment is based on anecdotal evidence rather than on any definition or objective identification of 'complexity'. We consider that 'complexity' needs to be defined and the number and details of 'complex' cases identified so that fees can be levelled accordingly. The majority of applicants we assist (often in the small claims lists) with minor, efficient claims should not be subsidising long and protracted claims. One of the measures used in the *Regulatory Impact Statement – Victorian Civil and Administrative Tribunal (Fees) Regulations 2013* ('The RIS') to demonstrate complexity is the cost per case figure. The RIS states that between 2002-03 and 2011-12, the average cost per case finalised at VCAT increased by 71.6%, from \$255.96 to \$439.33, however, the rate of increase in cost per case has slowed over that period: from 2002-03 to 2007-08 the increase in cost per case was 43.0% from 2007-08 to 2011-12 the increase in cost per case was 20.2%.<sup>1</sup> We therefore consider that the problem of increasing 'complexity' is overstated. We also consider that global cost per case is an insensitive measure for determining where costs are arising. Better data should be collated to identify which matters are more costly and therefore should be considered for fee increases.

The RIS states that the aim of the increased fees is to improve differentiation to ensure that greater degrees of cost recovery are attained in complex cases. This justification is at odds with a 329% increase in fees for applications that based on the simplified Australian Consumer Law and are under \$10,000.

Another justification for the increase in fees is that a substantial proportion of parties employ legal representatives or expert witnesses which increase the complexity of matters before VCAT. Most applicants are required to apply to have legal representatives under s 62 of the VCAT Act and that discretion is rarely exercised for matters under \$10,000. An increase in fees for consumer matters under \$10,000 is not justified on this basis. LCCLC seeks leave to appear as legal representatives in matters under \$10,000 where our clients are significantly vulnerable, disadvantaged and unable to self-advocate. It should be noted that LCCLC has rarely been successful with such applications for leave. Therefore, we do not accept that the use of legal representatives in small claims matters is responsible for any increasing complexity. If legal representation is considered to be the cause of increased complexity and expense in other lists, perhaps VCAT should consider charging parties a fee for having a legal representative. However, if it were to introduce such fee, VCAT should also provide for a waiver of that fee if a person can prove that they are not sufficiently able to self-advocate by reason of disability or disadvantage.

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<sup>1</sup> Victorian Civil and Administrative Tribunal Annual Report 2011/2012; Victorian Civil and Administrative Tribunal Annual Report 2007/2008; Victorian Civil and Administrative Tribunal Annual Report 2002/2003 accessed from: [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au) on 14 February 2013.

## (2) Efficiency versus equity

The Victorian Government's preferred fee structure favours efficiency over equity. It was noted in The Commonwealth Government's *A Strategic Framework for Access to Justice in the Federal Civil Justice System* ('Strategic Framework Report') that

access to justice is an essential element of the rule of law which supports civic and economic life. Maintaining the rule of law is fundamental to equity and economic prosperity in Australia, and requires the provision by government of civil justice services. Two simple examples show this—the provision of goods and services to consumers is dependent upon the expectation that the provider will be paid, and that what is being supplied is of the quality described. Equally... the capacity of citizens to challenge government decisions...[is] an important characteristic of accountable government and therefore have great public benefit.

This quote demonstrates the high public value of the work that VCAT does. This value is not properly accounted for in a 45% cost recovery model.

Later the Strategic Framework Report goes on to recognise the equity considerations inherent in consumer law matters:

consumer disputes generally involve a disparity of resources between the consumer and the business, and as the subject matter of the dispute is generally of low value, but potentially significant to the consumer, simpler means of dispute resolution are likely to be more effective—such as small claims tribunals, and industry ombudsmen. Such mechanisms are also appropriate because they have the flexibility to achieve an outcome that satisfies all parties.

These equity values are not properly addressed in the RIS and require further government consideration.

A high volume of consumer matters are heard in VCAT and this reflects the frequency of consumer complaints in the community. The Legal Australia-Wide survey found that consumer legal matters were the most frequently reported legal issue in Victoria.<sup>2</sup> This demonstrates that there is a great need for a cost-effective, quick and simple forum to have these matters heard. An increase in fees to \$160.40 for claims of less than \$10,000 would further increase the current inequity whereby applicants with short; simple and low-value claims in VCAT pay proportionately more than applicants with larger and more complex claims.

The report notes that 90% of VCAT's cost recovery is through application fees and therefore we can understand the Government's temptation to disproportionately increase the application fees for the largest area of demand. It is an effective means of collecting fees. However, this economic expedience is also vastly unjust. It would be at the cost of providing access to justice for those who experience the most common legal problem in Victoria. These matters go to the heart of legal equity, which is of upmost public benefit.

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<sup>2</sup> Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S 2012, *Legal Australia-Wide Survey: legal need in Australia*, Law and Justice Foundation of NSW, Sydney

### **(3) VCAT's purpose**

VCAT's service charter states:

VCAT's purpose is to provide Victorian's with a low-cost, accessible, efficient and independent Tribunal delivering high quality dispute resolution including the use of Alternate Dispute Resolution (ADR) process. We aim for service excellence by being cost-effective, accessible, informal, timely, fair, impartial and consistent.

As acknowledged in the RIS, VCAT is currently experiencing delays and are struggling to provide timely assistance.

The proposed fee increase will mean that VCAT is no longer a low cost means for dispute resolution for applicants. The current filing fee in the Magistrates Court of Victoria for proceedings of for less than \$1,000 is \$127.80.<sup>3</sup> This means, assuming that the Magistrates' Court fees remain stable, that in three years it will be cheaper to attend the Magistrates' Court than VCAT for matters under \$1,000. Applicants are likely to choose the cheapest forum and therefore would be inclined to approach the Magistrates' Court which will inevitably be more expensive to the Government than if the applicant attended VCAT.<sup>4</sup> This cannot be considered low-cost or cost-effective dispute resolution.

As described in part 5 below, complainants are likely not to pursue VCAT claims for less than \$200 because once the VCAT filing fee is paid it is not worth it. This is an indication that VCAT will become inaccessible for applicants with small claims. The proposed mediation fee has the potential of decreasing the uptake of voluntary mediation and increasing the pressure to settle quickly in compulsory mediation so as to not be charged fees for the next half day. If such a situation eventuates it will reduce the quality of the mediation and favour wealthier parties leading to a partial and unfair system of resolution. With all of these matters taken into consideration, the only aspects of VCAT's charter left unaffected are independence, informality and consistency.

### **(4) The wider economic context of consumer matters**

The Law and Justice Foundation Report<sup>5</sup> found that many people do not seek assistance for consumer matters. That report also found that consumers were most likely to handle their legal matters without professional advice. These findings tend to suggest a lack of awareness or lack of appreciation for government and legal information and advice services.

Evidence demonstrates that on average the earlier a matter is settled the more cost-effective it is to the participants and the tax-payer.<sup>6</sup> The RIS examines the cost recovery for fees in isolation. We consider that a more thorough analysis aimed at preventing the need to attend VCAT could be a better way of reducing the government appropriations for VCAT. This may be as simple as better promotion of Consumer Affairs Victoria and Ombudsmen, better availability of information and better promotion and support for Community Legal Services.

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<sup>3</sup> Magistrates Court of Victoria (2013) *Costs and Fees Ready Reckoner* accessed from [www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au) on 14 February 2013.

<sup>4</sup> Ipsos Australia (prepared for the Victorian Department of Justice), *Dispute Resolution in Victoria: Community Survey 2007 Report* accessed from [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) on 14 February 2013.

<sup>5</sup> Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, 2006

<sup>6</sup> For a summary of various findings, see, Wolski (2009) *Reform of the Civil Justice System two decades past – implications for the legal profession and for law teachers*, Bond Law Review 21(3).

We posit that where parties are assisted to prepare documents for VCAT, their matters can be heard and determined more efficiently. This saves the Tribunal time and assists parties to articulate the legal basis for their application or response that means that decisions are likely to be more robust. Consumer Affairs Victoria and Community Legal Services also significantly reduce the number of matters brought before VCAT by facilitating early resolution of disputes and discouraging applications for claims without merit. Consumer Affairs Victoria and Community Legal Services, particularly those with a specialist consumer law focus or a Consumer Advocacy and Assistance Program, are able to identify systemic issues and bring these to the attention of regulatory bodies, Government and the media. Such identification can prevent further consumer dissatisfaction and disputes. In our view, funding Consumer Affairs and Community Legal Services to provide these services delivers excellent economic value.

### **(5) Behavioural Change**

We strongly disagree with the assumption in the report that fee increases would not affect a change in applicant behaviour. We estimate that many consumer matters are for claims for less than \$1,000. The imposition of a \$160.40 application fee in addition to taking a day off work and travelling to and from the hearing venue would mean that a lot of people would rationally decide that pursuing their complaint is not worth it. This sends the message to businesses that they can ignore complaints about items that cost less than \$200.

The RIS concludes that if the fee increase has a dampening effect on the number of small claims then the demand would be less. We consider that this analysis is not sound. We believe that there are sufficient larger more complex matters that would take the place of these simple matters and these protracted matters are not as cost effective as the smaller matters that are currently being heard. We further question the assumption made in the RIS that Tribunal users face a range of costs in addition to the fees paid to VCAT itself, which are likely to substantially exceed the cost of the VCAT fee. For many people claiming under \$10,000 the only other non-recoverable cost associated with attending VCAT is travelling to the venue and a day of lost wages. The VCAT fee would often be the most expensive non-recoverable expenditure for applicants.

We would urge the government to collect better statistics on the value of small claims and the demographics of applicants as our experience suggests that many of the matters heard in the Civil Claims list for less than \$10,000 are for far less than that amount and are brought by people who are vulnerable or disadvantaged. The proposed increase in fees will disproportionately affect applicants with the greatest need. Without such evidence the government cannot truly balance private and public benefit and set a realistic cost recovery target that is in line with the objectives of the VCAT.

If you have any queries about this submission please contact the author Lisa Grealy on behalf of the Loddon Campaspe Community Legal Centre – [www.lcclc.org.au](http://www.lcclc.org.au)