

PURPOSE

This Workbook has been produced to assist consumers (purchasers) who are in dispute with a trader (supplier) about the quality or performance of goods or services, and who are considering making a claim through the Civil Claims List of the Victorian Civil and Administrative Tribunal (VCAT). The Workbook is not suitable for traders who have purchased goods or services for business purposes.

The Workbook provides:

- information about possible ways to settle the dispute prior to a decision being made by VCAT;
- a step-by-step guide to completing and lodging the VCAT *Application to Civil Claims List* form;
- information to assist consumers to prepare and represent themselves at VCAT.

USING THE WORKBOOK

The Workbook should be used with the *VCAT Civil Claims Guide* and the *Application to Civil Claims List*. Copies of these forms will usually be distributed with the Workbook and may also be obtained from VCAT or Consumer Affairs Victoria.

RELEVANT LEGISLATION

The *Victorian Fair Trading Act 1999* provides protection for consumers in their dealings with suppliers of goods and services. It may be helpful to become familiar with the relevant parts of the Act, as this may assist in the preparation of your application and participation in VCAT proceedings.

Under the *Fair Trading Act 1999* consumers are entitled to seek redress where goods and/or services have failed to meet the following general requirements:

- goods should match their description
- where goods are sold by sample, the bulk of the goods supplied must match the sample in quality
- goods should be fit for the purpose for which they are sold
- the seller should have the right to sell the goods
- the goods should be of reasonable quality
- services must be provided according to how they are described and with reasonable skill and care
- materials used in services must be reasonably effective for the purpose for which they are used.

The law also protects consumers against unfair trading practices including:

- misleading and deceptive conduct
- misrepresentation
- unfair terms in consumer contracts and
- unconscionable conduct.

The *Fair Trading Act 1999* and other Victorian legislation can be purchased at Information Victoria and may be accessed on-line via the Victorian Legislation and Parliamentary Documents website www.dms.dpc.vic.gov.au. For Example:

- Click on Victorian Statute Book
- Victorian Acts
- List Acts by Title
- 1999
- Scroll down to 16. *Fair Trading Act 1999*.

THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT)

Tribunals are established to offer specialised, less expensive, more accessible, quicker and more efficient dispute resolution services than may be available through courts.

VCAT is divided into three divisions and a number of specialist lists operate within each division. Consumer disputes are dealt with through the Civil Claims List of the Civil Division. Tribunal members with wide ranging powers hear and determine disputes.

Examples of the types of matters that the Civil Claims List deals with are included in the *VCAT Civil Claims Guide*.

Further information about VCAT can be obtained from the website www.vcat.vic.gov.au.

GLOSSARY

Adjournment: where a hearing is deferred to a later time or date upon request by one or more of the parties

Affidavit: written statement sworn on oath before an authorised person

Applicant: the party who lodges the application

Consumer: a purchaser of goods or services for personal, domestic or household use

Contract: an agreement, whether or not in writing, entered into by the consumer and the trader for the supply or specified goods and/or services

Costs: expenses that are incurred in taking a matter to a tribunal or court including, for example, application fees, time off work, travel and legal representation

Damages: an order made by a court or tribunal to compensate a party for loss suffered as a result of the action or inaction of another party

Disputes: arise where a party to the consumer contract is of the view that the other party has not satisfactorily met the terms of the contract

Enforcement: legal action taken to ensure that an order made by a court or tribunal is obeyed

Implied warranty: the principle that the goods and/or services purchased will be fit for the intended purpose, regardless of whether expressed in the terms of the agreement

Misleading and Deceptive Conduct: an action or failure to act that misleads and/or deceives

Misrepresentation: unintentionally or deliberately making false statements aimed at enticing a consumer to enter into an agreement

Rectification: to repair or make good

Rescission: cancellation

Respondent: the party against whom a legal action has been taken

Statutory Declaration: written statement signed and declared to be true and correct before an authorised person

Trader: a supplier of goods and/or services in trade or commerce (whether or not it is conducted for profit)

Warranty: a term in a contract where a promise is made to repair or replace a defect within a specific time frame.

3. How do you want the matter to be resolved?

Before entering into negotiations or more formal action it is important to be clear about what outcome(s) you want to achieve. Consider a range of options. It can also be helpful to think about what the other party may want to achieve through any negotiations.

What is your preferred outcome? Can you think of other satisfactory options to settle or at least partially settle the dispute?

Have you tried to resolve the dispute?

Often disputes arise because of misunderstanding and they can escalate through failure to act early and to communicate well. As a general rule it is recommended that the parties try to resolve the issue and explore alternatives prior to taking legal action. Delays may be caused if the following steps have not been taken prior to lodging an application with VCAT.

Speak to the trader

- Be clear about what the problem is and what outcome(s) you are seeking
- Speak to someone who has the authority to make decisions and take action, the owner or manager rather than the receptionist
- Record details of your discussions and any agreements reached.

Put it in writing

- Writing a letter ensures that there is a record of your complaint
- Handwritten letters should be clear and legible
- Keep a copy for your records
- The sample letter below highlights the key points that should be included.

The Manager/Proprietor

Business/Company Name (Place of purchase)

Address

Date

Dear...

1. Quote receipt/tax invoice number; briefly describe goods/services and note when purchased.
2. State what is wrong with the goods and/or services.
3. State what you want the seller/service provider to do about it.
4. State that you want a satisfactory, preferably written, response within a certain period (for example 7 or 14 days).
5. State that if no satisfactory response is received by that date that further advice will be sought and that an application may be made to the Civil Claims List of the Victorian Civil and Administrative Tribunal for a resolution of dispute, appropriate orders and disbursements.
6. For further queries please contact the writer on phone number ...

Your name and signature

(Place your return address and phone number here)

cc Does a copy need to go to another part of the organisation, for example, the head office, customer service or accounts department? Does a copy need to go to another company, for example, the manufacturer of the product?

Assisted negotiation

A number of bodies, such as Consumer Affairs Victoria and the Dispute Settlement Centre Victoria offer conciliation and/or mediation services to assist disputing parties reach agreement.

What measures have you taken to resolve the dispute? Is there anything else that you could do?

If you have been unable to resolve the dispute through discussion and correspondence, an application to the VCAT Civil Claims List may be appropriate.

Pursuing your claim through VCAT

Before making an application to VCAT it is useful to think about whether the likely outcome is worth the financial and other costs that may be associated with pursuing the matter.

Financial costs may include the application fee, business and company searches, independent technical reports, travel, time off work, photocopying, postage, photographs, costs associated with enforcing any order that is made and the like.

Personal considerations may include the time and stress involved and the impact of the dispute on your relationship with the other party.

List the financial and personal costs that you are likely to incur if you take the matter to VCAT?

Do you still think that it is worth proceeding? Why?

COMPLETING THE APPLICATION TO CIVIL CLAIMS LIST

Ensure that copies of the *VCAT Civil Claims Guide and Application to Civil Claims List* are available before completing this section.

This section provides step-by-step information about how to complete each question on the application form. It is suggested that you prepare the relevant details while progressing through the Workbook and then transfer the details to the Application to Civil Claims List form.

Throughout this section of the Workbook a fictitious case study will be used to demonstrate how to complete the form.

Questions 1 – 6 of the *Application to Civil Claims List* form aim to collect accurate information about the parties to the dispute.


This information is important as VCAT will forward correspondence to the parties as listed in the form and any orders that are made by the Tribunal will be made based on this information. If applicant's details are incorrect or the other party is not identified properly then any orders made may be difficult to enforce.

Case Study

John Smith purchased an ACME refrigerator from AAA Fridges for \$3,000 with a six-month warranty. The salesperson also included an extended one-year warranty. The refrigerator stopped working after seven months. The manufacturer refused to repair the refrigerator under the warranty.

Question 1.

The applicant(s) will, in most cases, be the person(s) who purchased the goods and/or services. If the goods or services were purchased for private use, as an individual consumer, tick the "Individual purposes" box.

	Application to Civil Claims List	VCAT file number C
Your details (you are the applicant)		
1. Were the goods or services for individual purposes only or in connection with a business/company?		
Individual purposes	<input checked="" type="checkbox"/>	Go to question 2.
Business/company	<input type="checkbox"/>	Go to question 3.

Question 2.

In completing the name and address details:

- **remember to use proper names**, as it would appear on a passport or drivers licence, not nicknames or shortened names
- if there is more than one applicant, include relevant details for all applicants
- ensure that address and telephone numbers are accurate and that a daytime contact number is available, as the Tribunal may need to contact you during business hours.

2. Your surname	Given names	
<input style="width: 90%;" type="text" value="SMITH"/>	<input style="width: 90%;" type="text" value="JOHN WILLIAM"/>	
Your address	Work telephone number	Fax number
<input style="width: 90%;" type="text" value="123 MAIN STREET"/>	<input style="width: 90%;" type="text" value="(03) 8888 8888"/>	<input style="width: 90%;" type="text" value="()"/>
<input style="width: 90%;" type="text" value="MELBOURNE"/>	Home telephone number	
<input style="width: 90%;" type="text" value="VIC"/> Postcode <input style="width: 10%;" type="text" value="3000"/>	<input style="width: 90%;" type="text" value="(03) 9999 9999"/>	Go to question 4.

Question 3.

This question does not need to be completed if you are applying as an individual.

3. Your name	Name of your business			
<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text"/>			
Registered address of business (PO boxes not accepted)	ACN	Home telephone number		
<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text" value="()"/>		
<input style="width: 90%;" type="text"/>	Work telephone number	Fax number		
<input style="width: 90%;" type="text"/>	<input style="width: 90%;" type="text" value="()"/>	<input style="width: 90%;" type="text" value="()"/>		
<input style="width: 90%;" type="text"/> Postcode	Type of business (see pg 2 of Guide)	Company <input type="checkbox"/>	Registered business <input type="checkbox"/>	Sole trader <input type="checkbox"/>

Question 4.

It is essential that the full details of the respondent(s) be provided. VCAT is unlikely to accept the application and the matter cannot proceed without this information and evidence to support it.

Who are you making this claim against (they are the respondents)			
4. Name of person	Name of company/business		
JANE JONES	AAA FRIDGES		
Registered address of business (PO boxes not accepted)	ACN	Home telephone number	
20 GREEN STREET SMITHVILLE VIC		()	
Postcode 3002	Work telephone number	Fax number	
	(03) 9999 0000	(03) 9999 0001	
	Type of business (see pg 2 of Guide)	Company <input type="checkbox"/>	Registered business <input checked="" type="checkbox"/> Sole trader <input type="checkbox"/>

The respondent will usually be a business. There are different categories of businesses

- Company
- Registered business
- Sole trader.

To complete the *Application to Civil Claims List*, you must first determine what sort of business the respondent is. A good place to start is the documentation that the trader has provided, for example quotes, invoices or contract.

Does the documentation include:

- the name, address and phone number of the business in its letterhead
- an Australian Company Number (ACN)
- a trading name (this may be different from the company name and different from the name of the person you were dealing with)?

Note: It is important to differentiate between an Australian Company Number (ACN) and an Australian Business Number (ABN). The ABN is not relevant for the purposes of this application.

Companies will have an Australian Company Number (ACN) and are registered with the Australian Securities and Investments Commission (ASIC). They will usually have Pty or Pty Ltd at the end of the company name.

The applicant must confirm the company details. This can be done by going to the Australian Securities and Investments Commission (ASIC), Level 17, 485 Latrobe Street Melbourne 9280 3500, for regional locations contact the Melbourne office or via the website – www.asic.gov.au.

- Go to Search
- Company and Company Names information
- Scroll down to National Names Index
- Search now
- Enter details
- If the company is listed, there will be an indication of the business status. A company will have the “ACN” and “Type of Company” noted. If the search indicates a “Registered State /no.” and “Type - Business Name” refer to registered businesses below.

Remember that one company may have a number of separate branches or franchises. Ensure that details are for the correct company.

If the applicant is able to supply a copy of the company’s letterhead, which includes the ACN and the registered office address, a copy should be attached to the *Application to Civil Claims List form*.

If the applicant does not have the details on a letterhead, a company extract will be required. Company extracts must be purchased from ASIC. Attach the company extract to the *Application to Civil Claims List* when it is available.

Complete the boxes on the form with exactly the same information as is in the letterhead or company extract. Remember to tick the appropriate “Type of Business” box.

Registered businesses in Victoria are registered with Consumer Affairs Victoria (CAV). If there is no ACN on the letterhead or if the business name does not appear as a company on the ASIC website it may be a registered business. Check the CAV website www.consumer.vic.gov.au.

If the business is listed there you will need to order and pay for a business extract. This can be done in person at Consumer Affairs Victoria, 113 Exhibition Street Melbourne, by mail or online, see following page. A fee will be charged for this service. When it is received, attach the extract to the *Application to Civil Claims List form*.

Complete the boxes on the form with exactly the same information as is in the business extract. Remember to tick the appropriate "Type of Business" box.

Step 1 – Go to the following website:

<http://www.consumer.vic.gov.au/businessnamesearch>

Step 2 – Type the name of business:

Search

Find a Business Name

This search will only find business names that are listed on the Victorian Names Register.
It will not tell you if a proposed business name is available and can be registered.

If you wish to register a business name, you can make an online [Business Name Application](#) or lodge a form direct with Consumer Affairs Victoria.

Purchase a Business Name Extract

If you wish to purchase a business name extract, first search for the name. You can then order the Extract from the pages that follow.

Registration Number:

OR

Registered Name:

Search on: Exact name
 Key words
 Sounds like

Step 3 – Click the name of the business to see a partial extract:

Search Results

Number of Result(s): 1
 Search Type: Key words
 Word(s) Searched: AAAFridges
 Time and Date: 2:38 PM 20/10/2006

Click on the business name to view a partial extract, Business Names are listed in blue below.

Organisation Name	Organisation Number	Date Registered	Date Deregistered	Renewal Date
AAAFRIDGES	B0001112F	05/10/1999	05/10/2002	05/10/2002

Please note that a partial extract is not sufficient for the purposes of the application.

Step 4 – Click 'Purchase Business Name Extract:

Partial Extract

The following details were extracted from the Register at 02:43 PM 20/10/2006.

Business Name AAAFRIDGES	Business Number B0001112F	
Nature of Business ON LINE WHITE GOODS BROKERS		
Date Registered 05/10/1999	Date Deregistered 05/10/2002	Renewal Date 05/10/2002
Trading Suburb ST KILDA	Trading Postcode 3182	

[Purchase Business Name Extract](#)

A Business Name Extract includes additional details including business contact and owner details. See Demonstration for an example

Step 5 – Click the 'Pay Now' button:

Shopping Cart Items

Remove Item	Product	Total Price (AUD)
<input type="checkbox"/>	Business Name Extract - AAAFRIDGES	12.90

Total: \$ 12.90
Includes GST: \$ 0.00

Step 6 – enter credit card details:

Credit Card Details

PLEASE COMPLETE ALL OF THE FIELDS BELOW:

Card Type:
 Card Number:
 Expiry: /
 Name on Card:
 Amount: \$ 12.90
 Includes GST: \$ 0.00

If selecting 'Pay Now' please click the button only ONCE. It will take about one minute for the transaction to be completed and for a Receipt page to appear.

If you click 'Pay Now' a second time or if you click the 'Back', 'Refresh' or 'Stop' buttons it may interfere with your transaction.

Step 7 – In the Receipt page, write down your retrieval number for later use, and click the link for picking up extracts:

Receipt

Consumer Affairs Victoria
 ABN: 32 452 288 984

Date: 06/03/2003 12:42 PM
 Method of Payment: Credit Card (VISA)
 Authorisation Number: 319635 (Please keep this safe for future enquiries)
 Receipt Number: 3455919
 Amount: \$12.90
 Includes GST of: \$ 0.00

Product	Quantity	Total Price (AUD)
Business Name Extract - AAAFRIDGES	Reference: 100	12.90

Reference: 100

Retrieve and view your extracts by clicking [Retrieve Extracts](#).
 Your extract retrieval reference number is: **100**
 The extracts can be picked up from:
http://police.justice.vic.gov.au/sereniti/av_extract_collection
 Please note the address and reference number to view your extracts up until 10-03-2003

You are advised to keep a record of these details for future reference.
 Either:
 • print a hard copy of this tax invoice using the print-friendly link and the print facilities on your browser;
 • write down the receipt number;
 • copy and paste the above text to an appropriate file.

Print this page

Step 8 – Type your retrieval number, and then click the 'Business Name Extract' link:

Retrieve Extract

Please enter your reference number to retrieve extracts for downloading/viewing

Extract Retrieval Reference Number:

Select the extract you wish to view.
 Extract(s) from this session are available for you to view until 10-03-2003.
 Please record the extract retrieval reference number. You will need this number to retrieve your extract later.

[Business Name Extract - AAAFRIDGES](#)

Print this page

Sole Traders are not a registered business or a company. If the business does not appear on either the ASIC or CAV websites a sole trader may run it. There may be no official information available and the applicant will have to seek the required information from the trader himself or herself or try other avenues. If, for example, the tradesperson was hired from an advertisement in the local paper and the applicant only has their name and/or phone number, the applicant could try checking the telephone directory or contacting the local paper and requesting further details. The applicant may also consider lodging a complaint with CAV.

Remember to tick the appropriate “Type of Business” box.

The application cannot proceed if all the details are not available.

Mr Smith has a receipt from AAA Fridges. As the receipt did not have an ACN printed on it, Mr Smith assumed that it was a business rather than a company. He checked the CAV website. Mr Smith purchased the extract. He completed Question 4 on the application form, on the application form, attached a copy of the extract to the application and kept the original for his records.

The applicant may have a complaint against more than one respondent, for instance, the credit provider as well as the trader. If there are more than two additional respondents, note this on the *Application to Civil Claims List* form and attach a sheet to the form.

Question 5.

The applicant must provide details for all respondents and may need to complete company or business searches for each of them. The applicant must also explain why they have an interest. If application is successful orders may be made against some or all of the named respondents. Ensure that witnesses are not named in this section – you do not want an order to be made against them!

Additional respondents/other parties involved in this claim (excluding witnesses)

Give details of any other parties who are involved in this claim (eg manufacturer, distributor, finance company). Refer to page 3 of the Guide. **Do not name witnesses here.** If you need to nominate more than 2 parties, please attach a separate list with their details.

5. Name of person Name of company/business

Registered address of business (PO boxes not accepted)

 Postcode

ACN (if applicable) Home telephone number

Work telephone number Fax number

Type of business Company Registered business Sole trader

Briefly describe why this person/company has an interest in this claim

Mr Smith checks the warranty card to confirm the manufacturer’s details. The warranty card includes the name ACME & Daughter Pty Ltd but no ACN, so a company extract is required. Mr Smith undertakes a search on the ASIC website. He finds the company details and purchases an extract. He completes Question 5 on the application form, on the application form, attached a copy of the extract to the application and kept the original for his records.

Questions 7 – 11 collect details about the dispute and identify the outcomes being sought by the applicant.

Question 7.

The applicant needs to ensure that the matter is covered by the legislation. If uncertain as to which Act applies, contact one of the organisations listed at the end of the Workbook for assistance.

Details of Claim

7. What Act(s) are you making this claim under? Refer to page 1 in the Guide for more information

Fair Trading Act 1999, and if relevant, Domestic Building Contracts Act 1995..... Go to question 8.

Section 45 of the Motor Car Traders Act (you must make your claim within 3 months of car purchase – please seek legal advice before making this application)..... Go to question 9.

Question 8.

Mr Smith’s matter comes under the *Fair Trading Act 1999*. He believes that the refrigerator is “not fit for the purpose” for which he purchased it and that “misrepresentation” has taken place in relation to the warranty.

What is the value of your claim?

8. Claims made under the Fair Trading Act 1999, and if relevant, Domestic Building Contracts Act 1995

What is the value of your claim?	\$	
What do you want VCAT to decide and order? (tick applicable boxes)		
<input checked="" type="checkbox"/> Payment of money	<input type="checkbox"/> Order to comply with a contract	<input checked="" type="checkbox"/> Misleading or deceptive conduct, false representation and unconscionable conduct
<input checked="" type="checkbox"/> Work to be done	<input type="checkbox"/> Unfair term(s) in a consumer contract entered into after 8/10/2003	<input type="checkbox"/> Declaration a debt is due or is not due
<input type="checkbox"/> Return of goods	<input type="checkbox"/> Cancellation (rescission) of a contract	<input type="checkbox"/> Order that a party has to do or does not have to do something (explain what you want below in 'other' box)
<input checked="" type="checkbox"/> Payment of damages (including exemplary)	<input type="checkbox"/> Loss, injury or damage because of a contravention of the Fair Trading Act 1999	
<input type="checkbox"/> Review or vary a contract		
<input type="checkbox"/> Other (please specify)		

The applicant must include the total amount being requested when submitting the application.

In deciding how much to claim consider the following type of questions;

1. What was the original cost of the goods and/or services?
2. How long have you had the goods?
3. Are you seeking full replacement value?
4. Have you taken depreciation into account?
5. Is rectification an option? Can it be repaired?
6. Have you obtained a costing for rectification or replacement?
7. Is the cost of rectification or replacement over the original purchase price? Are you seeking more than the original cost?
8. Are you seeking compensation for damages or losses?

In Mr Smith's case, the total cost of the claim includes the replacement cost of the refrigerator, if it cannot be repaired, and the cost of food spoiled when the refrigerator broke down.

What do you want VCAT to decide and order?

The applicant may tick more than one box. It is important where possible to give the Tribunal member the broadest range of options. Perhaps a combination of orders may offer the most appropriate remedy, or VCAT may reject one option but agree with another. If a particular decision/order is not requested it is unlikely that it will be granted. *Refer to the "Orders made by the Tribunal" and "Enforcement" sections later in this workbook prior to completing this question.*

What is it that you want? Brainstorm your ideas and then consider how these relate to the types of orders that VCAT can make?

Mr Smith wants his refrigerator fixed, confirmation that the refrigerator is covered by the extended warranty and compensation for the food that was spoiled. He decides to seek an order for "work to be done" under the terms of the extended warranty, or a payment of money to replace the refrigerator if it cannot be rectified, and a payment of money for the food spoilage.

Question 9.

There are strict timelines in the legislation regarding rescission of motor vehicle contracts. Independent advice should be obtained.

9. Claims made under Section 45 of the Motor Car Traders Act 1986

What was the cash price of the used car? (must be \$40,000 or less)	\$	
What is the reason for this claim? (you must tick at least one of these options)		
<input type="checkbox"/> False odometer reading	<input type="checkbox"/> Incomplete sale agreement	<input type="checkbox"/> Car substantially different
Do you want VCAT to order cancellation (rescission) of a contract?		<input type="checkbox"/> Yes <input type="checkbox"/> No

Question 10.

Provide a brief description of the goods and services not the reason for your complaint.

10. Please give a description of the goods and/or services provided

Purchase of two door stainless steel fridge/freezer

Question 11.

The dispute history is the applicant’s opportunity to outline the basis of their complaint (or counter claim see question 12), how the dispute developed and the steps that have been taken to try to resolve the matter. The Tribunal member who will hear the matter and the respondent(s) will have the opportunity to read the application before the hearing, so this history will assist them to understand the matter from the applicant’s perspective.

11. Outline the history of this dispute (attach extra sheets if you need more space)

Date of contract 19 / 01 / 06

Date of dispute 21 / 08 / 06

SEE ATTACHED

The **date of contract** is the date on which the applicant made an agreement with the trader to purchase goods and/or services.

The **date of dispute** is the date on which the problem became apparent.

Use the space provided, and attach additional pages if necessary, to **write a summary of events**, see sample below. Present the information in chronological order, starting from the date of contract and working through to the present time. Try to be concise and to avoid emotional or abusive language. The use of dot points and headings may make it easier to follow.

Refer to evidence and attach copies of documents where appropriate. Keep the originals with your records. Evidence may include, for example, copies of correspondence to the trader and any replies, diary notes about conversations and actions, names of witnesses, receipts and invoices.

Summary of Events

- 17/01/06 Advertisement in Melbourne News
- 19/01/06 Visited AAA Fridges store, Salesperson (Jim), recommended ACME 2 door model, said good customer feedback and a 12 month extended warranty. Paid \$3,000 cash (receipt attached)
- 20/01/06 Fridge delivered
- Mid August Fridge started leaking, does not seem to cool properly
- 21/08/06 Contacted AAA, who told me to contact the manufacturer ACME.
Rang ACME who told me to turn up temperature control and check the level of the fridge
- 22/08/06 Fridge still not working properly, ice cream melted, food not getting cold
Rang ACME, technician to visit in a few days
- 30/08/06 Fridge stopped working, food completely defrosted
Rang ACME
- 31/08/06 Technician visited. Said fridge no longer covered by warranty, will have to pay for repair.
Quote Attached

Questions 12 and 13 aim to determine if any other legal action has been initiated in relation to the matter either through VCAT or a court. The Tribunal and a court cannot deal with a matter at the same time. If the application is a counter claim, made in response to a claim made by the other party, this may effect how, when and where the matters are dealt with.

Question 12.

If the application is being made in response to another application (the claim) then it is considered to be a counter-claim. VCAT will arrange for the claim and the counter claim to be dealt with at the same time.

12. Are you making this application in response to another application in the VCAT Civil Claims List that has been served on you?

- No Go to question 13.
- Yes Write here the VCAT file number on the application form made against you.

Go to question 13.

This question is not relevant in Mr Smith’s case. A common scenario is where a trader has not, in the view of the consumer, satisfactorily completed the agreed work. So the consumer decides not to pay the bill. The trader may lodge an application to VCAT seeking an order that payment be made. (At end of the day the trader has done the work and is entitled to payment. Whether or not the work was satisfactory is another matter. The consumer cannot legally withhold the payment). The consumer may decide to lodge a counter-claim in relation to the quality of the work, seeking an order either that the work be rectified or a payment of monies to have the work done.

Question 13.

If either party has lodged the matter at the Magistrates’ Court or another court, it may be possible and preferable to transfer the matter to VCAT. The main reason for seeking a transfer is that VCAT application fees are lower, costs are not generally awarded against the parties and self-representation is encouraged where the matter is for less than \$10,000.

If the matter involves over \$10,000, transfer to VCAT is at the discretion of the court where the matter has been lodged. Contact the court staff at the relevant court to find out details of how to apply for a transfer.

13. Are you making this application in response to any court action (other than VCAT) that has been served on you?

- No Go to question 14. (signature)
- Yes What is the amount the court is seeking from you? \$

You have two choices:

1. Whatever the amount, you may ask the court to transfer your case to VCAT. The court has the choice whether or not to transfer the case. You will need to do this before making this application.
2. If you are the purchaser (not the supplier) and the amount the court is seeking from you is \$10,000 or less and the court has not commenced hearing your case, you can pay this amount to the VCAT trust account and the court will automatically transfer your case to VCAT. Do you want to do this?
No Yes Attach payment of the amount by way of bank cheque or cash if paying in person) to this application and attach a copy of all court documents in relation to the court action.
Go to question 14. (signature)

Question 14.

Remember to sign and date the application form.

Signature

14. Signature of applicant

Date *What to do next. Please turn over page.*

You should now have collected and prepared all of the details which are required to complete the application form. Transfer the information to the Application to Civil Claims List and then complete the following checklist.

Other than the application form, do not send original documents to VCAT, make copies and keep the originals in your records.

LOGGING THE APPLICATION TO CIVIL CLAIMS LIST

Fees

The *Application to Civil Claims List* page 3 provides details of how and where to lodge the form and an explanation of fee structure. Fees may change so check prior to lodgement. The fee must accompany the *Application to Civil Claims List* form, as it will not be processed without the payment.

Fee Waiver

Where the payment of a fee may cause financial hardship the applicant may apply to VCAT for a fee waiver. The relevant form is available on the VCAT website (www.vcat.vic.gov.au) click on the “Fees – Forms – Brochures” section, then to the “Miscellaneous Forms” then Fee waiver due to financial hardship or request that VCAT send you a copy. The form requires financial details such as income, expenses and bank balance, will require a copy of government benefit card if applicable, and must be witnessed by a person qualified to witness a statutory declaration such as a justice of the peace, member of the police force, barrister, solicitor or pharmacist.

Interpreter

If an interpreter is required for the hearing, the applicant will need to prepare a written request, specifying the language required, and attach this to the *Application to Civil Claims List* form at the time of lodgement.

Availability

If you have specific dates where you would be unable to attend a hearing, for example, a prearranged medical appointment, holiday or work commitment, attach a covering letter to the Tribunal requesting that the matter not be listed on these dates. The Tribunal may require supporting documentation, such as a copy of the airline ticket.

AMENDING YOUR APPLICATION

Wait to receive the reference number from the Tribunal before forwarding any additional information. Any amendments or additional information that you may send to VCAT should be in writing and must include this reference number.

State the names of the parties and the reason for the amendment. If the monetary amount has changed include supporting evidence such as an invoice and/or quote.

WHAT HAPPENS NEXT

Once the application is lodged, VCAT will confirm its receipt in writing and allocate a reference number to the matter. The Tribunal may seek further information from the applicant.

The Tribunal will then send the applicant a *Notice of Hearing*, which outlines the date, time and location of the hearing. Civil claims matters are generally heard in Melbourne, with some sittings held in regional/rural areas.

For matters listed in Melbourne, where there are special circumstances, such as a medical condition or age of one of the parties, which limits capacity to travel, the matter may, upon request, be transferred to a local venue where VCAT sits. The person seeking the transfer must write a letter and provide medical evidence to support the application.

The Tribunal will send a copy of the completed *Application to Civil Claims*, any attachments and the *Notice of Hearing* to the other party (respondent).

The parties to the dispute may continue to negotiate, and possibly settle all or part of the dispute, prior to the hearing. It is also useful to use the time to prepare for the hearing by preparing what you will say and getting evidence in order.

PREPARING FOR THE HEARING

In the period between the lodging of the application and the hearing date there are a number of things the applicant should do to prepare for the hearing. There may only be one opportunity to present the case. Although not an absolute guarantee of success, thorough preparation will ensure that you make the most of your opportunity to present your case.

Evidence

The applicant is required to produce evidence that will support the claim. Evidence can take a variety of forms, including:

- verbal submission by applicant
- written documents such as invoices, correspondence, quotes
- contracts
- technical reports – such as an engineers report
- witnesses – in person or via statutory declaration or affidavit
- visual materials such as photographs, videos, the damaged product.

You cannot rely on the other party to bring copies of documents to the hearing. If you do not have the original document, for example a copy of the contract, try writing to the other party to request a copy, prior to lodging the application if possible.

You can also compel another party to provide documents to the Tribunal. This request must be in writing to the Tribunal. Ask that a Direction be made pursuant to the *Victorian Civil and Administrative Tribunal Act 1998*.

If you are planning to present evidence as outlined above, it is suggested that you provide copies to the other party and the Tribunal prior to the hearing.

Witnesses

Witnesses are people who are able to confirm and/or support aspects of the claims that the parties are making to VCAT. For example, they were present when you purchased the goods. It is your responsibility as the applicant to arrange witnesses to support your claim. Check that the witness is willing to attend and give evidence at the hearing, confirm this in writing. Consider attaching a copy of the hearing notice.

If the witness is unable to attend the hearing in person they may provide evidence in the form of an affidavit or statutory declaration.

The applicant can compel a person to appear before VCAT as a witness and/or to produce documentation. This may be necessary where the person has refused to attend. This can be done by completing the *Summons To Appear* form (see VCAT website) and serving it on the relevant person. It should be noted that VCAT has the discretion to refuse to issue a summons, so you must ensure that it is necessary to your case to call the witness.

There is a cost associated with each summons issued and you will be required to serve a copy on the witness. You may also be liable for costs associated with the person appearing, as the witness can make a submission for costs to the Tribunal.

Prepare a list of questions for your witnesses or the respondent and his/her witnesses.

Preparing your verbal submission

At the VCAT hearing you will be required to make a verbal submission outlining the basis of your application, along with the presentation of evidence in support of your claim. It is advisable to prepare an outline of the verbal submission and to create a folder of evidence to support the submission.

The verbal submission should be kept as brief as possible. Notes prepared in dot form may make it easier to refer to during the hearing. The submission will usually include the following:

- Introduction – a brief outline of why an application has been made to the Tribunal and what the applicant is seeking from the Tribunal
- Proof of transaction, such as a copy of the contract
- Description of dispute
- Chronological history of the dispute (it may be helpful to refer to the response to Question 11 in the *Application to Civil Claims List* form)
- Reference to verbal, written and visual evidence where appropriate
- Summary of decisions and/or orders sought from the Tribunal.

It is advisable to practise what you will say at the Tribunal, as it may not be always be possible to read directly from your notes.

Folder of Evidence

It can be very helpful to organise all of the documents and materials relating to the matter into a folder. Where there are a number of documents and/or photographs, creating an index and numbering system will assist in locating them easily during the hearing. If appropriate, provide copies of the materials, in the same format, to the Tribunal member and the respondent. Ensure that a pen and paper is included so that notes can be taken during the hearing.

Special Requirements

If the applicant/respondent has any special requirements for the hearing, such as availability of an interpreter (discussed above) or if they want to show a video as part of the evidence, arrangements must be made with VCAT prior to the hearing date. The best approach is to write to VCAT, noting the matter reference number and requesting that the facilities be made available. It is suggested that this is followed up with a phone call prior to the hearing day to confirm availability.

ADJOURNMENTS

Adjournments are not often granted. The written consent of all parties is required in order to seek an adjournment.

The written consent must be provided to the Tribunal when a request is made, and must include supporting documentation such as a detailed medical certificate or an airline ticket.

SETTLEMENT PRIOR TO HEARING

The parties to the dispute can agree to settle the matter right up to the commencement of the hearing. If a last minute offer to settle is received from the other party, a request that the Tribunal adjourn the matter can be made.

At the actual hearing, the Tribunal member may make a suggestion that the parties make a further attempt to resolve the matter and will leave the hearing room while discussions take place. If an agreement is reached the Tribunal can confirm the agreement and make orders by consent of the parties to that effect.

If an offer is made and accepted prior to the hearing date it is important to confirm the agreement in writing. It is suggested that the applicant does not withdraw the matter from VCAT immediately, rather that an adjournment is sought and the applicant waits until the agreement/order is satisfactorily met.

WHAT WILL HAPPEN ON THE DAY OF THE HEARING?

Attending VCAT

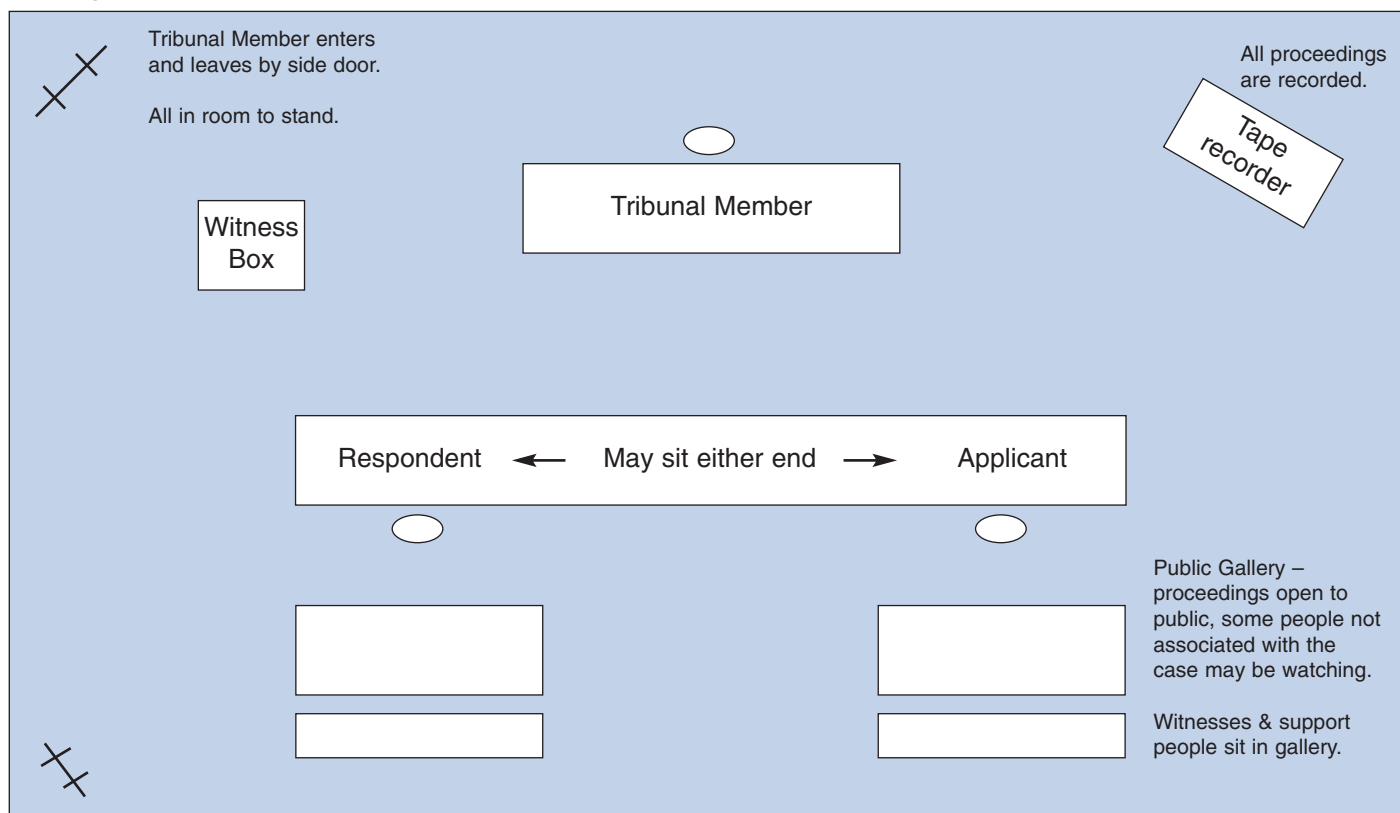
Neat, casual dress is suitable for VCAT hearings.

It is advisable to arrive at **least** fifteen minutes before the scheduled hearing time. **Do not be late** as the Tribunal can proceed to hear your matter in your absence.

Check in at the counter and tell staff that you have arrived. You will be advised where to wait and in which room the matter will be heard.

Turn off mobile phones and remove sunglasses before entering the hearing room.

Hearing Room Layout



When presenting at the Tribunal

- Be courteous and polite, err on the side of formality
- Speak slowly and clearly
- Be assertive where necessary to ensure you get your point across
- Don't be afraid to ask the Tribunal member to clarify points or statements
- Present information in a clear and logical form
- Address the Tribunal Member as "Sir"/"Madam"
- Address the other party as "the respondent" or by name (eg politely Mr/Ms Jones)
- Witnesses should be addressed by name (eg politely Mr/Ms Jones).

STEPS IN THE HEARING PROCESS

Step 1

TRIBUNAL MEMBER

- enters, all stand
- will set the tone and give a brief outline of the hearing process
- may suggest or direct, at any time throughout the hearing, that the matter be “stood down” to enable further discussion by the parties.

Step 2

EACH PARTY will be required to make an oath or affirmation to tell the truth.

Step 3

PARTIES advise the Tribunal Member of the presence of any witnesses. The Member may request that witnesses leave the room and wait outside until they are called. Witnesses will be required to be sworn in either at this time or when they are called to give evidence.

Step 4

APPLICANT speaks first

- it is the responsibility of applicant to prove the case
- if written reasons for the decision are required, the Tribunal Member should be advised
- outlines the basis of the application: describes the dispute and states what they want the Tribunal to order
- provides a full history of the dispute
- tables evidence, displays damaged item, questions witnesses as appropriate.

Step 5

RESPONDENT(S)

- is entitled to ask the applicant or witnesses about the evidence put forward, this may occur during the applicant's presentation or as part of their own presentation
- outlines her/his perspective on the dispute and preferred outcome
- tables evidence and calls witnesses as appropriate.

Step 6

APPLICANT

- has opportunity to respond, ask questions and challenge evidence
- summarises key points of their claim.

Step 7

MEMBER

- may ask the respondent if there is anything else they wish to add
- generally will advise of their decision immediately, however, if the matter is complex or a written reasons for the decision are required, the Member may elect to provide the decision in writing at a later date
- will leave the hearing room, parties are expected to stand and leave the room straightaway.

ORDERS MADE BY THE TRIBUNAL

If a monetary order is made, for example, the respondent is ordered to pay an amount to the applicant, it is advisable to request a certified copy of the order, as this will be needed if enforcement proceedings are required at a later date. You can complete a request form from VCAT at the conclusion of the hearing or by mail. Ensure you include the Tribunal reference number.

If the order is for work to be done, or for the trader to return goods or supply the goods or service, it is advisable to request that the order include a clause allowing the applicant to renew the application and seek a monetary order if the respondent fails to comply within the timeframe allocated by the Tribunal member. If the trader fails to comply with the order, this would enable the applicant to write to VCAT seeking a renewal of the proceedings and requesting an order of monies. A quote or supporting documentation for the cost of the rectification/repair should be included. There is no application fee for a renewal.

A copy of the order will be sent to all parties by mail within a few weeks.

WHAT IF ONE OF THE PARTIES DOES NOT ATTEND THE HEARING?

If the applicant fails to attend, the matter will be dismissed.

If the respondent fails to attend the matter will go ahead in their absence and the Member will make a decision. The Tribunal will send a copy of the order to the respondent. The respondent has fourteen days from **becoming aware** of the order to apply for a review hearing. The Tribunal will advise the original applicant of the hearing date if a review is granted.

The purpose of the review hearing is to decide whether there were reasonable grounds for non-attendance and whether the matter will be reheard. Applying for a review is different from an appeal of a Tribunal decision, see below. The original applicant is advised to attend the review hearing. If the review is successful the Tribunal can reopen and rehear the matter immediately, although it is usually re-listed to another date. In the interim period between the application for review and the review hearing the order is suspended.

APPEALING TRIBUNAL DECISIONS

There are very limited grounds for appealing VCAT decisions. The appeal is to the Supreme Court of Victoria and only on a question of law and must be made within specified time limits. Given the costs and complexities associated with this type of action it is strongly recommended that legal advice be obtained.

ENFORCEMENT

VCAT may make an order, but this does not guarantee the other party will comply with it. It is up to the applicant, not VCAT, to take action to enforce an order if the respondent does not comply. This may be a difficult and costly process and advice should be obtained before proceeding.

If it is an order for work to be done and a clause has been included allowing the applicant to seek a monetary order where the respondent fails to do the work, the applicant should write to VCAT requesting that the matter be renewed. Outline in the letter the amount you are seeking and include a copy of a quote/report for the work to be done by another suitably qualified person.

For monetary orders, it is recommended that if payment has not been received near to or by the time specified in the order, the applicant write a letter to the respondent enclosing a copy of the order, requesting payment and outlining that if payment is not received within a specified time frame further legal action will be taken which may result in further costs to the respondent.

VCAT does not enforce monetary orders, generally the applicant will be required to take action in the Magistrates' Court. The applicant will require a certified copy of the VCAT order. This can be obtained by request at the original hearing or by a written request to VCAT at a later date.

Enforcement of non - monetary orders requires an application to the Supreme Court.

In relation to claims against motor car traders or travel agents the applicant may wish to advise the relevant licensing authority prior to taking steps in the Magistrates' Court. Contact Consumer Affairs Victoria for further information.

CHECKLISTS

Application to the Tribunal

- All relevant questions have been answered
- Details and spelling checked (It may be worth getting someone else to read over the completed form)
- Company searches, as required, have been undertaken and company extracts purchased
- Business extracts, as required, have been purchased
- Copies of letterhead and/or company/business extracts are attached to the application
- Where the application is in response to a claim made by the other party, relevant information and court documents are attached and the payment made to VCAT Trust Account
- Summary of events has been prepared and copies of associated documentation and evidence are attached
- The *Application to Civil Claims List* form is signed and dated
- A copy of the completed form and attachments is made for your records
- Application fee enclosed.

Preparing for the hearing

Folder of materials prepared and put in order

- VCAT *Civil Claims List Application* (photocopy)
- Notice of Hearing
- Evidence, for example,
 - Invoices, quotes, contract, diary notes
 - Photographs, video
 - Correspondence
 - Technical reports
 - Damaged product
 - Statutory declarations or affidavits by witnesses
- Written outline of the verbal submission
 - History/summary of events
 - Statement of what is being claimed/orders sought
 - List of questions to ask witnesses.
- Pen and paper – to take notes when other parties are speaking.

On the day of the hearing

- Neat dress
- Arrive at least fifteen minutes prior to hearing time, check in at the counter and ensure you know which room the hearing will be held in
- Mobile phone off, sunglasses removed
- Check folder of materials is in order and that witnesses have arrived
- If it has not been done previously, provide or show copies of relevant documents and photographs to the other party
- If appropriate, undertake final discussions with the other party with a view to settlement prior to the hearing.

WHERE TO OBTAIN FURTHER INFORMATION AND ASSISTANCE

- Consumer Affairs Victoria
Walk-in service centre:
Victorian Consumer & Business Centre
113 Exhibition Street
Melbourne 3000
Hours of operation, Monday - Friday, 8.30am - 5.00pm, except public holidays
Helpline 1300 55 55 81
www.consumer.vic.gov.au
- Victoria Legal Aid – VCAT Duty Lawyer Service
Victoria Legal Aid provides free legal advice and limited assistance to applicants and respondents bringing or defending civil claims at VCAT. A Legal Aid lawyer is present at VCAT from Monday to Friday. Legal Aid has an office on the ground floor. If you would like to speak with a Legal Aid lawyer, you can enquire at the ground floor counter. Legal Aid lawyers are not in a position to provide ongoing assistance with the preparation of civil claims. www.legalaid.vic.gov.au
- Community legal centres – for your nearest centre contact the Federation of Community Legal Centres 03 9654 5204 or www.communitylaw.org.au

CIVIL CLAIMS WORKBOOK

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Disclaimer

Every effort has been made to ensure that the information contained in this Workbook is accurate at the time of publication. However, laws change and the details of and circumstances surrounding particular consumer issues will vary. This Workbook is not a substitute for professional and matter specific legal, consumer or financial advice.

Consumer Affairs Victoria (CAV) and Peninsula Community Legal Centre Inc (PCLC) disclaim any liability or responsibility for any errors or omissions in this workbook, or for any loss or other consequence that may arise from a person or persons relying on anything in this Workbook.

The examples discussed in this Workbook are fictitious. Any reference to the names of people or companies is purely coincidental and inadvertent.

About Peninsula Community Legal Centre Inc (PCLC)

PCLC has been providing free community legal services to people who live, work and study in the South East and Westport region of Melbourne for almost thirty years. Along with providing legal advice and casework services, the centre runs community legal education programs and is active in law reform and legal policy development work.

About Consumer Affairs Victoria (CAV)

CAV is the Victorian government's leading consumer protection agency. Its role is to protect and promote the interests of consumers. CAV provides enquiry, information and dispute resolution services to Victorians free of charge. CAV also provides free education sessions focussed on the rights and responsibilities of consumers and tenants to community groups state-wide.

FEEDBACK

We are interested in receiving feedback regarding the usefulness of the Workbook and suggestions for how it may be improved. Please forward written comments to Peninsula Community Legal Centre, Suite 1-4, Chatsworth House, 431 Nepean Highway, Frankston, Victoria, 3199 or by email to pclc@pclc.org.au.

