



Peninsula Community
Legal Centre Inc

Submission In Response to Proposed VCAT (Fees) Regulations 2013

Prepared by Peninsula Community Legal Centre Inc
15 February 2013



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Submitted to:

Department of Justice, Courts Policy

Peninsula Community Legal Centre (“PCLC”) appreciates the opportunity to respond to the proposed VCAT (Fees) Regulations (2013).

The terms “Vulnerable” and “Low Income”, as referred to in this submission, are defined in part 2 on page 3 below.

1. PROFILE OF PENINSULA COMMUNITY LEGAL CENTRE

PCLC is a not-for-profit organisation that has been providing free legal services to Melbourne’s outer south east communities for over 35 years. Its mission is “To empower and support disadvantaged community members of the South East and Westernport Region to use the law and legal system to protect and advance their rights and broaden their awareness of their rights and responsibilities.”

PCLC’s staff and volunteers provide clients with free and accessible legal services, particularly the most disadvantaged and marginalised in our community who may otherwise ‘fall through the gaps’. Our clients’ life circumstances can be severely affected by their legal problems and they are often not able to access other legal services. Being able to obtain free legal assistance can often help our clients move on with their lives and become active participants in their local communities.

Underpinning all service delivery is a philosophy of client empowerment and recognition of the inherent dignity of all people. In casework services, this translates to a focus on informed decision-making by clients and supported self-help wherever appropriate, so that clients achieve the confidence and skills to navigate the legal system. Most of PCLC’s clients cannot afford a private lawyer and would not qualify for legal aid. Their right to equality before the law might be meaningless if not for the work of PCLC in resourcing and directly assisting them to uphold their rights.

PCLC also has a strong commitment to empowering the broader community through community development and community legal education activities. PCLC is regarded by the local community as its key legal resource, organising and participating in forums about legal issues, providing customised workshops and reporting on policy issues that affect the community through local media. Across the community, PCLC endeavours to improve understanding of legal issues through its education activities, as well as supporting community groups and participating in relevant law reform activities.

PCLC has, since the 1990s, developed expertise in providing specialised tenancy and advocacy services, including Tribunal representation, for vulnerable and financially disadvantaged tenants and consumers. The funding is through Consumer Affairs Victoria. PCLC employs tenant and consumer advocates to provide: information and advice;

assistance in negotiation with landlords, traders, real estate agents and others; and representation at VCAT in the Residential Tenancies List and Civil Claims List.

Through the provision of advice, negotiation, support and representation at VCAT, in 2011-2012 PCLC's Advocates assisted 578 people to address tenancy matters and 114 consumers to resolve disputes relating to the purchase of good and services.

PCLC's expertise in these areas has enabled the PCLC to provide tenancy and consumer education. Workshops have been conducted for those seeking to self-represent at VCAT, and PCLC has produced the Civil Claims Workbook. This Workbook is designed for people who are considering self-representation in the Civil Claims List. It provides step-by-step information about completing VCAT forms, preparing for a hearing, what happens at a hearing and following up on VCAT decisions.

2. OVERVIEW

PCLC's clients are primarily:

- a) CentreLink recipients ("Concession Card Holders");
- b) people who are on low income who come within VCAT's Financial Hardship Fee Waiver Exemption ("Financial Hardship Fee Waiver Recipients");
- c) people who are on low income (although outside of the restrictive criteria of VCAT's Financial Hardship Fee Waiver Exemption) but are still on low income ("Low Income"); and
- d) people who are otherwise vulnerable, for example, for reasons of physical disability, mental disability, illness, family violence, literacy or are culturally and linguistically diverse ("Vulnerable").

The proposed significant fee increases will very adversely affect both "Low Income" and "Vulnerable" clients. For these people the increased fees, and the extent of them, will constitute a barrier to their right to access justice. By these proposed fee increases VCAT is moving away from its purpose of being a low cost means of all citizens accessing justice.

Accordingly, we oppose the proposed fee increases.

In the event that the proposal to increase fees proceeds, we recommend as follows:

- a) The current VCAT Concession Card Fee Waiver and the current VCAT Financial

Hardship Fee Waiver continue to apply;

- b) The stringent criteria for the VCAT Financial Hardship Fee Waiver be reviewed with a view to increasing the thresholds as many people who are undergoing financial hardship fall outside the very restrictive criteria required to obtain that waiver;
- c) The Application Form For Waiver Of Fees By Reason Of Financial Hardship be simplified;
- d) An exemption be introduced for clients of legal aid schemes and community legal centres; and
- e) An exemption be introduced for the Residential Tenancies List.

Before setting out our Recommendations below we:

- a) discuss the main reason we oppose the fee increases: they constitute a barrier to access to justice for those who are Vulnerable and have Low Income;
- b) respond to some of the arguments set out in the Regulatory Impact Statement; and
- c) make specific comments on the proposed fees for alternative dispute resolution.

3. Access To Justice Barrier And Purpose Of VCAT

Based on our experience, the level of the proposed fee increases will have a significant negative impact upon the ability of those who are Vulnerable and have Low Income to access justice through VCAT.

VCAT was established to address some of the issues which impeded access to justice; the significant costs associated with the court system being one of the primary impediments.

With these proposed Regulations we now seem to be moving to a system which, rather than enhancing access to justice, instead is moving in the direction of limiting access to justice for many of the most needy. For them, the requirement to pay a substantial application fee, and other fees, combined with the inability to recover those costs, will prove, in many cases, to be an insurmountable barrier to access to justice.

It is possible that there may now be an incentive for some claimants, who can afford to do so, to issue in the Magistrates Court where they can recover their costs against the losing party. This will pose further challenges for Vulnerable and Low Income clients where they find themselves as defendants in such Magistrates Court proceedings.

In a speech delivered by Justice Kevin Bell, President, VCAT, on 4 September 2008 His Honour said:

“Equal access to justice is of fundamental importance in a democracy. ...Equal access to justice is ...one of VCAT’s most important objectives. ‘Equal’ means open to, reaching and applying to everybody, regardless of any distinction whatsoever... By ‘access’ I mean the capacity of members of the community to come to the Tribunal for resolution of their disputes as quickly, effectively and cheaply as possible ...”¹

For the clients who we see daily, faced as they will be by the proposed significant fee increases, these words and this objective will be markedly interfered with.

Justice Bell continues by stating:

“However justifiably proud we may feel of VCAT’s achievements, this is a time for mature reflection, not complacency and self-congratulation. I think important questions can and should be asked about how well VCAT is meeting its objectives, and I would offer these as a beginning:

- is access to VCAT equal: ...do people in the outer suburbs of Melbourne and in regional and country Victoria have the same ready access as people in urban Melbourne; does the Tribunal make itself open to people with disabilities and other access barriers ...?;
- is the access as quick, efficient and cheap as possible ...?”²

The proposed significant fee increases need to be reconsidered in the context of these observations of Justice Bell, the purpose of VCAT, and the need to maintain and enhance access to justice for those who are Vulnerable and have Low Income.

¹ “The Role Of VCAT In A Changing World: The President’s Review Of VCAT” Speech delivered to the Law Institute Of Victoria 4 September 2008, 3

² The President’s Review Of VCAT above n1, 4

4. Regulatory Impact Statement: Impact Of Proposed Fee Increases

In the Regulatory Impact Statement the following assertion is made:

“A substantial proportion of the parties employ legal representatives and/or expert witnesses and, in general, incur substantial costs associated with their use of VCAT to resolve their disputes which are likely to significantly exceed the amount of the fees paid in many or most cases.”³

So far as the financially disadvantaged and vulnerable in our community are concerned, this quotation is not consistent with our experience in the Residential Tenancies List and the Civil Claims List. Other than those who are able access the limited free advocacy services which are available, such community members usually cannot afford to employ legal representation and experts in the way envisaged by the quotation referred to above.

The challenges to the financially disadvantaged and vulnerable in not being able to employ legal representatives (especially when the opposing party is able to do so) are often great but at least such applicants have been able, in the main, to access the Tribunal. However, many will no longer feel able to do so in the face of the proposed fee increases.

5. Regulatory Impact Statement: Public Benefit Of Access To Justice

As pointed out in the submission of the Federation of Community Legal Centres⁴, the Regulatory Impact Statement acknowledges the “public confidence that results from the existence of a tribunal that can resolve disputes in (a) timely, informal and cost-effective manner and protect the property and individual rights of all its citizens”⁵. As the Federation of Community Legal Centres states: “Yet by seeking to increase fees, the RIS contradicts this principle, suggesting that courts and tribunals primarily serve the interests of individual users”.⁶

6. Fees For Alternative/Appropriate Dispute Resolution

We support the comments made by the Federation of Community Legal Centres in their submission, as follows:

“Alternative or appropriate dispute resolution (ADR) has always been a key component of VCAT’s ability to deliver timely and cost-effective services. The RIS acknowledges that ADR

³ Jaguar Consulting, “Victorian Civil and Administrative Tribunal (Fees) Regulations 2013” (Regulatory Impact Statement, Victorian Department Of Justice, December 2012) (‘RIS’), 68

⁴ Submission by Federation Of Community Legal Centres dated 11 February 2013, 2

⁵ Jaguar Consulting above n1, 3

⁶ Federation Of Community Legal Centres above n4

benefits VCAT by reducing costs and expediting dispute resolution. At the same time, it proposes that users should contribute 45 per cent of the cost of ADR. Mediation fees are likely to deter parties from entering into mediation and may even deter people from seeking redress at VCAT, since the Tribunal has the power to order compulsory mediation. The projected cost of \$305.70 for a day-long mediation would be a significant impost on many Victorians, especially those who are CLC clients. It would be grossly unfair to impose such fees on parties who did not wish to participate in mediation.”⁷

7. RECOMMENDATIONS

A. Recommendation 1

- Proposed Fee Increases Not Proceed

For the reasons outlined in parts 3-6 above we recommend that the fee increases as proposed in the Regulatory Impact Statement not proceed.

B. Recommendation 2

– The Concession Card Holder Fee Waiver And The Financial Hardship Fee Waiver Be Continued

The current Concession Card Holder and Financial Hardship Fee Waivers should be continued.

C. Recommendation 3

– Criteria For Granting Of Financial Hardship Fee Waiver Be Reviewed

The criteria for granting a fee waiver is unduly restrictive particularly in light of recent increases in the cost of living.

The criteria for the granting of the fee waiver on the grounds of financial hardship should be reviewed and be rendered less restrictive.

D. Recommendation 4

- Simplifying Application Form: Waiver Of Fees By Reason Of Financial Hardship

The Application For Waiver Of Fees By Reason Of Financial Hardship is an overly complex form particularly when considering the situation of those who are completing it. Many low income applicants, particularly in the Civil Claims and Residential Tenancies Lists, have limited literacy skills or are culturally and linguistically diverse. A much simpler form should be introduced with an understanding of the situation (both as to literacy and financial position) of those who will be completing and receiving the waiver.

⁷ Federation Of Community Legal Centres, above n2,3

E. Recommendation 5

– Exemption For Clients Of Legal Aid Schemes and Community Legal Centres

There should be an exemption where a claimant is a client of a legal aid scheme or community legal centre (“CLC”). This is proposed to apply in addition to the current fee exemptions.

CLCs and legal aid schemes have amongst their clients people who are Vulnerable and have Low Income and who don't fall within the current fee exemptions. For a description of Vulnerable and Low Income please see part 2 on page 3 above. These people already have completed an assessment process to become clients of the legal aid scheme or relevant CLC. Yet if they do not come within the scope of the current fee exemptions then the proposed increased fees at VCAT will, for this group, result, in many cases, in a denial of access to justice.

Often, for this group, the subject of the proposed legal redress relates to basic needs such as shelter, transport or essential goods or services. The seemingly small sums involved may amount to a substantive proportion of an applicant's disposable income.

An exemption for clients of legal aid schemes or community legal services is part of the Federal Magistrates system.⁸ We are of the view that this is an excellent initiative which should also be introduced into VCAT.

Under this proposed exemption:

- (a) When a client undertakes an action (filing an application or other document) that might attract a court fee for which they would like to be exempt, they can produce a letter on CLC letterhead requesting exemption from the fee.
- (b) That letter needs to state (where CLCs are involved) that the client is a client of the CLC, that the CLC is a legal aid service listed as an exempt legal aid scheme or service under the regulations and that the client should be eligible for an exemption from the fees.
- (c) The exemption may be applied for in a matter in which the CLC is providing representation at VCAT, as many do, but would also cover those circumstances where clients are being advised and assisted in self-representation by a CLC.

What is said above regarding application of the exemption to CLCs should also apply to clients of Victoria Legal Aid.

⁸ See Commonwealth Court Fees exemptions and the associated regulations

Implementing this Recommendation 5 has the following key advantages.

- (a) CLC intake processes include an assessment of client circumstances for the purpose of determining whether clients are disadvantaged and should therefore be assisted. A CLC fee waiver category would confirm this assessment rather than directing resources to a separate assessment.
- (b) There will also be a saving of time and resources by VCAT in that the assessing of clients for fee waiver has already been completed by the relevant CLC.

F. Recommendation 6

- Exemption For Tenants In The Residential Tenancies List

The Residential Tenancies List is in a unique position. There should be no fees imposed on tenants in respect of their claims. However, if fees are to be imposed on tenants' claims there should be no increases to the existing fees. The reasons for both these positions are as follows.

- (a) The Residential Tenancies List is 100% funded by interest from tenant bond monies. Further, only 5-6% of applications to the Residential Tenancies List are being made by tenants. Therefore, in effect, tenants' monies are being used to provide a dispute resolution process primarily utilised by landlords.
- (b) Often in the case of Vulnerable and Low Income tenant claimants their claims, given their limited alternative options, can be seen as effectively seeking to protect a basic human right (for example, to maintain a roof over the head of their family or to repair a broken stove)

8. ENDORSEMENTS

PCLC fully endorses the submissions made by the Federation Of Community Legal Centres and Tenants Union Of Victoria in response to the Regulatory Impact Statement.

9. CONCLUSION

We oppose the significant fee increases proposed by the Regulatory Impact Statement.

The significant fee increases would constitute a barrier to access to justice for those who are Vulnerable and have Low Income. This is not consistent with the founding objective of VCAT to promote access to justice for all citizens.

In the event that the fee increases do proceed we recommend that an exemption be introduced for clients of legal aid schemes and clients of community legal centres.

We also recommend that:

- (a) the current fee waiver exemptions continue (ie the Concession Card fee waiver and the Financial Hardship fee waiver);
- (b) there be a simplification of the application for fee waiver based on financial hardship;
- (c) there be a review of the criteria for granting fee waiver based on financial hardship, so that the criteria is less restrictive; and
- (d) there be a fee exemption for tenants in the Residential Tenancies List.

PCLC thanks the Department Of Justice for the opportunity to provide comments. PCLC also welcomes any future opportunities to discuss PCLC's experiences and recommendations.