Major increases to VCAT fees proposed

17 January 2013

Summary

Major fee hikes proposed for Victoria's main administrative and dispute-resolution tribunal – the Victorian Civil and Administrative Tribunal (**'the Tribunal**') – will significantly disadvantage 'Mum and Dad' objectors and community group applicants over big developers, corporations and government agencies. Objectors in most planning disputes will be hit by fee increases from $322 to over $1000 just to get their matter listed. Then hearing fees of between around $370 and $1800 a day could be charged on top of that. Fee increases would rise under the proposal by an average of 56% and up to more than 2500% in the maximum case. The rationale for the increases is to make the Tribunal more 'user pays' and to charge fees similar to the courts. The paper outlines the proposed fee regulations and the main areas of concern arising from them.

Introduction

In December 2012 the Victorian Department of Justice announced a proposal to increase the fees payable by the public using the Tribunal.

As part of the proposal, the Department released draft *Victorian Civil and Administrative Tribunal (Fees) Regulations 2013* (**'the Regulations'**) and a Regulatory Impact Statement ('**RIS'**) to enable public comment on the proposed changes.

Public comment can be made on the changes until **15 February 2012**.

This Briefing Note explains what the proposed new fee arrangements are, and why we are concerned about them. If you share these concerns, we encourage you to make your own submissions about the fee arrangements.

The proposed new fee arrangements

In general, the Department is proposing very substantial increases in fees for access to and use of the Tribunal.

Four options are advanced in the RIS. The first is to retain fees at existing levels. The second is to implement an across-the-board 45% cost recovery target immediately. The third option is a 45% target introduced over 3 years. The fourth option is a 30% cost recovery target. The preferred option under the RIS is for a staged 45% cost recovery target (option 3).

Under the preferred approach put forward, in order to achieve the 45% cost recovery target, fee increases would rise on average by 56% across jurisdictions and lists and up to 2,598% in the case of maximum fee increases. A key area in which fee increases will occur is in fees for making an application to VCAT.

There is intended to be increases in fee levels across all lists and jurisdictions except where there is statutory prohibition on fee-charging (usually for social justice reasons, such as in human rights related lists).

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What is the reason for the fee increases?

The Department's objective in implementing these changes is to achieve significantly higher rates of 'cost recovery' (i.e. user pays) in the Tribunal. The RIS proposals have been prepared in accordance with Victorian Government policy to align rates of cost recovery in the Tribunal with those of the courts at 45% of Government spending (up from 15% recovery at VCAT).

The rationale for the proposed increases and cost recovery approach is to 'recognise the mix of public and private benefits' of a tribunal system and be 'consistent in the approach taken in the setting of fees for Victoria's courts'.

The preferred arrangements will include staging the increases over a 3-year time period.

What are the actual changes?

Generally, changes to fee structure will also include increased fees, including the introduction of new fees. These increases include:

- The introduction of hearing fees generally, that is for hearings proceeding after the first day, with higher rates of fee charged for longer hearings. The intention is that hearing fees would be equivalent to 80% of County Court fees.

- A category of 'complex cases' would be introduced, in which hearings fees would be introduced with a view to recovering 45% of hearing costs.

- Differentiation of application ('commencement') fees in a range of lists according to a sliding scale based on the estimated values of the object of the dispute (e.g. for development matters, higher fees for developments over $1 million; for consumer disputes, higher rates for transactions over $10,000 or over $1 million).

- The establishment of fees for mediation (alternative dispute resolution).

- Increases of 56% for all other fees (e.g. administrative fees) not addressed by the other categories.

Eligibility for fee waivers is not affected by the RIS proposals. Fee waivers are presently available under limited circumstances.

Rules and practices regarding costs are not affected by the proposals. It will remain the general rule that parties bear their own costs in proceedings.

How will the changes impact on planning cases?

For the Planning and Environment list, selected key increases in fees proposed are:

What proceeding relates to	Current fee	Proposed fee after 3-year phase-in
Planning and Environment Act, if development estimated at less that $1m	$38.80 or $322 ,depending nature of application	$1,007.40
Planning and Environment Act, if development estimated at between $1-5m (for certain applications, including review)	$322	$2,014.80
Planning and Environment Act, if estimated value greater than $5m (for certain applications, including review)	$1290.60 ('major case' list)	$2,014.80
Planning and Environment Act, transfer of cases to Major Cases list where threshold met	$3188	$3,257.80
Environment Protection Act, review of works approval, development valued at less that $1m	$38.80	$1,007.40
Environment Protection Act, review of works approval, development estimated at greater than $1m	$38.80	$2,014.80
Environment Protection Act, review of works approval, matter listed on major cases list	NA	$3,257.80
Mineral Resources (Sustainable Development) Act	$322	$1,047
Hearing fee per day, Major Case list	$3,193.90	$3,226
Hearing fee per day, complex case	NA	$1,834.40
Hearing fee per day, ordinary hearing, days 2–4	NA	$3,68.40
Hearing fee per day, ordinary hearing, days 5–9	NA	$616.50
Hearing fee per day, ordinary hearing, days 10+	NA	$1,028.70
ADR (mediation)	NA	$305.70 (full day), $170.40 (half day)

How cost increases might impact on ordinary citizens and community groups

It is worth giving some thought to how these new fees would play out in actual cases after the 3-year phase-in period, especially those that might be brought by self-represented objectors or community groups. So, for example:

Tran v Yarra City Council (2013) VCAT 13 is a simpler Tribunal case heard late in 2012, in which resident objectors, representing themselves, objected to a development next door impeding their amenity and impeding the efficiency of their solar panels. It was a one-day hearing, before a single VCAT member, and involved an unaccompanied site inspection. This type of case now would cost application fees of $322 and under the new regulations the costs would be a $1007.40 application and no hearing fees.

In the 2009 case *Sunbury Conservation Society v Hume City Council* [2009] VCAT 685, the community group, the Sunbury Conservation Society, appealed against a Council decision to allow subdivision of a historic homestead site and removal of native vegetation. The case ran over 3 hearing days. It involved two VCAT Members. Given those facts, this type of case may be listed as a 'complex' case, and instead of an application of a few hundred dollars' application and hearing costs under the proposed fee regime might run to more than $4500.

Similarly, in *South Beach Wetlands and Landcare Group v Moyne Shire Council* [2008] VCAT 2383, a local community group appealed against a Council decision to allow a subdivision that would have impacted negatively on a wetland with important environmental values. The appeal won. Under the new fee regime, application and hearing costs in this sort of case would have run to several thousand dollars.

Big developers and government agencies can routinely afford the enormous costs associated with lawyers, experts and high Tribunal and court fees. Indeed, they are often tax deductible for them! Big fee increases put those parties in a much more advantageous position than ordinary people and community groups.

What are the main areas of concern with the proposed Regulations?

Making justice less accessible

The first and obvious concern with the fee increase proposal is the effect these fee hikes will have on access to the Tribunal.

VCAT is intended to be an accessible forum for the resolution of disputes across a whole range of areas, from consumer disputes and planning to disputes about access to government documents. It dealt with nearly 90,000 cases in 2011/12. These fee changes will make access for ordinary citizens significantly more expensive and therefore potentially prohibitive.

The RIS itself identifies the negative impacts of access to justice in the proposals and presumes a substantial drop in the numbers of people seeking to use VCAT. It then proceeds to adopt the second most prohibitive option in terms of access to justice (only an immediate fee hike would be more regressive). The least problematic option in terms of access to justice is a modified version of the status quo.

It can be assumed that decline in demand will hit those with less means first and hardest. That is unlikely to be large developers or other proponents.

VCAT is supposed to be different to courts

The access to justice issue fundamentally relates to the underlying purposes and rationale of the Tribunal as distinct from the regular courts. Tribunal systems generally have been established to create greater access to and equity in the justice system. They are intended to be cheaper, quicker, less formal and more efficient than the courts. They commonly deal with a range of disputes that are more appropriate for less formal and/or more specialised resolution, such as consumer, residential tenancy and planning cases.

The comparisons drawn in the RIS between VCAT and the courts are therefore inappropriate. While we are firmly of the opinion that the courts should also be more accessible and less expensive, there is a basic flaw in the logic of the RIS that the cost recovery principles and programs being applied to the courts should be applied in the same manner to the Tribunal.

Perversely, because the Tribunal is funded from a range of sources, including from income earned on statutory trust funds as well as government revenues and fees, it presently has considerably lower levels of government funding as a proportion of overall expenditure than the courts. The Supreme Court for example derives 76% of its funding from Government revenue, the Magistrates Court around 70%, and the Tribunal just over 43%. It is actually more diverse and efficient in its funding base than the courts already.

Impeding public interest litigation

Many leading decisions made at the Tribunal arise from cases prosecuted by individuals or community groups who are acting in the wider public interest, even where they may have personal interests at stake as well. In the circumstances of parties that the EDO represent, these may be cases serving to protect local conservation areas,

to protect threatened species, to stop polluting projects or destructive developments, or to obtain important information from government agencies. Other Community Legal Centres run similar cases in other lists, such as in relation to consumer protection, protecting the rights of people with disabilities or other human rights issues.

The public interest function of the Tribunal is also advanced by its role in and capacity to hold decision-makers to account (e.g. in the context of decisions made by public agencies) or to ensure justice and transparency in the operation of markets (e.g. in the context of consumer protection). Undermining access to the Tribunal by way of eroding affordability will also undermine accountability, balance and elementary justice. It will contribute to erosion in the confidence of the provision of 'popular justice.'

It is likely that, under the new fee regime, a number of important cases the EDO has run in recent years would not have proceeded because of prohibitive cost. For example, Tribunal fees in *Dual Gas v EPA*, a leading case in which we represented Environment Victoria and LIVE, who were opposing construction of a new coal-fired power station, would have run to around $40,000. Down near Portland we successfully assisted a local community group to oppose a poor development proposal to build on wetlands adjacent to sand dunes: *Printz v Glenelg Shire Council*. Pursuing a matter such as this would have cost well over $2000 in VCAT fees, rather than the $322 application it did cost them.

How can I make a submission?

A copy of the RIS is at the Department of Justice website: http://www.justice.vic.gov.au/home/the+justice+system/regulatory+impact+statements/ris+for+proposed+vcat+fees+regs, and you can make a submission by going to that site or by sending a submission to legalpolicysubmissions@justice.vic.gov.au.

Submissions can be made until 15 February 2013.