



Office of the  
Victorian Privacy  
Commissioner

Office of the Victorian Privacy Commissioner

Submission to  
The Victorian Civil & Administrative  
Tribunal

on its

***President's Review: "The role of VCAT in a changing world"***

5 June 2009

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## Introduction

### The Information Privacy Act and VCAT

The *Information Privacy Act 2000* ('IPA') is one of the 130 separate pieces of legislation that confer jurisdiction on the Victorian Civil and Administrative Decisions Tribunal (VCAT).

The IPA came into operation on 1 September 2001 and became enforceable on 1 September 2002. It establishes the office of Victorian Privacy Commissioner and contains a set of ten Information Privacy Principles which regulate the way in which Victorian government agencies deal with personal information other than health information.

The IPA is administered by the Victorian Privacy Commissioner. Under the Act, I am able to decline to entertain complaints on various grounds. If I do not decline complaints, I am required to try to conciliate them. If a complaint is declined or conciliation is not reasonably practicable or is unsuccessful, the applicant has the option of seeking de novo review by VCAT. VCAT therefore has an integral and crucial role to play in the framework established by the IPA.

### Access Issues

Since the commencement of the IPA, 71 matters have been referred from this Office to VCAT. Of these, VCAT has published only eight decisions substantively dealing with issues under the Act.<sup>1</sup>

In comparison, in NSW, the only other State jurisdiction with privacy legislation that confers jurisdiction on a tribunal, the Administrative Decisions Tribunal (ADT) has published 343

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<sup>1</sup> [Ng v Department of Education \(General\) \[2005\] VCAT 1054 \(6 June 2005\)](#); [WL v La Trobe University \(General\) \[2005\] VCAT 2592 \(8 December 2005\)](#); [CT v Medical Practitioners Board of Victoria \(General\) \[2005\] VCAT 1810 \(18 August 2005\)](#); [Smith v Victoria Police \(General\) \[2005\] VCAT 654 \(19 April 2005\)](#); [Little v Melbourne CC \(General\) \[2006\] VCAT 2190 \(30 October 2006\)](#); [M v Department of Human Services \(General\) \[2009\] VCAT 456 \(23 March 2009\)](#); [Dodd v Department of Education and Training \(General\) \[2005\] VCAT 2207 \(21 October 2005\)](#); [Whitfield v Greater Bendigo CC \(General\) \[2005\] VCAT 1756 \(23 August 2005\)](#)

decisions dealing with the *Personal Information and Privacy Protection Act 1998* (NSW) since that Act commenced in July 2000.<sup>2</sup>

While there are no doubt a range of reasons for this, including the different complaints mechanisms under the two statutes and the fact that the NSW Privacy Commissioner does not play an active role in conciliating most complaints, the difference is still striking. It means that a body of jurisprudence concerning the IPA is yet to develop.

Some difficulties in applicants accessing VCAT may be at least partially responsible. In my experience, many of these difficulties involve operational matters and will be dealt with in more detail under that heading, below. In particular, the lack of easily accessible, competent advice on the IPA and VCAT procedure is reported by complainants as a substantial hurdle in approaching VCAT and presenting their case. The level of community awareness of the role of VCAT and how it operates also appears to be fairly low.

## **Operational Issues**

Complainants whose matters have been referred to VCAT have reported that they feel confused, intimidated and unsupported when attempting to represent themselves at VCAT. This is exacerbated by the fact that respondents are invariably represented by in house government lawyers, the Victorian Government Solicitor's Office or private lawyers.

Complainants also report that they find VCAT processes overwhelmingly legalistic. This includes even the earliest stages of VCAT matters, with initial correspondence often couched in legalistic language and Directions Hearings conducted in very formal surroundings – invariably a Hearing Room – and often in an adversarial, formal and legalistic way. This reportedly leaves complainants feeling disempowered, confused and detached. In at least some cases, this would appear to have resulted in the applicant discontinuing or withdrawing their VCAT application.

In the two matters in which this Office has intervened under Section 40A of the *Victorian Civil and Administrative Tribunal (VCAT) Act 1998*, staff members of this Office have directly observed this. The proceedings were quite formal, with the VCAT Member located on the bench and the applicant and respondent some distance away at the bar table. The

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<sup>2</sup> See <http://www.austlii.edu.au/au/cases/nsw/NSWADT/>. In addition, three decisions on the Personal Information and Privacy Protection Act have been made by the NSW Court of Appeal: [Vice-Chancellor Macquarie University v FM \[2005\] NSWCA 192 \(10 June 2005\)](#), [Director General, Department of Education and Training v MT \[2006\] NSWCA 270 \(29 September 2006\)](#), [Ombudsman v Koopman Anor \[2003\] NSWCA 277 \(29 September 2003\)](#)

discussion was also quite formal and legalistic, with the applicant being asked questions about the legislation and VCAT's jurisdiction which would seem, in the circumstances, inappropriate. While it would be unreasonable to expect that VCAT Members are fully across every provision of all 130 statutes that confer jurisdiction on VCAT, this reinforces the fact that discussion of statutory provisions and jurisdictional issues should, in my view be avoided at so early a stage of proceedings, especially before any attempt at mediation is undertaken.

This contrasts with the experience of one staff member of this Office, who previously practised law in NSW. In that jurisdiction, the initial proceeding at the ADT is described as a "Planning Meeting" and is not usually held in a hearing room, but instead in a small room, around a meeting table. This facilitates a more participative discussion of the issues between the two parties and the desired outcomes, without necessarily examining questions of statutory interpretation or jurisdictional issues. Some move toward a less formal approach, at least in the early stages of matters, would be beneficial.

## **Alternative Dispute Resolution (ADR)**

Privacy disputes are particularly suited to resolution using ADR. This ensures the process is inherently private and can be more easily fitted to the particular facts and circumstances of the dispute. For that reason, it would be extremely desirable for ADR to be a compulsory step in every dispute under the IPA referred to VCAT. I have no direct experience of the ADR process at VCAT, as even where this Office intervenes in a matter, it does not participate in mediation or other forms of ADR. However, in my experience of conciliating complaints under the IPA, limiting both the legalistic approach and legal representation during ADR can be beneficial. In particular, legal practitioners who do not have sufficient training or experience in ADR can often be detrimental to the process.

I would encourage VCAT to continue to play a leading role in promoting the advantages of ADR in the general community and to take whatever steps necessary to ensure that ADR in VCAT is genuinely participatory and is as flexible and informal as possible.

HELEN VERSEY  
Victorian Privacy Commissioner