PRIVACY COMPLAINTS AT VCAT

A privacy complainant may request that their complaint be referred to the Victorian Civil and Administrative Tribunal (**VCAT**) by OVIC, if OVIC makes a decision that:

* the complaint should be declined under section 62(1) of the Privacy and Data Protection Act 2014 (**PDP Act**);
* conciliation is not reasonably possible; or
* conciliation has been attempted, but has failed to result in an agreement.

OVIC will provide a notice to the complainant and respondent if this occurs. A complainant then has 60 days to direct OVIC in writing to refer the complaint to VCAT for a determination.

WHAT IS VCAT?

VCAT is a Tribunal which is independent of OVIC. It hears and decide disputes about a range of issues including information privacy.

Information privacy complaints are heard in the VCAT Human Rights List. A VCAT member who is legally qualified hears privacy complaints.

WHAT IS THE PROCEDURE FOR HEARING COMPLAINTS IN VCAT?

OVIC referral to VCAT

Following a complainant’s written request, OVIC will send to VCAT a copy of the original complaint (either a complaint form or the letter/email of complaint) or a Complaint Outline prepared by OVIC staff.

OVIC will also provide VCAT with contact details of both parties so that VCAT can correspond with them. VCAT will then contact the parties directly to schedule a ‘directions hearing’.

Directions Hearing

A directions hearing is not the full hearing for the complaint. It is a short hearing where the VCAT member decides how the case should be managed and how much time it will take.

The VCAT member considers matters such as what the complaint is about; how many witnesses may be called, and how much time the parties believe they will need to present their arguments. The member will also set key dates including deadlines for the parties to send documents to each other and the date of any mediation or compulsory conference. You can find out more about directions hearings on the [VCAT website](https://www.vcat.vic.gov.au/the-vcat-process/types-of-hearings/directions-hearings).

Mediation or Compulsory Conference

In most cases, VCAT will set a date for the parties to attend either a mediation or compulsory conference before a full hearing. This gives the parties an opportunity to resolve the case without proceeding with the full hearing.

Mediations are private meetings where parties come together to discuss ways to reach an agreement with the help of a mediator. Rather than making a decision on the case, the mediator facilitates a discussion between the parties with the aim of settling the matter without a VCAT hearing. The mediator might be a VCAT member or an accredited mediator appointed by VCAT.

Compulsory conferences are conducted by a VCAT member and are an opportunity for both parties to confidentially discuss ways to resolve the complaint. Unlike a hearing, the VCAT member does not make a decision on the complaint during a conference. Reaching an agreement at a conference is a confidential and faster way to resolve a complaint. Even if the parties do not agree on every aspect of a complaint at a conference, participating in one can make a hearing much shorter.

You can find out more about mediations and compulsory conferences on the [VCAT website](https://www.vcat.vic.gov.au/the-vcat-process/mediations-and-compulsory-conferences).

If the parties agree to resolve the complaint at a mediation or compulsory conference, the case will be closed. If not, the next step will usually be to proceed to a final hearing.

Final Hearing

At a final hearing, the parties present their case, ask questions, and provide evidence. While hearings at VCAT are less formal than a traditional court, parties should still expect to:

* call or give evidence on oath or by affirmation;
* ask questions of witnesses and be asked questions themselves;
* present their own arguments; and
* answer questions put to them by a VCAT member.

You can find more information about preparing for final hearing on the [VCAT website](https://www.vcat.vic.gov.au/the-vcat-process/prepare-to-come-to-vcat/prepare-for-the-hearing).

HOW DOES VCAT ASSESS WHETHER THERE HAS BEEN AN INTERFERENCE WITH PRIVACY?

At the final hearing, it is the Complainant who bears the ‘burden of proof’. That is, the Complainant must give VCAT evidence to show that the organisation interfered with their privacy by breaching one of the IPPs.

For example, to prove that IPP 2 – the Use and Disclosure principle – has been breached, the Complainant will generally need to show that the use or disclosure occurred, and that it took place in a way not permitted by IPP 2.

In terms of the ‘standard of proof’, in civil cases in Australia, the standard is ‘the balance of probabilities’. This means that the finder of fact, in this case VCAT, must be satisfied that it is more likely than not that the conditions required to establish the party's case exist.

Under section 98(1)(b) of the VCAT Act, VCAT ‘is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures’. In practice this can mean that the Tribunal may factor in the difficulty of producing definitive proof and may give a complainant the benefit of the doubt.

WHAT CAN VCAT DECIDE?

After the final hearing, VCAT will make a decision. It will usually issue its reasons in writing.

Possible outcomes of the hearing include:

* dismissal of all or part of the complaint;
* uphold the complaint but take no further action;
* order the respondent to stop or not repeat the acts complained of;
* order the respondent to take some action that will redress any loss or damage suffered by the complainant; and
* order the respondent to pay the complainant compensation for loss or damage suffered by the complainant.

CAN VCAT DECISIONS BE APPEALED?

If any party disagrees with the VCAT decision they may appeal questions of law to the Supreme Court of Victoria.

WHO ARE THE PARTIES TO A COMPLAINT BEFORE VCAT?

The complainant and respondent are the parties to the complaint. Once a complaint has been referred to VCAT, OVIC will usually have no further direct involvement. OVIC will not provide any advice to either party in relation to VCAT proceedings.

In limited circumstances, OVIC may become an independent party to a proceeding before VCAT. This may occur if VCAT decides to join OVIC or if OVIC seeks to be joined. OVIC will only seek to be a party when the case involves a question of law under PDP Act; when the proceeding may have a significant impact upon the interpretation of the PDP Act; or when it is otherwise in the public interest.

Even in the rare circumstances where OVIC is a party to proceedings, OVIC will act as an independent and expert participant. As such, OVIC may make submissions on questions of law, policy and the public interest as they relate to privacy and the PDP Act, but will not advocate for or assist either party.

In some cases before VCAT where it is not a party, OVIC may monitor proceedings. This may involve OVIC receiving relevant documents from VCAT including copies of Orders and Notices of Hearings. It may also involve OVIC staff attending to observe VCAT hearings.

ARE THERE ANY COSTS INVOLVED?

There is no application fee for bringing a privacy complaint to VCAT.

For other costs, the general rule is that each party pay their own costs of the proceedings irrespective of the result. However, in some cases, VCAT may make an order that the unsuccessful party pay some or all the legal costs of the successful party.

All costs and compensation awarded to a party shall be a debt due to that party and recoverable by legal action.

IS IT NECESSARY TO BE LEGALLY REPRESENTED?

You do not need a lawyer to bring a case at VCAT – you can present your case yourself.

However, VCAT is a legal process and parties may prefer to seek legal assistance if that is possible. It is for the parties to decide themselves if they wish to be legally represented at VCAT. OVIC cannot provide complainants with legal advice or other help at VCAT.

Can VCAT keep a complainant’s identity private?

Usually VCAT files, hearings and decisions are open to the public and media. Decisions may be published on the Australasian Legal Information Institute website, and may include information that the complainant has provided to VCAT during the case. VCAT cases usually names the parties, including the complainant.

In certain circumstances VCAT can make an order to keep a complainant’s personal information confidential.

If you wish to apply for confidentiality, you must do so before VCAT makes any orders. Find out more about [applying for confidentiality at VCAT](https://www.vcat.vic.gov.au/the-vcat-process/prepare-to-come-to-vcat/apply-for-confidentiality).