

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NOS. R2018/39544,
R2018/41829 & R2019/170

CATCHWORDS

Victorian Civil and Administrative Tribunal Act 1997 – s 146 – whether to permit media organisation, which is not a party in relevant VCAT proceedings, to inspect and copy documents on VCAT three proceeding files

LANDLORD (R2018/39544)	Csc1957 Investments Pty Ltd
TENANTS (R2018/39544)	Tom Karas & Irene Meletsis
FILE ACCESS SEEKER	The Herald and Weekly Times Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President I. Proctor
HEARING TYPE	Directions Hearing
DATE OF HEARING	16 August 2019
DATE OF ORDER & WRITTEN REASONS	29 October 2019
CITATION	Csc1957 Investments Pty Ltd v Karas & Or (Residential Tenancies) [2019] VCAT 1650

ORDERS

- 1 Under section 146 of the *Victorian Civil and Administrative Tribunal Act 1998*, the Tribunal orders that subject to the Tribunal giving leave, no person other than the parties in this proceeding may inspect and copy documents on the VCAT proceeding files R2018/39544, R2018/41829 and R2019/170.
- 2 The Tribunal directs that The Herald and Weekly Times Pty Ltd may not inspect and copy documents on proceeding files R2018/39544, R2018/41829 and R2019/170.

Ian Proctor
Deputy President

APPEARANCES:

For the Landlord:	Mr S. Charter
For the Tenants:	In person
For HWT	Mr C. Jankie, Solicitor

REASONS

Introduction

- 1 This decision concerns an application by a journalist from the Herald Sun for access to three VCAT case files¹ concerning disputes between a landlord and tenant in VCAT's Residential Tenancies List.
- 2 The issue to decide was whether, with s 146(3) of the *Victorian Civil and Administrative Tribunal Act 1998 (VCAT Act)* creating a right for any person to inspect and copy material in VCAT case files, I should, on the basis of the landlord and the tenants' objections, in the circumstances of these cases, make a direction, under s146(4)(b), preventing HWT from inspecting and copying the files.

Background

- 3 On 12 November 2018, VCAT received an application from Csc1957 Investments Pty Ltd (**the Landlord**), concerning a rented premises (**the Premises**) in Collingwood. The landlord sought possession of the Premises because it intended to sell the Premises. This became VCAT Case R2018/39544. While the heading to these orders and reasons refers primarily to this case, the reasons also apply to the other two cases following. The same orders are made in each case.
- 4 On 28 November 2018, VCAT received another application from the Landlord seeking possession of the Premises, on the basis that the tenants, Mr Karas and Ms Meletsis (**the Tenants**) were behind in the rent. This became VCAT Case R2018/41829.
- 5 On 2 January 2019, VCAT received an application from Mr Karas alleging that the Landlord, had without legal authority changed the locks and taken possession of the Premises. This became VCAT Case R2019/170.
- 6 In mid-January 2019, the application concerning sale of the Premises was withdrawn. On the morning of the hearing of the other two applications in late February 2019, the parties advised VCAT they had settled their disputes. Consent orders were made without evidence being presented.
- 7 The Tenants conceded the tenancy would end and the Landlord agreed to give the Tenants opportunity to collect furniture and personal effects from the Premises.

File access request

- 8 In July 2019, VCAT received a request from a journalist working for the Herald Sun, which is owned by The Herald and Weekly Times Pty Ltd (HWT), seeking access to the VCAT case files concerning the three cases.

¹ The VCAT Act refers to "proceeding files".

- 9 The request was referred to me as Deputy President and head of VCAT’s Residential Tenancies Division. VCAT wrote to the Landlord and Tenants asking their views on file access. They objected. VCAT advised HWT, which advised it continued to seek file access. HWT’s file access request was scheduled for hearing on 16 August 2019.

Applicable law

- 10 Section 146 of the VCAT Act says:

146 Proceeding files

- (1) The principal registrar must keep a file of all documents lodged in a proceeding until the expiration of the period of 5 years after the final determination of the proceeding.
- (2) A party in a proceeding may inspect the file of that proceeding without charge.
- (3) On paying the prescribed fee (if any) any person may—
 - (a) inspect the file in that proceeding; and
 - (b) obtain a copy of any part of the file.
- (4) The rights conferred by this section are subject to—
 - (a) any conditions specified in the rules;
 - (b) any direction of the Tribunal to the contrary;
 - (c) any order of the Tribunal under Part 5 of the Open Courts Act 2013;
 - (d) any certificate under section 53 or 54.

- 11 Concerning s 146(4)(a), the *Victorian Civil and Administrative Tribunal Rules* 2018 do not place any conditions on s 146.

- 12 VCAT’s, Practice Note – PNVCAT1 – Common Procedures, says in part under the heading “Can I Keep Information Confidential from Other Parties or the Media?”:

In general, Tribunal files are available for public inspection and Tribunal hearings are open to the public. ...

Parties should be aware that, when they file an application, documents or evidence with the Tribunal, or produce documents or give evidence at a hearing, that material may be available for inspection by other parties and members of the public, including the media, unless it is protected information under certain specified statutory exemptions.

In limited circumstances the Tribunal may on its own initiative make, or a party may request an order that access to specific document(s) be restricted on the basis of confidentiality, including ...

an order that access to the Tribunal file be closed or restricted, in whole or in part, under s 146 of the Act;

- 13 Concerning VCAT's power to make a direction under s 146(4)(b), in *Herald and Weekly Times Pty Ltd v Victorian Civil Administrative Tribunal & Ors* [2006] VSCA 7, Maxwell P in the Supreme Court of Victoria Court of Appeal said, at [26]:

... The regulation of access to files which s 146(4)(b) contemplates does not assume, less still necessarily involve, any implied limitation on the power to give a direction. On the contrary, the effective regulation of access would seem to assume the existence of a wide and general power, exercisable at any time and in any circumstances, as occasion requires. Moreover, the generality of the language in subparagraph (b) – "any direction of the Tribunal to the contrary" – allows of no reading down.

- 14 A year earlier Morris P at VCAT said in *Fletcher v Salvation Army of Australia* [2005] VCAT 1523:

This brings into question the right of a person who is not a party to a tribunal proceeding, such as a newspaper company, to obtain access to tribunal files before a mediation takes place. In recent times this has been a matter of contention. It is vital that the relevant provisions of the *Victorian Civil and Administrative Tribunal Act 1998* be amended to protect the mediation process and to provide reasonable privacy to individuals engaged in civil or administrative disputes. Certainly the process of hearing and determining disputes should be held in public; but it has been widely recognised that the principle of public justice does not extend to providing unlimited public access to documents filed with a court or tribunal.

- 15 HWT drew my attention to the High Court of Australia's decision, *Hogan v Hinch* [2011] HCA 4, where the High Court found that suppression orders under the *Serious Sex Offenders Monitoring Act 2005* (Vic) were not beyond power due to the operation of the Australian Constitution.

- 16 Noting that the decision focused on the reporting of hearings in open court, the Court in part said, at [27]:

..., a statute which affects the open-court principle, even on a discretionary basis, should generally be construed, where constructional choices are open, so as to minimise its intrusion upon that principle. That approach, which accords with the principle of legality, informs the construction of s 42 in this case. The section must also be construed so as to minimise its intrusion upon common law freedom of speech. The Charter [of Human Rights and Responsibilities Act 2006 (Vic)] requires that so far as it is possible to do so consistently with their purpose, such provisions "must be interpreted in a way that is compatible with human rights." Relevant human rights set out in Pt 2 of the Charter include the right to freedom of expression and the right to participate in public life. There are other rights which may be affected by a suppression order. They include the right of children to be protected and the right of privacy.

- 17 Discussions of the open court principle in the common law, includes limitation on access to court files.
- 18 In a 2010 article in the Journal of Judicial Administration, titled “Public Access to Court Records in Australia: An International Comparative Perspective and Some Proposals for Reform: (2010) 19 JJA 197, J. Bellis surveys access by non-parties to court files in Australia and internationally. Under the heading, “Public Access to Court Records: The Case for Reform” she says in part, at page 221:

The current regime governing public access to court records in Australia is complex and confusing, based on an amalgam of statutory provisions, court rules and practice directions that are difficult to understand in a coherent manner. ... the rules governing public access to court records are themselves often inaccessible ...

Public access is also subject to broad and largely unstructured discretion.

... rules governing public access to court records vary widely not only as between jurisdictions, but as between and within courts in the same jurisdiction.

Advocates for reform argue that access to all court records that have been admitted and relied on in the trial process is necessary for a complete and accurate scrutiny, and timely reporting of the judicial process, which the open court principle is intended to ensure

- 19 Under the heading, “Which Court Records Are Publicly Accessible as of Right”, Ms Bellis continues, at page 223:

A clear definition of which court records are publicly accessible as of right will be central to a more transparent, coherent and fair regime that balances the public interests in open courts with other social values and interests, including personal privacy and security. From a legal perspective, in Australia there is neither a common law nor constitutional right of public access to court records founded in either freedom of speech or freedom of the press. Rather, the open courts principle is intended to ensure public confidence in the administration of justice and the courts by allowing for informed scrutiny of the judicial process. It has been held that the requirements of open courts apply once a judge is actively engaged in the trial or proceeding.

Accordingly, in Australia, as in New Zealand and the United Kingdom, the criterion that has been most consistently applied to determine whether public access should be allowed is whether the court record has been “deployed” in open court, that is, whether the record has been admitted in the judicial proceedings.

... in reviewing the submissions made by Australian press councils and media organisations in recent years, there is little to suggest that media representatives or others in Australia are advocating significantly increased rights of access to materials in court files prior to a matter being heard at a committal or a trial. ... Contemporary case

management and court practices are actively designed to promote case settlement, thereby avoiding the costs, not only to the parties but also to the court system, of a trial. It is a fair question whether public access to court records that never become the subject of judicial consideration is necessary to fulfil the generally accepted objective of open courts.

- 20 In a 2017 journal article, “Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings” ((2107) 26 JJA 76), S. Roddick says:

The current position in Australia is difficult to summarise, as each jurisdiction has its own approach to non-party access to documents on the court record. In some jurisdictions, decisions about non-party access are made by Parliament and enshrined in legislation, thereby depriving the courts of any input except to the extent that they are given power to depart from the general position laid down in the legislation. Some statutes afford non-parties a right to inspect and copy certain enumerated documents from the time they are filed; others do not confer a right of access until the document has been used in the proceeding; yet others do not permit non-party access at all. ...

Where the matter is one for the discretion of the judge, the critical factor is often whether the document to which access is sought has been deployed in the proceeding. If it has, it is generally regarded as having passed into the public domain. However, unless it can be inspected by non-parties, the notion that it has passed into the public domain is more theoretical than real. Accordingly, in such circumstances, courts are likely to regard non-party access as a corollary of open justice. As Spigelman CJ observed [*John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101, [65]]:

The principle of open justice is not engaged at the time of the filing of the proceedings. It is only when relevant material is used in court that it becomes relevant.

- 21 The Media and Internet Law and Practice loose-leaf service (Thomas Reuters Westlaw), updated as at August 2018, says concerning access to court files and exhibits:

The courts have recognised the discretion to allow access to documents should be exercised in accordance with open justice principles. Thus, access to documents which are required to understand what has occurred in open court must ordinarily be given. ... In *John Fairfax Publications Pty Ltd v Rich* (BC 200200924), after reviewing the recent authorities, Bartlett J stated that:

... Decisions about access to documents in court files are to be determined first and foremost by reference to principles of open justice and the due administration of justice that require an appropriate measure of cooperation by the court with those sections of the media which seek to report proceedings before the court. Those principles focused most sharply on the situation where a trial has taken place or is at least in progress. The

proceedings which must be opened and to which access in the public interest must be guaranteed are proceedings that actually take place in court. It is in that context that the court has an undoubted and clear role to play in assisting the media to obtain a full and fair understanding of what has transpired so that informed reporting can occur without incomplete appreciation of source materials and in a way which enables the various matters which have come out in court, whether or not actually spoken aloud to be understood in the context of the case ...

Notwithstanding these principles, courts are often reluctant to provide access to pleadings and other documents, such as affidavits which have not been read in court, prior to trial. ...

- 22 The above discussion concerns common law access to documents on court files, whereas s 146 gives non-parties a statutory right to file access, subject to the Tribunal's discretion.
- 23 Dove VP discussed this distinction in *O'Sullivan v Firearms Appeals Committee* [2004] VCAT 1661. HWT sought access to a VCAT file after the matter had been heard in open tribunal. HWT sought to report on matters which are heard in open tribunal and submitted that full and accurate reporting would be inhibited without access to documents which had been tendered in evidence but not otherwise read out in open tribunal.
- 24 Dove VP commented that the Committee's case was made up entirely of documents tendered in evidence in the case and the hearing would be largely incomprehensible without access to the documents. He commented that s 146 "appears to provide a statutory abrogation of the common law position". Dove VP, with reference to Federal Court of Australia authority, permitted file inspection.
- 25 The statutory regime for file inspection by non-parties of VCAT files was created in 1998, before other legislation came into force in Victoria. I have considered the following legislation, concluding it has limited relevance here.
- 26 The *Open Courts Act 2013 (OCA)* is of limited relevance to the issue of VCAT file inspection, where evidence has not been put before VCAT during a hearing. The main purposes of the OCA is to reform the law surrounding suppression orders and the making of closed court orders with a presumption in those circumstances in favour of disclosure of information. In that context, the OCA does not limit or otherwise affect the making of an order by VCAT that prohibits or restricts access to a VCAT file; see s 7(1)(d)(iii).
- 27 Neither does the *Charter of Human Rights and Responsibilities Act 2006* have significant relevance here. While section 13 says that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with and not to have his or her reputation unlawfully attacked, permitting HWT to inspect the files here

and HWT then perhaps reporting their contents, on no view would amount to arbitrary or unlawful interference or attack. While section 17 speaks of families being a fundamental group unit of society entitled to be protected by society and the state and every child having the right, without discrimination, to such protection as is in his or her interests and is needed by him or her by reason of being a child, the discretion conferred by s 146 in any case allows for accommodation of objectively justified concerns.

- 28 Nothing in the *Privacy and Data Protection Act 2014* applies in respect of the collection, holding, management, use, disclosure or transfer of information related to the exercise of judicial or quasi-judicial functions by a court or tribunal; see s 10.
- 29 The VCAT Website relevantly says that information held on VCAT case files is available to any person who identifies a particular case and asks to inspect the file, with exceptions, and that requests for Guardianship List files will be referred to a VCAT member to decide access. This description is incomplete. Requests by non-parties for access to VCAT's Review and Regulation List files are also referred to a VCAT member to decide access.
- 30 Access to VCAT files is often denied to non-parties, such as where allowing access would unreasonably intrude into a person's privacy concerning health matters (evidence on VCAT files may include medical reports and medical files) and to maintain the privacy of people who make complaints to regulators, such as patients who complain about health practitioners to the Australian Health Practitioners Regulatory Authority.
- 31 When the Residential Tenancies List received HWT's request, it was referred to me because non-party requests are rare. I adopted the procedure used in the Review and Regulation List.

The hearing

- 32 At the hearing, HWT was legally represented, the Tenants appeared in person. Mr Shane Charter, associated with the Landlord, appeared.
- 33 HWT made legal submissions emphasising the right to inspect and copy the file conferred by s 146 and submitting that there were no significant countervailing factors which should lead VCAT to make contrary directions. It submitted that the parties had decided to engage in litigation, fully aware that this may bring them to the attention of the media, and it is now in the interest of transparency and open justice that HWT be permitted to inspect the files. HWT in part cited legislation discussed above. HWT cited and provided copies of most of the court and VCAT decisions discussed above.²

² The journal articles a result of my research with my decision reserved.

- 34 The Tenants gave evidence that they had rented the Premises as their home. The Landlord had locked them out of the property, leading to them taking legal action at VCAT. Apart from general concerns that their privacy be respected, their particular concern was adverse impacts on their children of further publicity. They submitted this was a private tenancy and no one's business, other than the Landlord and them. They cited various legislation, in part referred to above. They complained, providing no evidence in support, that HWT had in the past exposed their personal information concerning them, characterising this as "unsavoury attacks" against their family, their home and their business.
- 35 Mr Charter described himself as having an interest in the Landlord company. He objected to file access as an intrusion on his privacy, describing HWT pursuing a "baseless vendetta against him for seven years", alleging media coverage led to break-ins where his family were living.
- 36 With Mr Charter self-represented, and with no evidence before VCAT concerning the HWT reporting concerning him, I reserved my decision. I gave opportunity for Mr Charter to provide documentary evidence, the Tenants to provide legal precedents (as they requested), and HWT to provide a written response. This was on the basis that, unless HWT sought a further hearing, I would then provide orders and reasons.
- 37 Mr Charter provided material. VCAT did not receive any documents from the tenants. HWT made a brief written reply submission, not seeking a further hearing.

Evidence

- 38 The three files include affidavit evidence concerning disputes between the parties and involving others.
- 39 Following the hearing, Mr Charter provided excerpts from media publications being:
- A news.com.au 10 May 2013 article entitled "Shane Charter Sells Mansion to Pay Legal Bills, describing the mansion as a "fortress home", giving the address and reporting a break-in at the home;
In an accompanying email, he alleged this media coverage, mentioning the first break-in, had likely resulted in a second break-in at the same home;
 - A Herald Sun 7 May 2015 article titled, "Biochemist Shane Charter Convicted of Trafficking Anabolic Steroids". The article describes Mr Charter as the "biochemist in the middle of the Essendon drug saga" being "arrested after returning from Thailand declaring he was carrying human growth hormone, a police raid on his home and Mr Charter as the "biochemist in the middle of the Essendon drug saga"

and being “placed on a community corrections order and convicted and fined \$2,500”;

In the same email, Mr Charter drew my attention to his lawyer in court being reported as saying that Mr Charter had been “the subject of intense media scrutiny and had received death threats following the Essendon saga”.

- A Herald Sun 5 May 2018 article, “Intruder With Knife Threatens Wife of Biochemist Shane Charter”, describing a masked man threatening his wife at their then family home. The article briefly described the incident, reported on business connections and described Mr Charter as, “a bodybuilder, biochemist and convicted drug trafficker who had a central role in the Essendon Football Club supplement saga”;

Mr Charter pointed to media coverage before the threat to his then wife.

- A 16 January 2019 article in The Courier, “Brothers in ‘Bizarre’ Victorian Property Dispute”. The article identifies Mr Charter, a brother of his, Mr Karas and Ms Meletsis, and describes a related hearing before the Supreme Court of Victoria, summarising the dispute between the parties. The article reports the Court deciding VCAT should deal with the dispute.

Mr Charter advised that following this article, which referred to “the Nicholson Street property in Fitzroy”, the Premises was broken into in June 2019. He provided a ‘Notice to the Victim’ a form used by Victoria Police which it provides to victims of crime. The notice recorded a break-in at the Premises.

Submissions after the hearing

40 HWT submitted:

- a) Section 146 of the VCAT Act gives HWT and any other non-party a right to inspect VCAT case files and here, there was no reasonable basis to restrict that right;
- b) Mr Charter’s evidence does not establish that any publication by HWT is in any way correlated with the, regrettable, break-ins related to him. HWT noted that it had never published such addresses with respect to Mr Charter;
- c) Mr Charter’s evidence demonstrates the extent of his public profile and the consequent public interest in the litigation to which he was a party; and

d) Issues of privacy, such as any address of Mr Charter held on the VCAT files, can be dealt with by way of a proceeding suppression order under the *Open Courts Act 2013*, prohibiting publication of relevant addresses.

41 Mr Charter submitted his privacy would be unreasonably interfered with, on the basis of his previous experiences, if HWT's file access request was granted and reporting would create a risk of further risk to him, given his experience of break-ins at properties following HWT reporting.

Decision

42 If this case had proceeded to a VCAT hearing, which would have been held in public, with the documents on the file tendered into evidence, HWT's file access request would have likely been granted. This would have been in the context of likely orders under the OCA, prohibiting reporting of the Premises address, addresses of those concerned and the names of the children.

43 However, here the parties settled their dispute before the VCAT hearing got underway in substance.

44 As the Court of Appeal said in *HWT v VCAT*, effective regulation of VCAT file access includes broad discretion to make a contrary direction, exercisable at any time and in any circumstances, as occasion requires. That said, such discretion is to be exercised in the context of the right to file access that s 146 provides to non-parties. The discretion is also best exercised with reference to long-standing common law principles, as summarised above both in the deciding cases and in learned commentary.

45 There is strong public interest in supporting the process of private negotiation by which parties settle their disputes before reaching hearing, where the parties, after the case is completed, object to file access on the basis of their privacy being adversely affected.

46 The parties' objections in this case to having their privacy interfered with appear to be reasonable, particularly the Tenants' objections concerning potential adverse effect on their children.

47 Having read the material on file, I am of the view that nothing in this material is of public interest in terms of relevance to previously reported matters, to the extent that I am aware of them.

48 I do not refuse HWT's file access request based on Mr Charter's submission that his reporting led to the break-ins he complains of. That is nothing more than speculation.

49 As it happens, a summary of the dispute between the parties, is already in the public arena, by way of reporting of the related Supreme Court hearing, referred to above.

50 Taking these issues into consideration, I have refused HWT access to the three VCAT files.

Ian Proctor
Deputy President