

Victorian Civil and Administrative Tribunal

PRACTICE NOTE - DOMESTIC BUILDING LIST

PNDB1 – GENERAL PROCEDURES

(replaces Practice Note dated 7 October 1998)

1. This Practice Note applies to the practice of the Tribunal in exercising a function allocated by the Rules to the Domestic Building List of the Civil Division and comes into effect on 11 July 2005.
2. All references to the Act means the *Victorian Civil and Administrative Tribunal Act* 1998, to the Rules means the *Victorian Civil and Administrative Rules* 1998 and to the DBCA means the *Domestic Building Contracts Act* 1995.
3. All references to the Deputy President mean the Deputy President in charge of the Domestic Building List for the time being.

4. Times

Where times are specified in this Practice Note they are indicative only and may be varied at the absolute discretion of the Tribunal.

5. Communications with Tribunal and other parties

5.1 Communications with the Tribunal

All written communications to the Tribunal must be addressed to the principal registrar quoting the number given by the Tribunal to the relevant proceeding.

5.2 No direct contact with Tribunal Members

Any communication by a person in relation to a proceeding with the Tribunal must be through the registry. A person must not contact a member of the Tribunal directly in relation to a proceeding.

5.3 Notification of communications to all parties

A party who at any time makes any written communication to the Tribunal must at the same time –

- a) serve a copy of that communication on all other parties; and
- b) notify the Tribunal in writing that they have done so. It is sufficient for the communication to state that a copy has been sent to the other parties.

6. Commencement of a Proceeding

- 6.1 A party wishing to make application to the Tribunal must file three (3) copies of an application in the form of Form 8 as prescribed by the Rules.

- 6.2 Where practicable (and in all cases where the applicant is legally represented) the application shall be accompanied by Points of Claim, or otherwise by a document setting out in narrative form, the details of the contract, the site address, the claims made, any incomplete and/or defective works, the amount claimed and the relief and remedies sought.
- 6.3 A respondent who wishes to lodge a counterclaim may do so by filing Points of Counterclaim and paying the prescribed fee. Points of Counterclaim may accompany Points of Defence in the one document.
- 6.4 A respondent who wishes to lodge a counterclaim should do so promptly, and, in any event, where practicable, should advise the applicant of its intention to do so (together with details of the counterclaim) at least seven (7) days prior to any mediation.
- 6.5 Where the claim relates to incomplete and/or defective building works a copy of any available expert report identifying such incomplete and/or defective works should accompany the application or Points of Counterclaim, as the case may be, and, where practicable, should be sent to the other parties at least seven (7) days prior to any mediation.
- 6.6 To avoid unnecessary applications for joinder under s60 of the Act as person/s whose interests are affected, all applications seeking a review of a decision of an insurer should, generally, include the building owner, the builder or owner builder as a party. Where they are not included as a party a covering letter advising the reasons the applicant believes they should not be a party should be forwarded to the principal registrar with the application.

7. Pleadings

- 7.1. Although the Tribunal is not a court of pleadings, Points of Claim or Points of Counterclaim should:
- (i) include fully itemised particulars of the claim and the relief or remedy sought;
 - (ii) clearly identify any incomplete and defective works (which may be by reference to an attached expert's report providing such report is clearly itemised);
 - (iii) where a standard form contract is referred to it is sufficient to refer to a particular clause of a specified contract and is not necessary to recite that clause in full unless the words are of particular significance.
- 7.2. Points of Defence should:
- (i) not contain bare denials;
 - (ii) set out the material facts relied upon, properly particularised;
 - (iii) include any set-off claimed.

- 7.3. In the interests of avoiding requests for particulars all necessary particulars should be provided in the Points of Claim, the Points of Counterclaim or the Points of Defence as the case may be. Where leave to request further particulars is ordered, the party in default may be ordered to pay all necessary costs in providing those particulars, including the costs of the request.
- 7.4. A request for further particulars may be made at any time without leave of the Tribunal. However, if a request is contested and subsequently disallowed costs may be ordered. A request:
- (i) must not contain a request for ‘the usual particulars’ or ‘the usual details’ – the particulars sought must be clearly specified;
 - (ii) must not be in the form of interrogatories;
 - (iii) particulars should be provided within fourteen (14) days of any request or as otherwise ordered by the Tribunal.

8. Dealing with Applications

- 8.1 Upon the filing of an application in the Domestic Building List the principal registrar shall classify the proceeding as:-
- (i) a small claim;
 - (ii) a standard claim; or
 - (iii) a complex claim.
- 8.2 The principal registrar shall then
- (i) in the case of a small claim set the proceeding down for hearing;
 - (ii) in the case of a standard claim refer the proceeding to mediation;
 - (iii) in the case of a complex claim refer the proceeding to a directions hearing.

9. Classification of Proceedings

- 9.1 Subject to the directions of the Deputy President, the principal registrar shall classify an application as:-
- (a) *a Small Claim* where:
 - (i) the amount claimed is less than \$10,000; and
 - (ii) the proceeding does not raise any complex issues of fact or law; and
 - (iii) it appears the hearing will not take longer than one day.
 - (b) *a Standard Claim* where:
 - (i) the amount claimed is more than \$10,000 and less than \$100,000; or
 - (ii) where an amount claimed is not specified in the application.
 - (c) *a Complex Claim* where:
 - (i) the amount claimed is more than \$100,000; or
 - (ii) the application raises complex matters of facts or law.

9.2 The proceeding may be reclassified upon receipt of a cross application or counterclaim at the discretion of the Tribunal, and any small claim hearing may be cancelled and the proceeding referred to mediation or to a directions hearing.

10. Dealing with proceedings once classified

10.1 Small Claims:

- (i) These will be listed for hearing on the first available date which, generally, will be not less than six (6) weeks after the date on which the application is lodged. A hearing time of two hours will be allowed unless the parties advise the principal registrar, in writing (at the time of making the application or immediately upon receipt of the Notice of Hearing) that further time will be required in which case they shall also provide their estimate of the hearing time.
- (ii) Parties must send copies of any experts' reports, quotations and/or invoices on which they seek to rely to the other parties at least seven (7) days prior to the hearing.
- (iii) Parties should bring to the hearing all evidence and documentation on which they seek to rely which may include:
 - the building contract and any written variations
 - quotations and/or invoices
 - expert reports
 - witnesses (including experts in person)
- (iv) Unless all parties agree legal representation will only be permitted by order of the Tribunal under s62 of the Act except as otherwise provided in s62 including where:
 - (i) the application is an appeal against a decision of an insurer who is entitled to be legally represented under s62(2)(g) of the Act; or
 - (ii) another party to the proceeding is a professional advocate.
- (v) Even where legal representation is permitted there should be no expectation that an order for costs will be made in favour of the successful party, in accordance with the provisions of s109 of the Act.

10.2 Standard claims:

- (i) These will be listed for mediation on the first available date which, generally, will be not less than five (5) weeks after the date on which the application is lodged.
- (ii) All parties are required to attend the mediation in person, or in the case of a company, by a representative who has personal knowledge of the issues in dispute, and who has written authority to settle.
- (iii) Should the mediation be unsuccessful the proceeding will be referred to a directions hearing, as soon as convenient, at which time directions will be

made for the further conduct of the proceeding including the setting of a timetable for completion of all necessary interlocutory steps and where practicable the setting of a hearing date.

10.3 *Complex Claims*

- (i) These will be referred to a directions hearing at which time directions will be made for the further conduct of the proceeding which may include referral to mediation or compulsory conference, the setting of a timetable for completion of all necessary interlocutory steps and, where practicable, the setting of a hearing date.

11. Directions hearings

- 11.1 A proceeding may be referred to a directions hearing by the Tribunal or at the request of any party to a proceeding.
- 11.2 The purpose of a directions hearing is to make orders or directions to facilitate the expeditious and just disposition of the proceeding.
- 11.3 At the initial directions hearing directions will be made for the further conduct of the proceeding including referral to mediation, a compulsory conference and/or the setting of a hearing date. Where practicable parties should confirm availability of all witnesses prior to attending the directions hearing, and should be in a position to indicate the likely number of witnesses, including experts they intend to call, and their estimate of the likely duration of the hearing.
- 11.4 Parties are expected to attend directions hearings personally unless they are legally represented in which case their legal representatives may attend on their behalf.
- 11.5 Where it is impossible for a party or their legal representative to attend in person, arrangements may be made with the registry for attendance by telephone. Attendance by telephone is not encouraged but may be permitted where it is impossible for a party to attend in person or by a representative. A party wishing to appear by telephone must provide a telephone contact number where they can be reached at the time scheduled for the directions hearing and for at least one hour following. All attempts will be made to contact the party at the time scheduled for the directions hearing, or as soon as practicable thereafter. If the party cannot be contacted on the number provided the directions hearing may proceed in their absence.
- 11.6 Failure to attend either personally or by a representative at a directions hearing may result in costs being ordered under s78 or s109 of the Act.

12. Consent directions in chambers for the future conduct of the proceeding

- 12.1 Consent directions may be made in chambers at the discretion of the Tribunal without the need to appear at a directions hearing providing:
 - (i) all parties are legally represented; and
 - (ii) the estimated hearing time is less than ten (10) days; and

- (iii) the directions are as set out in the Directions by Consent Form and signed by the legal representatives of all parties.
- 12.2 All consent directions will be referred to the presiding member for consideration, and the proceeding may still be referred to a directions hearing at their discretion.
- 12.3 Consent directions will not be made in chambers where:
- (i) the estimated hearing time is longer than ten (10) days; or
 - (ii) costs orders are sought (other than 'costs reserved'); or
 - (iii) for the referral of a proceeding to a Compulsory Conference.
- 12.4 If the proposed dates as set out on the Directions by Consent form result in a hearing date more than **four (4) months** away, the proceeding may be referred to a directions hearing for review of the dates.
- 12.5 It is expected that parties be ready to proceed on the day notified by the principal registrar as the date of the final hearing. Costs may be ordered where an adjournment is sought because a party is not ready to proceed on the date set down for hearing.

13. Joinder Applications

- 13.1 Any application for joinder of further parties, whether as respondent or joined party, should be made in a timely manner, on the Application for Orders/Directions form.
- 13.2 Such application for joinder should be accompanied by affidavit material in support together with draft Points of Claim.
- 13.3 A copy of such application together with the supporting material must be served by the applicant for joinder on all parties to the proceeding, and the proposed party (who must also be advised of the date and time of the directions hearing at which the application will be heard) by 12 noon at least four (4) business days prior to the directions hearing.
- 13.4 Should any party to the proceeding, or the proposed party, oppose such application for joinder they must, where practicable, file and serve affidavit material in reply by 12 noon at least two (2) business days prior to the directions hearing.
- 13.5 Where the proceeding relates to an appeal by an insurer or a builder of a decision of a warranty insurer, it is desirable that the owner or the builder as the case may be, is a party to the proceeding. Where they are not named as a party in the original application, orders for their joinder may be sought. Where the owner or the builder consents to joinder, orders in chambers will generally be made, otherwise the application for joinder should be made in accordance with the above procedure.

14. Urgent applications

- 14.1 Any application for urgent relief must be made by lodging an application (either an originating application or an Application for Orders/Directions) and should be

accompanied by affidavit material in support. Any such application must include all available contact details for all parties.

14.2. Where practicable, a copy of any such application together with the supporting material should be served on the other party/ies by 12 noon on the day prior to the day on which it is to be heard.

14.3. The principal registrar will send a Notice of Hearing to all parties noted on the application by the most expeditious means available but in any event the applicant for urgent relief must take all reasonable steps to notify the other party/ies of the time and date of the hearing.

15. Experts

15.1 Where experts are appointed they must prepare their reports in accordance with VCAT Practice Note 2. Expert reports which do not comply with this Practice Note may not be accepted into evidence, subject to the discretion of the presiding member.

16. Expert Appointments

16.1 From time to time the Tribunal may appoint an expert under s94 of the Act or a special referee under s95 of the Act.

16.2 It should be expected that the costs of any expert or special referee so appointed will be shared equally by the parties or as otherwise ordered by the Tribunal.

16.3 The expert or special referee will be requested to provide an estimate of their costs and the parties will be required to deposit their respective shares into the Domestic Builders Fund, or as otherwise ordered, before the expert or special referee commences any work under the appointment.

16.4 If any party fails to make the payment, as ordered, the proceeding will be referred to a directions hearing.

17. Meetings of Experts

17.1 From time to time the Tribunal may order a meeting of experts – either between the experts themselves with a joint report to be provided to the parties and the Tribunal, or facilitated by a mediator or Member. Such meeting may be ordered as part of a mediation or compulsory conference in the discretion of the Tribunal.

17.2 Parties and their legal advisors shall not attend a meeting of experts ordered by the Tribunal unless granted leave to do so by order of the Tribunal.

17.3 Where a meeting of experts is ordered as part of a mediation or compulsory conference process all discussions, concessions and agreements reached shall be on a ‘without prejudice’ basis and for the purpose of the mediation or compulsory conference only unless the parties agree otherwise.

18. Compliance with directions

- 18.1 Parties must comply with all directions and orders made by the Tribunal.
- 18.2 Subject to 18.3 following, where the parties wish to alter the timetable and leave is sought at a directions hearing, an Application for Orders/Directions must be filed and served, clearly setting out the amendments sought.
- 18.3 Where all parties consent in writing to the suggested amended timetable this will be considered by the Tribunal, and if approved, the orders made in chambers.
- 18.4 Where directions giving effect to an amended timetable result in an adjournment of the hearing date the parties may be required to attend at a directions hearing where the timetable will be reviewed and directions made for the further conduct of the proceeding.
- 18.5 Where a party fails to comply with directions, a directions hearing may be requested by a party or a compliance hearing may be convened by the principal registrar at which time the Tribunal may:
- (i) amend the timetable;
 - (ii) the proceeding may be dismissed or struck out if the non-complying party is the applicant, or may otherwise be determined as against the non-attending party under s78 of the Act;
 - (iii) order the party in default, or its representative, to pay costs including indemnity costs where appropriate under s109(3) or s109(4) of the Act;
 - (v) require any costs order to be satisfied before continuing with the proceeding;
 - (iv) make any other order that is just.

19. Witness statements

- 19.1 Witness statements will generally, be ordered for all proceedings where the duration of the hearing is estimated to be four or more days, or as otherwise ordered by the presiding member in his or her absolute discretion.
- 19.2 Where an expert report has been prepared in accordance with VCAT Practice Note 2 there is no need to prepare a witness statement unless further expert, or lay evidence is to be called from a particular expert.
- 19.3 A party will only be permitted to call evidence of any material facts not included in a witness statement with leave of the Tribunal. Where the hearing is delayed, costs may be ordered against the party seeking to call the additional evidence.
- 19.4 All parties must arrange for their witnesses to attend the hearing for the purposes of cross-examination unless advised by the other party/ies that they are not required.

20. Mediation

- 20.1 A proceeding may be referred to mediation under section 88 of the Act.

20.2 The conduct of the mediation shall generally be at the discretion of the mediator although it is to be expected that it will be conducted in accordance with the *VCAT Mediation Code of Conduct*.

20.3 Should a party fail to attend mediation the proceeding will be referred to a directions hearing.

21. Compulsory Conferences

21.1 Referral of a proceeding to a compulsory conference shall be at the discretion of the presiding member.

21.2 The purpose of a compulsory conference is as set out in section 83 of the Act.

21.3 The conduct of the compulsory conference shall otherwise be at the discretion of the presiding member.

21.4 All parties must attend a compulsory conference personally or be represented by a duly authorised person with personal knowledge of the issues in dispute, and who has unlimited authority to settle.

21.5 Should a party fail to attend a compulsory conference, the proceeding may be determined adversely to the absent party with appropriate orders being made, including orders as to costs, or the absent party struck out of the proceeding under s87 of the Act.

21.6 Where a party does not attend personally but is represented by a person who has limited authority only to settle, or where a party fails to comply with any directions made for the conduct of the compulsory conference, which, in the opinion of the presiding member, unfairly disadvantages the other party/ies or impedes settlement discussions, costs may be ordered against such party.

22. Settlement prior to mediation/compulsory conference/hearing

22.1 Where settlement has been reached parties must advise the principal registrar as soon as practicable.

22.2 Parties may apply for orders to be made by consent giving effect to the settlement reached between the parties which may include an order that the proceeding is struck out with a right to apply for reinstatement.

23. Hearings

23.1 It should be expected that orders will be made for the preparation of Tribunal Books and the provision of transcript for the hearing of all complex cases, and in other cases at the discretion of the presiding member. A list of appointed Court Recorders and Transcript Services is available from registry.

- 23.2 The responsibility for preparation of the Tribunal book will ordinarily be the applicant's but the costs of preparation will be costs in the cause.
- 23.3 The cost of providing transcript will be shared equally by the parties in the first instance but shall otherwise be costs in the cause.
- 23.4 All parties will be required to make opening statements at the commencement of the hearing.
- 23.5 In complex cases and otherwise as ordered by the Tribunal, parties must provide written outlines to each other party and to the presiding member of their opening statements at the commencement of the hearing. Where a written outline has not been prepared, the matter may be stood down at the discretion of the presiding member, to enable the preparation of such outline and costs may be ordered in respect of any wasted time.

24. Adjournments

- 24.1 Applications for adjournments are not encouraged and there should be no expectation they will be granted even where the parties consent to an adjournment. Where an adjournment is requested:
- (i) It should be made in writing addressed to the principal registrar and should be made as soon as practicable. Any request for an adjournment must be accompanied by copies of any supporting documentary evidence e.g. medical certificate, airline tickets, travel itinerary.
 - (ii) *Mediations* – all requests for adjournment of mediations should be made where practicable, at least 7 days prior to the mediation. If all parties consent, an adjournment will generally be granted. However, if one party objects the application for an adjournment will be considered by the Tribunal who will direct whether the mediation should proceed, be adjourned or the proceeding referred to a directions hearing. Generally, a maximum of two adjournments will be granted by consent and any further applications will be referred to a directions hearing, subject always to the discretion of the Tribunal.
 - (iii) *Compulsory Conferences* – as for mediations. If the adjournment of a Compulsory Conference necessitates amendments to the timetable these may be requested by consent but, subject to the discretion of the Tribunal, may be referred to a directions hearing.
 - (v) *Hearings* – applications for adjournment of hearings, will be considered by the Tribunal and it may be referred to a directions hearing.

24. Expedited Hearings

- 24.1 Where the amount in dispute (the application and the counterclaim combined) is less than \$30,000 and the estimated hearing time is three days or less, and no complex issues of law are involved, the parties may apply for, or the Tribunal may, of its own motion, order that the proceeding be set down for an expedited hearing.

- 24.2 An expedited hearing will proceed by way of Affidavit. The applicant will be required to file and serve affidavit material in support of their claim with the respondents filing and serving affidavit material in reply. Copies of all documentation on which a party seeks to rely including experts' reports, quotations and/or invoices should be annexed to the appropriate affidavit. A party wishing to cross-examine a deponent (including any expert) must give written notice to the Tribunal, and all parties at least five (5) business days prior to the hearing otherwise cross-examination will not be permitted without leave of the Tribunal.
- 24.3 If a proceeding has been set down for an expedited hearing, at the request of the parties and the hearing takes longer than the estimated duration, the hearing may be adjourned part-heard and orders for costs may be made if it is considered proper to do so.

25. Default Procedure

- 25.1 Where a respondent or a joined party fails to file and serve Points of Defence as ordered by the Tribunal, the applicant or in the case of a joined party, the applicant for joinder, may apply to the Tribunal for summary determination of the proceeding.
- 25.2 Such application for summary determination may be made not less than fourteen (14) days after the date on which the Points of Defence were to have been filed and served and should be made by filing and serving an Application for Orders/Directions accompanied by affidavit material by the applicant, or applicant for joinder as the case may be, or some other person/s who have personal knowledge of the claim verifying the facts constituting the claim.
- 25.3 Upon receipt of any such application the principal registrar shall set the proceeding down for summary hearing on a date at least fourteen (14) days later and shall advise the parties in writing of the time and date of such hearing by the most expeditious means available.
- 25.4 Should the respondent or joined party fail to file and serve an affidavit in opposition to such application the Tribunal may proceed to summary determination of the proceeding in the absence of the respondent.
- 25.5 Should an affidavit in opposition be filed the member presiding at the summary hearing may in his or her discretion determine the proceeding as between the applicant and the respondent, or the applicant for joinder and the joined party, as the case may be, or make directions for the further conduct of the proceeding.

26. Entry of judgement in default under Terms of Settlement

- 26.1 Where Terms of Settlement provide for entry of judgement in default, the party applying for such judgement should make application for reinstatement of the proceeding and judgement on the Application for Orders/Directions form which should be accompanied by affidavit material in support.

- 26.2 A copy of the application for judgement in default and the supporting material must be served on the party against whom judgement is sought at the time the application is made.
- 26.3 Any affidavit material in reply must be filed and served as soon as practicable but no later than 12 noon two business days prior to the hearing.
- 26.4 The application will be set down for hearing at which time judgement will be entered if the Tribunal is satisfied that the party against whom judgement is sought is in default of its obligations under the Terms of Settlement, or make further directions.
- 26.5 Where judgement in default is sought under Terms of Settlement judgement will not be entered in chambers unless there are exceptional circumstances.

27. Withdrawal of proceedings

- 27.1 At any time before the hearing a party may seek leave to withdraw their claim by written notice to the principal registrar and to the other parties.
- 27.2. Where application for leave to withdraw is accompanied by the written consent of all parties, orders will usually be made in chambers.
- 27.3 Where the written consent of all parties does not accompany a request for leave to withdraw a proceeding, or where a party objects to such application for leave, the application for leave to withdraw will be referred to a directions hearing where the request will be considered. If written consent of all parties is obtained prior to the directions hearing, orders may be made in chambers.
- 27.4. A copy of the orders will be forwarded to all parties by the principal registrar.
- 27.5 Any application under s74(2) should be made as soon as practicable after a party receives a copy of the order.

28. Transfer of proceedings between the Domestic Building and Civil Claims Lists

- 28.1 Where the amount claimed in an application to the Domestic Building List is less than \$10,000 the proceeding may be transferred to the Civil Claims List if, in the opinion of the Deputy Presidents in charge of both lists, it is the more appropriate list for determination of the issues in dispute.
- 28.2 Where the amount claimed in an application to the Civil Claims List in relation to a domestic building dispute exceeds \$10,000, the proceeding may be transferred to the Domestic Building List, if the Deputy Presidents in charge of both lists are of the opinion it is the more appropriate list for determination of the issues in dispute.
- 28.3 All applications seeking a review of the decision of an insurer will be heard in the Domestic Building List under sections 59A and 60 of the DBCA irrespective of the amount claimed.

29. Costs

- 29.1 Section 109 of the Act provides that each party shall bear their own costs unless the Tribunal is satisfied it should exercise its discretion under s109(2) taking into account the matters set out in s109(3).
- 29.2 Where parties are legally represented, their legal representatives must draw their client's attention to the provisions of s109 and advise them in writing of the costs of and incidental to the preparation for the hearing, the cost of conducting the hearing and a daily hearing cost thereafter in the event it cannot be concluded in the time allowed.
- 29.3 Costs may be ordered if the failure by a party to a proceeding to comply with the requirements of this Practice Note causes an adjournment of a mediation, directions hearing, Compulsory Conference or Hearing, or otherwise disadvantages a party to the proceeding.

30. Publication of Decisions

- 30.1 Where written reasons are provided for a decision, they will be available on www.austlii.edu.au ('Austlii') five business days after the decision is handed down (for interlocutory and final determinations) unless the handing down of the decision is listed in the daily Law List in which case they shall be published on Austlii as soon as practicable thereafter.
- 30.2 At the same time as they are sent to Austlii, Decisions with Written Reasons will be distributed electronically to those who have requested they be included on the distribution list by contacting VCAT's Information & Knowledge Manager, Clare.O'Dwyer@justice.vic.gov.au.

31. Appeals

- 31.1 A party who makes application for leave to appeal and, where leave is granted, institutes an appeal, must notify the principal registrar in accordance with s148 of the Act.
- 31.2 A party applying for a stay of a decision of the Tribunal pending the hearing and determination of an appeal must do so in writing accompanied by appropriate supporting documentation.
- 31.2. Parties are requested to advise the principal registrar when an application for leave to appeal is granted or dismissed, and the outcome of any appeal.

32. Forms

All forms referred to in this practice note are available on the Tribunal's web page at www.vcat.vic.gov.au.

33. Users' Group

The Deputy President meets regularly with the Users' Group. For contact details for members of the Users' Group please refer to the link to Domestic Building on the Tribunal webpage.