



## *Victorian Civil and Administrative Tribunal*

### **Expert Evidence in the Domestic Building List – Guidelines**

The Domestic Building List wishes to ensure that experts understand their responsibilities and obligations, and that a common approach to the preparation of reports is adopted and followed.

To facilitate settlement negotiations, and where settlement is not achieved, to minimise the length and complexity of hearings, **experts will generally be ordered to meet and prepare joint reports. Often they will be required to attend a conclave of experts chaired by a Member of the List or a building consultant mediator.** Subject to the discretion of the member presiding at the hearing, expert evidence will be heard **concurrently** in appropriate cases.

These Guidelines are intended to assist experts, parties and their legal representatives understand experts' obligations and the Domestic Building Lists expectations in relation to the preparation of reports, the joint meeting/chaired conclave of experts and the hearing of concurrent evidence.

**Where experts are engaged they must be provided with copies of PNVCAT 2 – Expert Evidence and these Guidelines with their instructions.**

Orders and directions will be made as necessary.

### **Preparing reports**

It is important when preparing expert reports that there be a clear distinction between **incomplete** and **defective** works. Each item identified as being incomplete or defective must be separately numbered using consecutive numbering. Where a supplementary report is prepared by an expert the numbering should **continue on** from where the numbering left off in previous reports. It should not be restarted.

All expert reports on which a party seeks to rely must comply with the requirements of PNVCAT 2 – Expert Evidence and Clause 18 of PNDB1 (2007).

#### **In summary, PNVCAT 2 requires:**

- (i) The expert's paramount duty is to the Tribunal;
- (ii) The expert has an overriding duty to assist the Tribunal;
- (iii) An expert is not an advocate for a party;
- (iv) Reasons for recommendation for rectification, demolition or other alteration of premises must be included in any report;
- (v) The report must include the likely costs of any recommended works;
- (vi) The report must indicate whether any alternative remedy or remedies are reasonable alternatives

#### **Clause 18 of PNDB1 (2007) requires:**

- 18.1 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 Tribunal.

18.2 All expert reports filed must:

- (a) have a cover page which clearly identifies:
  - (i) the address of the subject property, and
  - (ii) the party for which the report has been prepared, and
  - (iii) the person from whom the expert received his/her instructions, and
  - (iv) the date of any inspection, and
  - (v) the date of the report; and
- (b) consecutive numbering must be used for each item of alleged defective and/or incomplete works. Numbering should not be restarted for each room/interior/exterior category. Where a report is prepared in response to another report, the same numbering must be used.
- (c) where the original photographs are in colour, colour photographs or good quality colour photocopies. Black and white photocopies are not acceptable.

18.3 Where practicable, Experts Reports should be filed in A4 size, stapled not bound and two hole punched. However, where reduction to A4 renders a document illegible it should be filed, folded and two hole punched so that it may be read without being removed from the folder

## **Joint Expert Report**

### Scott Schedule

- Where there are alleged defective and incomplete works, the joint expert report should be in the form of the Scott Schedule which is attached to these Guidelines.
  - (i) The initial responsibility for preparing the draft Scott Schedule will usually rest with the party who alleges there is defective/incomplete works – preferably by that party’s expert.
  - (ii) That party should prepare the Schedule and complete at least the columns listing the items and their expert’s comments and estimates.
  - (iii) A copy of the draft Scott Schedule should be filed and served on all parties.
  - (iv) All parties must ensure that their expert has a copy of the draft Scott Schedule well before the joint meeting.

### Joint meetings of experts

- The Tribunal will usually order that experts meet (within disciplines) and prepare a joint report (in the form of a Scott Schedule where appropriate) identifying the areas of **agreement** and **disagreement** and the reasons for any disagreement. Experts are not expected to comment or report on legal questions of liability.

## Chaired conclaves of experts

- Where there are a large number of defective or incomplete works, and/or the issues in dispute are technically complex, the tribunal may direct, either on its own initiative or at the request of the parties, that the conclave of experts be chaired by a member or a building consultant mediator.
- The member or mediator will act as a facilitator.
- The conclave may be conducted on site, or it may be agreed that the experts will meet on site, after the conclave, to prepare their joint report.
- Orders will be made for the joint report (in the form of a Scott Schedule where appropriate) to be signed by the experts and filed within a specified time after the conclave.
- **It should be expected that orders will be made that the parties and/or their legal representatives may not attend the joint meeting/chaired conclave and that they cannot review a copy of the joint report before it is completed and signed by the experts.**

## The joint report

It is expected that in preparing the joint report, the experts will have regard to their responsibilities to the tribunal as set out in VCATPN 2 – Expert Evidence. The preparation of the joint report will not prevent an expert from revising his opinion as new evidence/material becomes available.

- The joint report must identify the areas of agreement and disagreement with comments where they disagree.
- Where there are incomplete and/or defective works, the joint report must include a proposed scope of works, and the cost of such rectification and/or completion works.
- Where possible, the experts should agree on a scope and method of rectification and/or completion works and where they are unable to do so, their respective suggestions must be included in the joint report, together with any alternative recommendations.
- Where the disagreement relates to the legal liability of a party, the experts must nevertheless provide a proposed scope of works, and the cost of such rectification and/or completion works, as if the tribunal had determined that party is liable to rectify/complete.
- It is expected that, consistent with their obligations to the Tribunal, the experts will make a genuine attempt to narrow the issues and set out clear reasons for any disagreement.
- The joint report must be signed by all experts who participated in the joint meeting/conclave before it is filed and provided to the parties.
- Where one or more of the experts later revises his/their opinion it is expected that the experts will again confer and prepared an amended joint report which will identify and explain any changes. This amended joint report must be signed by all the experts before it is filed and provided to the parties.

## **Concurrent Evidence**

It should be expected that, subject to the discretion of the presiding member, expert evidence will be heard concurrently. This is sometime referred to as 'hot tubbing'. The concurrent hearing of expert evidence enables the member to gain a clear understanding of each expert's opinion and allows the experts to explain the reasons for their opinion on each issue.

- It is important that the parties arrange for their experts to be available at the same time during the hearing so that their evidence can be heard concurrently.
- Arrangements for the scheduling of the concurrent hearing of expert evidence will be made at the commencement of the hearing.
- Where a view is considered appropriate, the experts will usually be required to attend so it is important that the parties have checked their respective experts' availability to ensure they are available to attend a view, and give their evidence concurrently.

The joint report/s prepared by the experts will form the basis of the Agenda for the hearing of their evidence concurrently. Subject to the discretion of the presiding member the hearing of concurrent evidence will proceed on the following basis:

- The presiding member will set an Agenda in consultation with parties and their representatives
- The experts will be sworn in and qualified
- The joint report, and where appropriate, the Scott Schedule prepared by the experts will form the basis of concurrent evidence
- The presiding member will ask each expert to summarise their position – if the claim concerns a number of defects/incomplete works, each item will be discussed in turn
- Experts can ask each other questions, discuss issues
- The member will probably ask questions
- Cross-examination occurs after the expert evidence has been heard concurrently, although objections will be heard when and if they arise.

## **Directions**

Some examples of directions which may be made are attached.

*Victorian Civil and Administrative Tribunal*

**Expert Evidence in the Domestic Building List**

**SAMPLE DIRECTIONS**

1. By [date] the experts must confer and file and serve a joint expert report in the form of a Scott Schedule which must be signed by both experts.
2. Liberty to the parties to apply by consent for the meeting of experts to be chaired by a member or building consultant mediator.
3. No party or representative of a party is to discuss or view the joint report prior to it being completed and signed by the experts.

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1. There shall be a meeting of experts chaired by [who, when, where]
2. By [date] the parties must agree and advise the Tribunal which experts will be attending the meeting. The purpose of the meeting is to enable the experts to provide a joint report identifying points of agreement and disagreement and/or for the purposes of agreeing a scope of works for testing, monitoring and remedial works together with a timetable for the carrying out of such works. The parties and their professional advocates must not attend the meeting.
3. At least 7 days prior to the meeting of experts, the [who] must file and serve a draft Scott Schedule, a copy of which must be provided by each party to their experts at least 48 hours prior to the conclave. Each party must ensure that their experts have copies of all expert reports which have been served and/or filed. This draft Scott Schedule will form the basis of the discussions at the conclave. The discussions will remain confidential, but the joint report, including any agreed scope of completion and/or rectification works will be open.
4. By [date] the joint expert report signed by all experts who attended the conclave must be filed, with a copy being provided to each party. The joint report must be in the form of a Scott Schedule (based on the draft Scott Schedule) and must identify the areas of agreement and disagreement. Where possible, the experts must make their recommendations as to a scope of completion and/or rectification works.
5. No party or its legal representatives can seek or require to view the experts' joint report before it has been completed and signed by the experts.

1. By [date] the experts will prepare a joint report setting out:-
  - (i) the issues and matters upon which they agree, setting out the terms of such agreement; and, where appropriate an agreed scope of works together with an estimated cost of carrying out such agreed scope; and,
  - (ii) the issues and matters upon which they disagree setting out precisely the compass of each such disagreement and the reasons for such disagreement.
2. No party or its legal representatives can seek or require to view the draft of the expert's joint report before it has been completed and signed by the participating experts.

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1. There shall be a meeting of experts to be chaired by [who, when, where] Neither the parties nor their professional advocates may attend the meeting. The purpose of the meeting is to enable the experts to provide a joint report identifying points of agreement and disagreement and/or for the purposes of agreeing a scope of works for testing, monitoring and remedial works together with a timetable for the carrying out of such works.
2. By [date] the joint expert report, signed by all experts who attended the meeting of experts, must be filed and served.
3. No party or its legal representatives can seek or require to review or discuss the experts' joint report before it has been completed and signed by the parties.

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
DOMESTIC BUILDING LIST**

**File Number:** D.../08

**Item No:** by reference to expert reports

**Estimate:** estimated cost of rectification/completion

**PARTIES:**

**Property Address:**

**SCOTT SCHEDULE**

Where prepared as a joint expert report it must be signed and dated by all experts

<b>Item No</b>	<b>Brief Description of item</b>	<b>Owners' Expert's Comments</b>	<b>Agreed Y/N</b>	<b>Builder's Expert's Comments</b>	<b>Owners' Estimate \$</b>	<b>Builder's Estimate \$</b>	<b>Tribunal's comments</b>