

Using ADR to resolve building disputes in the Building & Property List

VADR

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**FAIR, EFFICIENT JUSTICE
FOR ALL VICTORIANS**



About VCAT

- Established 1998
- President – Supreme Court Judge currently, Justice Greg Garde
- 2 Vice Presidents – County Court Judges

4 Divisions each headed by a Deputy President

- Human Rights Division – Guardianship List, Human Rights List
- Residential Tenancies Division
- Civil Division – Civil Claims Lists, Owners Corporations List and Building & Property List
- Administrative Division – Planning & Environment List, Review & Regulation List and Legal Practice List

9 Lists generally headed by a Deputy President

Caseload - 90,000 cases a year (60,000 Residential Tenancies) sitting in Melbourne CBD, and 35 metropolitan and regional venues

VCAT's Vision and Values

VCAT's Vision:

To serve the community by resolving disputes in a timely, cost effective and efficient way

VCAT's Values:

Fairness, professionalism, integrity, independence, efficiency, approachability, accessibility

Legal Representation

Unless all parties agree legal representation will only be permitted by order of the Tribunal under s62 of the *Victorian Civil and Administrative Tribunal Act* 1998 ('the VCAT 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.

Building & Property List

The **Building & Property List ('BPL')** was created on 1 July 2014 and merged three lists: Domestic Building, Retail Tenancies and Real Property Lists.

BPL deals with:

- domestic and commercial building disputes.
- consistently approximately 1300 domestic building applications a year plus counterclaims
- a few commercial building disputes last financial year but steadily increasing
- unlimited jurisdiction

BPL (building) case streams

Case managed list

Claims up to \$25,000

- Applications are reviewed by Deputy President or Senior Member. Where amount claimed is less than \$15,000, generally the matter will proceed direct to hearing if anticipated hearing time is less than 1 day
- May be referred to mediation

Claims \$25,000 to \$100,000

- First listing - mediation conducted by a panel mediator.

Claims over \$100,000

- First listing – usually a directions hearing when a timetable will be set including a compulsory conference.
- Informal docket system for more complex matters

Why ADR?

- Traditional adversarial approach to litigation and 'toxic costs'
- Alternatives:
 - ❖ Mediation
 - ❖ Compulsory Conferences
 - ❖ Chaired conclaves of experts
 - ❖ Concurrent evidence or 'hot tubbing'

Mediation

- Panel mediators – all accredited, lawyers and building consultants
- Usually listed for a full day, but may be listed for half a day
- Conducted at 55 King Street, Melbourne, in some regional courts and on site where appropriate
- Number of mediations
- What happens if mediation leads to a resolution?
 - ❖ Terms of Settlement (standard Terms are available)
 - ❖ Orders made that proceeding is struck out with a right to apply for reinstatement
- What happens if settlement is not achieved?
 - ❖ Directions hearing (on same day where possible), timetable set and a compulsory conference may be ordered

Compulsory conferences

- Robust approach akin to evaluative mediation
- Section 83 of the VCAT Act:
 - ❖ Identify and clarify the issues in dispute
 - ❖ Identify and clarify questions of fact and of law
 - ❖ promote settlement
 - ❖ make directions
- Section 85 of the VCAT Act: evidence of anything said or done in the course of the compulsory conference is inadmissible except in limited circumstances
- Section 87 of the VCAT Act: proceeding may be determined adversely to the interests of a non-attending party with the consent of parties who attend.

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- Conducted by BPL members
 - ❖ 'horses for courses'
 - ❖ timing
 - ❖ flexibility
 - ❖ how many?
 - What happens at a Compulsory Conference?
 - Next steps

Expert conclaves and concurrent evidence

2 step process:

- Expert conclave – a chaired, facilitated meeting of experts, in disciplines, often chaired by Member or occasionally by a building consultant mediator
- Hearing – experts' evidence heard concurrently

There will often be a compulsory conference between the conclave and the hearing

Expert conclave

AIMS of Conclave

- Identify the issues relevant to areas of expertise
- Ensure the experts are addressing the same issues
- Discussion of issues leading to areas of agreement and disagreement
- Production of a joint report usually in form of Scott Schedule
 - ❖ Identify areas of agreement and disagreement
 - ❖ Agreed scope of rectification/completion works
 - ❖ Estimated cost of works
- Facilitate settlement discussions

Concurrent hearing of expert evidence

- Identify issues (by reference to joint report/Scott Schedule)
- Set an Agenda in consultation with parties and their representatives
- Swear in the experts
- Ask each expert to summarise their position – if claim concerns a number of defects/incomplete works, discuss each item in turn
- Experts can ask each other questions, discuss issues
- Member asks questions
- Then parties cross-examine although objections will be heard during the hearing of concurrent evidence.

In summary:

- Mediation and compulsory conferences enable parties to agree on a resolution they have ownership of, and control over.
- conclaves and joint reports narrow the issues and may facilitate settlement
- the concurrent hearing of expert evidence significantly reduces hearing time

Conclusion

The importance and value of refined mediation skills in this process of transforming the conduct of building and construction litigation cannot be underestimated.

AND ABOVE ALL

We must never lose sight of the people behind the litigation. It is their dispute not yours nor mine... and they have to live with the outcome and consequences.

QUESTIONS?
