

Lovegrove & Lord Commercial and Construction Lawyers

Presented to the A.I.B.S

VCAT – A Brief Guide

When do you issue in VCAT? When is VCAT the appropriate jurisdiction? – when is the Magistrates Court, the County Court, the Supreme Court or even the Federal Magistrates Court the appropriate forum?

The Domestic Building List deals with Domestic Building Disputes, i.e. with the exception of the Civil Claims list, which can deal with *Fair Trading Act 1995* claims, the Tribunal does not have power to deal with commercial building disputes.

The *Domestic Building Act 1995* defines a domestic building dispute in Section (54) of the Act as:

“54. What is a domestic building dispute?”

(1) A “domestic building dispute” is a dispute or claim arising –

(a) between a building owner and –

(i) a builder; or

(ii) a building practitioner (as defined in the **Building Act 1993**); or

(iii) a subcontractor; or

(iv) an architect-

in relation to a domestic building contract or the carrying out of domestic building work; or

(b) between a builder and-

(i) another builder; or

(ii) a building practitioner (as defined in the

Building Act 1993);
or

(iii) a sub-contractor; or

(iv) an insurer – in relation to a domestic building contract or the carrying out of domestic building work; or

(c) between a building owner or a builder and

(i) an architect or

(ii) a building practitioner registered under the **Building Act 1993** as an engineer or draftsman – in relation to any design work carried out by the architect or building practitioner in respect of domestic building work.

(2) For the purpose of sub section

(1), a dispute or claim includes any dispute or claim in negligence, nuisance or trespass but does not include a dispute or claim related to personal injury.

(3) A reference to a building owner in this section includes a reference to any person who is the owner for the time being of the building or land in respect of which a domestic building contract was made or domestic building work was carried out.”

The monetary jurisdiction is unlimited, that is, a claim from \$1 to millions of dollars may be brought before the Tribunal. The Tribunal has a tremendous level of power and discretion when you look at the relevant legislation.



In effect, this means that a “Domestic Building Dispute” must be stayed in the relevant Court upon *upon application of a party. Note: the parties may agree, for whatever reason that the matter should proceed in the Court. You should have agreement in writing, to prevent exposure on costs.*

Where a successful application is made in the Magistrates Court, the successful party will be entitled to their costs. Applications to the Magistrates Court can be made at any time before evidence is given.

Where there is a claim under the *Trade Practices Act 1974*, the Tribunal cannot hear it. There are decisions that

such an action must be brought in a court.

In many respects the *Fair Trading Act 1995* mirrors, the *Trade Practices Act 1974*, therefore if you decide that you would prefer your domestic building dispute in VCAT, then you should look at whether there is an action pursuant to the *Fair Trading Act 1995*.

To look at the VCAT experience, it is useful to compare my experience in VCAT with other forums that have the power to hear domestic building disputes.

Magistrates Court

The Magistrates Court has a jurisdictional limit of \$100,000. The procedure with the Magistrates Court is

fairly straight forward. Usually, once a complaint has been filed and served, the matter is listed for a pre hearing conference.

If the pre hearing conference (“PHC”) is unsuccessful, Order are given at the PHC for the future conduct of the matter, including a hearing date.

One advantage of dealing with the Magistrates Court, is that at present, hearing dates are reasonably quick.

The disadvantage however, is that you do not have a guaranteed start for the hearing date, and Magistrates don’t appear to like building matters much! Nor are they usually very experienced with them – Magistrates deal with a “garden variety” of criminal as well as civil matters.

On the other hand, if a defence is not filed within the required 21 days, the Plaintiff can make an application for Default Judgement, which is done in

Chambers without need for appearance. Enforcement proceedings can then be commenced immediately.

Unfortunately, while costs follow the event in the Magistrates Court, that is the successful party will be awarded costs, the Magistrates Court scale of costs is in almost all cases, woefully inadequate.

Most building disputes that get to hearing stage are complex, even though the monetary amount in dispute is not always great. In fact, there is often not a huge amount of difference in costs incurred by a party whether it is a \$20,000 or a \$100,000 dispute. The cost/benefit scenario of going to a hearing in the Magistrates Court is therefore unusually problematic.

County Court

The County Court has a dedicated Building List.

The judge in charge of this list, Judge Harbison has strict case management guidelines.

Indeed at the first directions hearing, the timetable will be set out and a hearing date set down.

Mediation will be set down, but in my experience, the matters are “cooked” more than is the case in VCAT before such mediation occurs, that i.e., most interlocutory matters have been attended to before mediation is held.

In the Civil Jurisdiction of the County Court, the monetary limit for claims of Personal Injuries is unlimited. For other civil actions, not including Personal Injuries and not otherwise excluded by the law, the Jurisdictional Limit is capped at \$200,000 (unless the parties consent in writing to exceeding that limit). If more than \$200,000 is awarded, the plaintiff is entitled to recover the full amount;

In order to more efficiently manage cases, the Court allocates cases to one of the following Lists:

- **Business List** (comprising the divisions of Commercial, Building and Miscellaneous); or
- **Damages List** (comprising the divisions of General, Defamation, Applications, Medical and Serious Injury); or
- **WorkCover List** (comprising the divisions of General and Section 134AB)

The focus of the seminar today is on the Building division of the Building List.

Supreme Court

The Supreme Court has a dedicated Building List. However, in recent experience, I understand there are delays in getting matters heard, given that the Judge in charge

of the Building List (currently Justice Habersberger) also hears major criminal matters including murders. At a seminar last year, Justice Habersberger, the Judge in charge of the Building List, conceded that where a person's liberty was at stake, such as in matters of murder, the resolution of a building dispute just had to wait!

Federal Magistrates Court

Limit on jurisdiction of Federal Magistrates Court – Section 86AA of the *Trade Practices Act 1974*.

Where proceedings under Part VA or Section 82 (action for damages resulting in loss) are instituted in, or transferred to, the Federal Magistrates Court, the Federal Magistrates Court does not have jurisdiction to award an amount for loss or damage that exceeds”

(a) \$750,000; or

(b) if another amount is specified in the regulations – that other amount.

The Federal Court is not usually appropriate, but I will not go into that now.

VCAT

You have heard by now that one of the main focuses of VCAT is Alternative Dispute Resolution.

Whilst in the Magistrates Court there is a, in some case, cursory attempt at settlement via the Pre Hearing Conference, in

VCAT the emphasis is on alternative dispute resolution.

The Magistrates Court will have usually only the one attempt at settlement via the pre hearing conference, whereas at VCAT, there will usually be at least one mediation, sometimes more.

There is also the option of Compulsory Conference, which is unique to VCAT.

Whilst the vast majority of Compulsory Conferences have achieved a cost effective outcome, there

are times when a Compulsory Conference, having followed a mediation is not such a good use of resources.



Where the situation arises that an unsuccessful mediation is followed by a compulsory conference which also fails, clients are usually disillusioned by the “system” seeing the compulsory conference as a waste of time and money, and seeing the compulsory conference simply as a further cause of delay before they get their day “in Court.”

It used to be my experience that the Tribunal would not set down a hearing date prior to the compulsory conference. It had previously been stated to me that if a hearing date were to be set down, then there was not sufficient

incentive to settle at compulsory conference. I must say, that, more recently there have been some instances where the Tribunal has set down Orders and a hearing date before the matter goes to Compulsory Conference. This does seem to give comfort to, in particular home owners.

Costs

Now, to what for practitioners is a vexing issue – costs in VCAT.

As practitioners, we were all taught that costs follow the event i.e. the successful party is awarded their costs. We all know that, except in extreme cases,

those costs are limited to party/party costs which covers somewhere usually between 50% -60%.

However, VCAT, as you are now aware, starts, in the legislative framework, from the scenario that each party bears their own costs. This is subject to the conditions contained in Section 109 of the VCAT Act.

This makes advising clients very difficult. They have difficulty understanding that, even if they are successful, they may not be awarded costs. Home owners in particular become very nervous, and at times, in my view, capitulate, or settle for less than their case would dictate, purely because the thought of not being awarded any costs at all is too much of a financial risk to take.

Having said that, it is my experience that, more often than not, costs are awarded where a party is successful particularly, it seems, where the amount awarded is over about \$20,000.

In Conclusion

Finally, just a few words on VCAT in general.

Practitioners who are not experienced with VCAT sometimes don't appear to take the Tribunal seriously, and are not prepared for any application. Such practitioners do so at their peril. The VCAT Act gives very broad powers to the Tribunal, and in relation to costs, the discretion is, in fact, far wider than that of the Courts.

Please Contact any of our Lawyers for advice on the above topic

Telephone: 9600 3522

Facsimile: 96003522

Email:

reception@llcc.com.au

If you wish to view this article or any other articles written by solicitors of this firm, please free to visit the Lovegrove Library at www.lovegroveandlord.com.