

OWNERS' GUIDE TO VICTORIAN BUILDING LAW & BUILDING CONTRACTS

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Lovegrove Solicitors have extensive experience and expertise in both property and construction law; and are happy to be consulted on point. To find out more about Kim log onto our website at www.lovegrovesolicitors.com.au

Before qualifying as a solicitor, Stephen Adorjan worked in Australia and overseas as design architect, superintendent, contract administrator, builder, estimator and project manager; both in private enterprise and for the Australian government. For several years he was also a member of the National Practice Committee of the Australian Institute of Architects (AIA); and in that capacity he was heavily involved in the drafting, reviewing and updating of all building contracts and other practice aids published by the AIA

Following his admission to legal practice Stephen spent nine years as in-house solicitor and Legal Manager of the Master Builders' Association of Victoria ("MBAV"); where he still works part time as solicitor for special projects. During those nine years he represented Victoria on the National Contracts Advisory Committee of the Master Builder movement; where he had a similar role in regard to the various standard building contracts and guides published by that body. The work of this Committee also includes the ABIC suite of contracts, which is developed, published and updated as a joint venture with the AIA. Stephen is also familiar with most of the other standard contracts widely used in the industry and can assist comparative analysis of these.

CHAPTER 1 – INTRODUCTION

This small publication has been written to assist home owners and intending home owners with understanding residential building contracts. It also provides insights into the ways by which they can manage and minimise many of their risks.

The publication touches upon the potential traps involved in entering and running building contracts; and it also discusses the methods by, and the forums where, *domestic building disputes* can be resolved in Victoria.

CHAPTER 2 - HOW DO YOU BEGIN?

2.1 GENERALLY

For most people a home is the largest single investment they make in their lifetime. Most of them are inexperienced in the processes of design and construction, and few of them are familiar with dealing with contracts, especially building contracts, which are in a special category of complexity.

This document is mainly intended to help these consumers understand the processes and laws involved, their options, their rights and their obligations.

The production of a new home – or altering, extending or otherwise improving existing homes - is a continuous process called “project delivery”.

2.2 PRE –CONSTRUCTION PHASE: DESIGN CONTRACT

The project delivery starts with identifying an end product – called the brief - and then developing a design that will, when built, achieve the agreed objectives. The ultimate end product of this phase will be the obtaining of a building permit. This involves producing a set of designs, drawings and specifications which satisfy not only the client’s brief, but also a large number of technical and legal requirements.

In the classic paradigm the owner– or intending owner - will first of all consult and brief a designer. Designers may be appropriately qualified and registered¹ architects, engineers or draftspersons. Many builders also offer such design services, but the actual design work must be done by registered architects, engineers or draftspersons, whether they are employees of the builder or contracted consultants.

Owners and designers (or builders) will need to enter contracts with their clients for these services. There are in fact design contracts, but they now fall within the legal definition of “*domestic building contracts*” unless they are between the owner and one of the following: -

- a registered architect or architectural practice; or
- a draftsperson or drafting practice registered in the category of building design; or
- An engineer or engineering practice registered in the category of building engineering.

Note that a building partnership or company, where at least one of the partners or directors is registered in one above categories, is also regarded as a “registered practice” for these purposes. However, if you enter a contract for any pre-construction services with any other builder, all the rules pertaining to *domestic building contracts* will apply. The purpose of these rules is consumer protection. They severely limit what the contracts may contain and they also prescribe a large number of consumer protection measures that the contracts and the services must include.

If the fees involved in a (non-exempt) pre-construction contract are more than \$5,000.00; the contract must also comply with the even stricter rules applying to *major domestic building contracts*.

Unless otherwise agreed, design contracts will usually be completed when a building permit has been issued by a registered building surveyor. From that point on you are allowed to carry out the physical building work in accordance with that permit. It is at this point (at the latest) that you need to enter a contract for the construction phase.² (Naturally this does not arise where you had already entered a design-and-construct contract)

If you had entered a pre-construction contract (whether it is, or is not classified as a *domestic building contract*) you are not, and cannot be, compelled to enter a contract with the same building practitioner for the subsequent construction phase. You are free to engage any other appropriately registered building

¹ Architects are registered by the Architects’ Registration Board of Victoria; all other building practitioners are registered by the Building Practitioners’ Board. These organizations may be contacted to verify that the person or firm you are dealing with is, in fact, registered in the appropriate category. Consumers are strongly advised to do this before making any commitment.

² For discussion of the “building permit stage”, see Chapter 2.2.6(6)

practitioner for the building work, using the documents prepared by the first practitioner/s. If any attempt is made to prevent you from doing this, you should urgently consult an experienced construction lawyer.

Note however that there may still be contractual restrictions on your use of the designs and documents prepared by the designers. You will need to check this aspect of your position with your construction lawyer, as well.

2.3 DESIGN & CONSTRUCT

An alternative project delivery method is the design and construct [“D & C”] contract. In this arrangement, the same person or firm will enter a single contract with the consumer for providing the entire delivery process; from client briefing to handing over the finished building work. From the legal perspective, these will always be *major domestic building contracts* and need to comply with all the applicable rules.

2.4 SPEC DESIGNED HOMES

Many builders will have already prepared a number of standard designs. In this arrangement there is no – or only a very limited – design phase. Consumers will usually be offered choices from among a range of standard designs; and the builder will undertake to erect a new home for them in accordance with the chosen scheme. In the hypothetical event where a consumer took one of the pre-designed schemes without any modifications, it would be sufficient for the parties to just enter a *major domestic building contract* for the construction phase exclusively.

This is unlikely to ever happen in real life. There will always be some personal input by the consumer, and therefore some design input by the builder before a building permit is obtained. Unless the builder offers to do the design component free of charge - and this does happen at times - the contractual situation will be the same as in either item 2.2 (namely a design contract, followed by a construction contract) or in item 2.3 (D&C contract).

2.5 DISPLAY HOMES

A further sub-category of the spec-designed home is the display home. In this variant a prototype of a standard design is built in full; so that potential clients can better appreciate the result. There are special, additional, protections provided by the legislation for buyers of display homes. Essentially, builders are compelled to reproduce a home that is identical in every respect to the display home seen by the client, except in so far as any departure has been agreed by the parties, confirmed in writing and incorporated in the *major domestic building contract*.

2.6 STAGE IN THE PRE-CONSTRUCTION PHASE

2.6.1 DESIGN

The design component will generally comprise the following stages, in chronological order:

- briefing;
- sketch design to the client’s approval;
- preparation of preliminary documents (drawings, specifications, computations);
- application for and obtaining of a planning permit, where this is required;
- preparation of full documents (all necessary investigations, reports, computations, drawings, specifications, schedules etc);

In the classic project delivery scheme, this is the earliest point at which a (separate) domestic building contract can be entered with a builder. The legislation stipulates that all *major domestic building contracts* must include

“... plans and specifications for the work and those plans and specifications [must] contain enough information to enable the obtaining of a building permit”³

³ **Domestic Building Contracts Act 1995** s 31(1)(d)

2.6.2 INTERMEDIATE ACTIVITIES

(a) Building permit

Applying for and obtaining building permits is, at least formally, the owners' responsibility. They may do it themselves; more usually however they will use either the designer or the builder as their agent for this purpose. This is why we refer to this as an intermediate activity.

If an owner wants the designer to be his or her agent, this must be included in the scope of the designer's contract; if the owner wants the builder to be the agent, it must be included in the scope of the building contract. In either case the owner must give the agent a written and signed authority to act on his or her behalf in obtaining permits (etc).

Also, regardless of who applies for the permit, the designer remains responsible for making whatever modifications the building surveyor may direct to the drawings and specifications before being prepared to issue the building permit.

On the issue of the building permit the pre-construction phase is completed; and the construction phase may begin.

(b) Tendering and contracting

As mentioned earlier, a construction contract may be entered when – but not before – there are sufficiently developed documents that may be submitted with a building permit application. If the earliest option is chosen, the builder must of necessity base his or her price offer on the documents as they are at the time of submitting that price. The resulting contract price will need to be varied if and when – as a result of the building surveyor's directions - there are any changes between the contract documents and the amended "permit documents."

The alternative is to obtain the building permit before entering a construction contract. However, this can present complications in that the building permit must normally ⁴ clearly identify the builder and the builder's relevant registration number. Therefore, if the consumer should later decide to use a different builder, the permit will need to be amended. But this is not an insurmountable obstacle.

Clearly, before entering any construction contract, the owner needs to obtain written offers from one or more builders. These offers are called quotes or, more correctly, tenders.

Whenever the owner has engaged a separate consultant ⁵ the consultant can – and should – assist in the seeking and obtaining of the tender/s. These consultants may also assist in evaluating the tender/s and in any requisite negotiations before an offer is accepted. These activities, if required, need to also be specified in the scope of the consultant's design or Project Management contract.

In most cases owners do not engage consultants to assist them with these activities. This may be a mistake. It is the most critical point in the "traditional" project delivery method; where inexperienced owners can make very costly mistakes. We would recommend that owners give serious consideration to engaging a registered architect, PM, quantity surveyor or other appropriate design/construction professional for this process; even where they are (for whatever reason) not prepared to engage them in any other role during the project delivery. It is quite possible to do this as a "stand alone" activity.

Failing any of the above options, owners need to follow their own counsel concerning the tender process. It is outside the scope of this paper to give detailed advice in this regard. However, any tender need to contain, as a minimum, the following information:

- The contract price;

⁴ That is; except in the case where the owner has obtained an "owner-builder" certificate from the Building Commission [see 2.8]

⁵ Namely a registered design professional (architect, engineer, draftsman) or a registered domestic Project Manager ["DB-M"] to manage the process/es

- The amount of deposit;
- Full details of the builder, including his/her/its domestic builder's registration number;
- The name/s and address/es of the owner/s who will enter the contract with the builder;
- The address of the site and details of the relevant certificate of title;
- A concise description of the work (e.g. "new double storey brick residence" or "extensions to an existing weatherboard home");
- The form of contract to be used;
- The proposed start and completion dates – or the length of the proposed contract period expressed in a number of calendar days together with nominating the events which will determine the start date;
- Clear identification of all the "contract documents"
- Any proposed exclusions and/or any unusual or special conditions.

At some point, *before signing the contract*, the owner and the builder must also reach agreement concerning a number of other variables. These will include details of provisional allowances, builder's margins on adjustments to these allowances, liquidated damages (if any); payment terms, interest on late payments and so on. The agreed details must all be incorporated in the contract (see Chapter 3)

2.7 OWNER-BUILDERS

The legislation contains special provisions that enable certain eligible persons to apply for and – if successful – obtain an "owner-builder's certificate of consent" from the Building Practitioners' Board ["the BPB"]

You may be eligible to apply if you are

- a natural person ; and
- wanting to construct or renovate a domestic building on your own land, and
- not in the business of building.

For more information concerning this option, consult a construction lawyer, or refer to the Building Commission's website:

www.buildingcommission.com.au

2.8 CONCLUSION

This chapter has provided a general broad outline of what usually happens before a building contract is signed; but it cannot deal with all the available variations and permutations to the "classic" project delivery methods discussed. The rest of this paper will not deal with any contract other than domestic building contracts for the construction phase.

CHAPTER 3 - TYPES OF CONTRACTS

3.1 BACKGROUND

Boiled down to its barest essentials, a building contract obliges the builder to build a certain product for the owner, and the owner to pay the builder the agreed price for this service. These are the principal outcomes that the parties expect from each other; and a failure by either party to fulfill his or her principal obligation will be a fundamental infringement of the entire purpose of the agreement.

Because buildings are complex and expensive products, and the process of creating them is both complex and time-consuming, it follows that building contracts are complex documents. They must set out the technical, legal, financial and management considerations that will govern the way in which the contracting parties deal with one another.

In order to reduce the difficulties involved in reaching comprehensive agreements, associations of industry participants (such as architects, engineers, builders) as well as government agencies (such as Standards Australia) have evolved and published several series of “standard” building contracts. Each of these series includes standard contracts for domestic work – generally one for new work (namely building on an empty site) and one for work involving existing buildings – alterations, extensions, additions, repairs etc.

In the 1990’s the Victorian Parliament promulgated massive new – and novel - legislation, to control and supervise building and construction activities in general (the **Building Act 1993**) and to specifically control the way in which “homes” are built and extended etc (the **Domestic Building Contracts Act 1995**)⁶

The objective of the DBCA is to provide greater protection to home owners (and, to a lesser extent, other property owners) in their direct dealings with building practitioners for *domestic building* services. In this context the expression “home owners” mainly refers to persons who live, or who intend to live, in the homes which are to be built – or altered, extended, renovated etc – under the contract in question. This being in contradistinction to “developer owners,” who are persons or organisations in the business of having homes constructed for them by builders, with the intention of renting or selling them to others.

This objective is achieved by provisions ensuring that:

- certain practices are restricted; regulated or outlawed (as the case may be); and
- certain contractual provisions are outlawed; and
- certain consumer protection measures are implied and/or expressly included in all domestic building contracts.

The legislation makes extensive demands on the form and the content of all domestic building contracts whose price exceeds \$5,000.00.⁷ Any contract for domestic building work which fails to comply with any of these demands in any respect is effectively in breach of the legislation; and these breaches can have very serious consequences, indeed. As a result, only “complying” contracts should be used for all domestic building work.(Unless the final price is certain to be less than \$5,000.00 – which is a rare event).

The intricacies of the DBCA will be discussed in some detail later in this manual.

⁶ Hereafter it will be referred to as “**the DBCA**”

⁷ Designated as “**major domestic building contracts**”

3.2 COMPLYING STANDARD CONTRACTS

3.2.1 BENERALLY

Every owner is free to have a purpose-made contract prepared for him or her. It would be very unwise to have this done otherwise than by lawyers with extensive experience in building and construction law. Therefore it is an expensive (and time-consuming) option. Still, there are times when this may be justified; usually on major projects, or when the owner will be using these contracts repeatedly.

For the rest of us, standard off-the-shelf contracts are available at very reasonable prices. These contracts contain standard provisions dealing with the situations encountered during the construction process on the vast majority of projects. They also contain project-specific provisions, which need to be completed by the parties in accordance with their negotiated bargain. In addition, the parties may also agree to change some of the printed conditions by

- adding special conditions; or
- deleting certain conditions; or
- modifying certain conditions.

These contracts are therefore flexible and non-restrictive; in contrast with some other types of “take it or leave it” standardized contracts.

Legal advice should always be sought before making any such adjustments, as any changes made to the standard text can have unintended legal consequences. As well, certain components of the standard text are prescribed by the legislation and those may NOT be removed or altered in any way.

3.2.2 AVAILABLE TYPES

For domestic building work in Victoria, the best and most widely used standard contracts are produced by industry and professional associations, namely the:

- Master Builders Association of Victoria (MBAV);
- Housing Industry Association (HIA); and
- Australian Building Industry Contracts (ABIC) – which is a joint venture between Master Builders Australia and the Australian Institute of Architects (AIA)

The domestic contracts published by these organisations are available and suitable for use by owners and builders alike; and are drafted to balance their rights and obligations in a generally fair and equitable way.

As mentioned, these contracts are negotiable as between owners and builders. They all contain spaces for provisions that are particular to the contract in question, and which must be completed by the parties in accordance with the bargains they make as a result of those negotiations. Such matters include the contract price, the contract completion period (or date), liquidated damages (if any), excluded work (if any), provisional items (if any), the percentage chargeable for the builder’s margin on variations and/or provisional items, the rate of interest chargeable by the builder for late payments and so on.

3.2.3 ADOPTION OF NON-COMPLIANT CONTRACTS

Sometimes owners wish to take a non-compliant contract and have their consultants make extensive changes; in part to comply with the DBCA and in part to add any special requirements. There are a few warnings about this option:

- (a) Builders are not familiar with the resultant contract, and therefore their risks will increase. If the contract turns out to be in any way deficient in its compliance with the DBCA, it is the builder who will bear the brunt of the costs and penalties arising from such non-compliance. Builders will therefore, quite reasonably, manage these risks by

- engaging an experienced construction lawyer of their own to check whether a modified contract is in fact compliant;
 - increasing their prices.
- (b) As all standard contracts are copyright; no-one may copy and re-use them. Similarly, any unauthorised significant changes to the standard contract will be considered infringements of the copyright owner's intellectual property rights and may lead to legal sanctions against the owner, the builder or both. Therefore this option should not be used unless the copyright-holder's consent has been first obtained.

3.3 FIXED PRICE (HEAD) CONTRACTS

Both MBAV and HIA produce compliant fixed price head contracts – also known as fixed lump sum contracts. For characteristics of fixed price contracts refer to 8.5.7.

3.4 COST PLUS CONTRACTS

Refer to Chapter 7 for discussion of these contracts.

3.5 ARCHITECT- ADMINISTERED (HEAD) CONTRACTS

Sometimes building contracts (whether fixed price or cost plus) will be administered by the owner's architect. In these situations the architect will have dual roles:

- s/he will act as the owner's agent and adviser and will administer the contract on the owner's behalf; and
- s/he will also act as an independent expert certifier.

Certifying functions involve those where the architect is called upon to bring his or her expertise and experience to determine questions of quality (whether the builder's performance meets the contractually stipulated standard, whether completion has been achieved) and quantity (whether or how far claims for payment, cost adjustments or extensions of time are justified). In this role the architect must act impartially – without regard to which party may or may not benefit from or his or her objective decision. Contracts for such an arrangement must be drafted accordingly.

There is a set of DBCA-compliant fixed price architect-administered contracts published under the banner of Australian Building Industry Contracts ["ABIC"]⁸. These are not to be used unless there is a registered architect administering the contract. On the other hand, most registered architects will recommend that these contracts be used if they are going to superintend the contract.

Note that changing the word "architect" in an ABIC contract to any other description - which will have the practical effect of appointing a non-architect to the contract administrator's role - is breach of the ABIC copyright.

⁸ In response to varying laws, there are distinct ABIC domestic contracts for each State and territory. Make sure that the one you use is the right one for Victoria.

3.6 SUB-CONTRACTS⁹

The contract between a registered builder and an owner is generally referred to as a “*head contract*.” In most circumstances builders are not obliged to carry out all of the work under the *head contract* themselves or by their own employees; but are permitted to engage trade contractors to carry out certain parts or components of the work which form part of the builder’s scope of responsibilities under the corresponding *head contract*.¹⁰

The resulting contracts between builders on the one hand and trade contractors on the other hand are known as *sub-contracts*. Trade contractors typically include concretors, carpenters, steel fabricators and erectors, bricklayers, plumbers, cabinetmakers and so on. Although these contracts are excluded from the legal definition of “*domestic building contracts*” any dispute involving a subcontractor in a domestic project will still be a “*domestic building dispute*” and therefore subject to the relevant rules.

Normally no direct rights or obligations arise between owners and subcontractors. Therefore they must only communicate with each other via the builder, who is the only person contractually bound to them both. Any breach of this protocol by either side can lead to serious complications, delays, cost blowouts and bitter disputes. Some head contracts specifically forbid any “back-channel” communications by the owner; and a breach of this condition may entitle the builder to suspend work and/or to end the contract for the owner’s breach. Note however, that such conduct can sometimes justify suspension or termination by the builder even in the absence of any express provision in the contract.

In the normal course of events owners may not interfere with how the builder organizes its workforce or schedule, either. This non-interference extends to the number and type of subcontractors the builder chooses to engage, the choice of subcontractors, and the contractual arrangements (including the subcontract price) between the builder and its subcontractors. If an owner wants to make a different arrangement with his or her builder, this must be put to the builder at the tender stage. Some builders may refuse to enter any contract under such conditions; others will cover their increased risks by increasing the tender price. If the builder agrees, the resulting head contract must contain the agreed provisions together with any consequent amendments to the standard text.

⁹ Subcontracts are let for the carrying out of certain work; sometimes with and at other times or without involving the supply of the necessary materials etc by the subcontractor. When the builder enters contracts that deal only with the purchase or hire of materials, equipment etc. those are called “supply contracts.” As far as owners are concerned, the same considerations apply to supply contracts as to subcontracts.

¹⁰ Note however that builders may not sub-let the whole of the work; as this would constitute unlawful pyramid contracting.

CHAPTER 4 - THE DOMESTIC BUILDING CONTRACTS ACT 1995

As mentioned, this is an Act of Parliament which governs most residential building design and construction. All “*building practitioners*”¹¹ carrying out “*domestic building work*” must comply with this legislation and the contracts for this type of work must also comply with it. The definitions of “*domestic building*” and of “*domestic building work*” are very broad.

4.1 WHAT IS DOMESTIC BUILDING?

“*Domestic building*” is essentially any building that is or will be readily (that is: without substantial changes) capable of being used as a *home* (or as *homes*).

4.2 WHAT IS DOMESTIC BUILDING WORK?

“*Domestic building work*” includes all construction work relating to such buildings, and also includes demolition, repair, alteration, extension, renovation work and so on. It also includes all other construction work associated with, or on the land occupied by, these buildings – such as landscaping, paving, fencing, carports, garages, swimming pools and so on; as well as the provision of services – such as lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or to the property on which the home is or is to be.

In addition, design and other pre-construction work (referred to in the Act as “*the preparation of plans and specifications*”) for *domestic buildings* is also classified as “domestic building work” **unless** it is design work carried out by an appropriately registered

- architect; or
- draftsman; or
- engineer¹²

4.3 EXCEPTIONS

4.3.1 Certain “single trades” are exempt from the scope of the DBCA. These are the following:

- attaching external fixtures (awnings, security screens, insect screens, balustrades etc);
- electrical work;
- glazing;
- installing floor coverings;
- insulating;
- painting;
- plastering;
- plumbing work
- wall and floor tiling
- erecting a chain wire fence to enclose a tennis court;
- erecting a mast, pole, antenna, aerial or similar structure.

However, these trades are exempt only as long as the tradespersons concerned do not carry out any other type of work on the project. For example, if a glazier replacing glass to existing windows should also repair or re-paint the timber frames of those windows, the exception no longer applies.

4.3.2 There is one notable other exception:

“... any work involved in obtaining foundations data in relation to a building site” is also excluded from the definition of *domestic building work*. However, case law has established that this exemption applies strictly only to the “obtaining” of the data; but all further dealings with the data thus

¹¹ This term was introduced by the Building Act 1993. It covers – among others – all builders and all tradespersons carrying out building work

¹² See chapter 2

obtained (analysis, classification, establishment of bearing capacity etc) will constitute *domestic building work*.

- 4.3.3** For the sake of completeness; certain Court decisions indicate that work carried out for *developers* (as distinct from owners living – or intending to live – in the dwellings in question), may also be exempt from the DBCA. This interpretation is still somewhat controversial; and those relying on it may yet be proved wrong.

4.4 DOMESTIC BUILDING CONTRACTS & MAJOR DOMESTIC BUILDING CONTRACTS

All contracts for the provision of *domestic building work* are defined as “*domestic building contracts*”.

All *domestic building contracts* with a price above \$5,000.00 are defined as “*major domestic building contracts*”. Note that the \$5,000.00 refers to the FINAL contract price. As a matter of prudence therefore every contract that may end up exceeding this amount (because of variations) should be treated as a *major domestic building contract*, even if the initial price is below \$5,000.00.

Stringent conditions apply to all *domestic building contracts*, and in particular to *major domestic building contracts*. Because the vast majority of contracts will be *major domestic building contracts*, all further discussion will only be dealing with these.

4.5 REQUIRED INSURANCES

- 4.5.1** Unless the work in question is exempted, the legislation requires builders to provide a so-called “homeowners’ warranty insurance” to their domestic clients, before carrying out any work and before accepting any moneys under the contract. The details of this insurance policy are set out from time to time in Ministerial Orders published in the Government Gazette.

Domestic builders must hold eligibility for this insurance from one of the approved insurers, as a pre-condition of their registration as domestic builders. This means that once you have ascertained that your builder has the requisite registration, it follows automatically that he also holds this eligibility.

Whenever builders enter a contract where this policy is required, they must also obtain a job-specific policy under their eligibility cover; and provide a copy of that policy, or of a certificate of that policy, to the owner. Until this has been done, it is unlawful for the builder to carry out any work under the contract or to demand or accept any money (including any deposit) under the contract.

- 4.5.2** The following work is currently exempt from this requirement:
- any work with a price below \$12,000.00 (but again remember that, as soon as the price increases and passes this limit, the insurance becomes *required*); and
 - “*Multi-storey, multi-unit developments*”.

The definition of the second exemption is somewhat convoluted and you are encouraged to seek legal advice before deciding whether a project qualifies for that exemption.

4.6 MANDATORY REQUIREMENTS UNDER s31

Regardless of whether a contract is standard form or custom-drafted, section 31 of the DBCA imposes all of the following mandatory requirements:

- The contract must be in writing.
- It must set out in full all of the terms of the contract.
- The work to be done must be described in detail.
- The contract must include the plans and specifications for the work, and those plans and specifications must contain enough information to enable the obtaining of a building permit.
- The names of the parties and their respective addresses must be included.

- The builder's domestic registration details must be shown
- A date must be specified for the start of the construction work. If a fixed date cannot be specified because of pre-conditions that need to be satisfied first, a contractual mechanism must be set out, spelling out how the commencement date is to be ascertained. For instance the contract may provide that work will start 7 days after the issuing of the building permit. Either option is acceptable, as long as there is clarity on this point.
- In a like vein, the date for completion must be specified. Whenever the commencement date is not known in advance (see above), the date for completion needs to be stated in terms of the number of *calendar* days that will elapse after the commencement date. (this length of time also known as the contract period). Note that the builder must also specify how many calendar days he has allowed in the contract period for the following:
 - actual working days;
 - non-working days (weekends and gazetted public holidays);
 - other breaks in the continuity of the work (such as RDO's and Christmas close-down);
 - delays due to inclement weather;
 - delays due to the effects of inclement weather;
 - other delays that are reasonable to allow due to the nature of the contract.
- The contract price must be stated. Note that this price should be GST-inclusive.
- The date on which the contract is signed by the parties (known as the contract date) must be shown
- The contract must be in English and its turn of phrase must be clear
- It must contain a conspicuous notice (the form of which is prescribed in the Regulations) concerning the owners' rights to a cooling-off period and how that right may be exercised (see 4.11 below)
- A definitions section must be included, and all defined terms must be shown in a distinctive manner whenever they occur throughout the text. Examples of the distinctive manner include the use of bold type or italics.
- The contract must include the statutory warranties set out in sections 8 and 20 of the DBCA (see 4.7 below)
- A checklist must be included, in the prescribed form. This checklist is to verify that the owners understand key provisions of the contract before they sign it.

The legislation also provides that the contract is "of no effect" unless both (or all) parties have signed it. Please note therefore that a failure to have it signed by all parties may prevent any of them from enforcing it.

4.7 BUILDERS MUST BE REGISTERED

4.7.1 Unless they fall into one of the exempted categories, all *building practitioners* who carry out *domestic building work* for owners¹³ must be registered in a relevant category¹⁴ by the Building Practitioners' Board.

4.7.2 Under normal circumstances Building Surveyors may not issue a building permit for *domestic building work* under a contract until they are satisfied that the builder in charge of the construction work is appropriately registered (and holds eligibility for the required insurance).

In most cases the required registration will be "domestic builder unlimited" – or "**DB-U**". Builders registered as "domestic builder limited" (**DB-L**) are restricted to contracting with owners¹⁵ only within the limited capacities permitted in their registration. For example a "DB-L (carpenter)" may contract with owners only to carry out carpentry work, and so on.

Unregistered building practitioners may not contract directly with owners at all – unless they fall within and satisfy the "exempt single trade" conditions (see 4.3.1 above).

¹³ as distinct from sub-contracting to a registered head contractor

¹⁴ Relevantly either as *domestic builder unlimited* [DB-U], or in one of the categories of *domestic builder limited* [DB-L].

¹⁵ It must be remembered that "owner" for these purposes also includes any "owner-builder".

4.7.3 Building surveyors may only issue building permits for *domestic building work* without identifying a *DB-U* as the builder when the work will be carried out by an “owner-builder”. There are only two legitimate ways of becoming an “owner-builder”.

- The first applies only if
 - the registered proprietor of the land is already a registered builder or registered architect; and
 - wishes to act as the builder for him-her- or itself.
- Otherwise one can only become an “owner-builder” by applying for and obtaining an *owner-builder certificate of consent* from the Building Practitioners’ Board. [See 2.8]

4.7.4 Before dealing with any prospective builder you are strongly urged to check his, her or its registration credentials. Only building practitioners registered “*DB-U*” may enter domestic *head contracts*. Therefore they must be able to advise you of their *DB-U* number. You should then verify whether the details given to you are correct and current, by contacting the Building Practitioners’ Board [“the BPB”]. The BPB maintains an on-line as well as a telephone enquiry line for this purpose. Whenever in doubt, seek legal advice.

4.8 STATUTORY - IMPLIED - WARRANTIES

4.8.1 Section 8 of the DBCA specifies a set of warranties for the benefit of owners that apply, by force of law, to all *domestic building work* – regardless of whether they are or are not *also* incorporated in the contract for that work. (Incidentally, the legislation does require these warranties to be expressly incorporated into all contracts, as well).

Furthermore, these warranties

- cannot be waived or contracted out of by the parties; and
- they “go with the land” – so as to benefit all future owners during their ownership of the land, subject to the limitations on building actions and otherwise.¹⁶

4.8.2 Under section 8 of the DBCA the builder warrants that:

- (a) the work will be carried out in a proper and workmanlike fashion and in accordance with the plans and specifications; and
- (b) all of the materials will be good and fit for their purposes and – unless otherwise specified – will be new; and
- (c) the work will be carried out in accordance with all laws, not limited to the *Building Act*. This extends the compliance requirements to include – for example – relevant provisions of the *Building Regulations*; the *Building Code* [“BCA”]; and the *Disabled Discrimination Act*.
- (d) the work is carried out with reasonable care and skill and in a fashion that is specified in the contract; and
- (e) in the case of construction or renovation of a home, the work will be suitable for occupation once the work is completed; and
- (f) in circumstances where the contract states that the work is for a particular purpose, the work will be fit for that purpose.

Any breach of any of these warranties will constitute a *defect*. If any of these defects cause any further damage (say: a leak from a defective roof results in mouldy carpets below), the builder will also be required to rectify – or pay for rectifying – such “consequential damage”.

4.8.3 Section 20 implies yet another warranty, namely that
“... any provisional sum included by the builder in the contract has been calculated with

¹⁶ See Item 4.0

reasonable care and skill taking account of all the information reasonably available at the date the contract is made, including the nature and the location of the building site.”

Note that the builder’s warranties concerning provisional allowances do **not** cover any amounts inserted by, or at the request of, any other person (such as the owner or the architect).

4.9 LIMITATIONS ON THE OWNERS’ RIGHTS UNDER THE WARRANTIES

4.9.1 The most important limitation is that the warranties apply only to:

- a) defects (meaning defective materials or defective workmanship); which were
- b) provided by the builder under the contract.

(a) Non-defects

Not all imperfections constitute defects. Various *Australian Standards* apply to building materials and workmanship. These Standards are incorporated by reference into the *Building Regulations* and so they effectively form part of each contract. They all take cognisance of the inherent limitations of the materials and processes they deal with; and allow certain tolerances for the various scenarios. If an observed “defect” falls within the relevant permissible tolerance, it is not a *defect* for legal purposes.

The Building Commission has published a “*Guide to Standards and Tolerances*,” which contains extracts from the Standards dealing with tolerances that apply to some of the most commonly disputed scenarios (such as the permissible variation in the thickness of mortar joints, or the permissible maximum non-standard width of gaps between timber flooring boards - and the frequency with which these variations are permitted to occur). This is a very useful document for both builders and owners to have. While this *Guide* is not exhaustive and is not in itself a legally binding document, it is informative and is also an authority generally followed by VCAT in disputes concerning defects.

In addition to tolerances, some scenarios may constitute a defect early in the life of a building, but – as a result of “normal wear and tear” – cease to be defects later. An obvious illustration is flaking exterior paint: this would be a defect six months or a year after completion, but (probably) not after five or six years.

(b) Not part of the builder’s obligations

It should go without saying that no builder should be responsible for any material that had been supplied, or any workmanship that had been provided by “others” (that is: someone else) outside the scope of the Works of the contract. Unfortunately this is not always understood by everyone; and this often leads to unnecessary disputes.

For the sake of clarity, defects in materials and work contributed by the builder’s subcontractors and suppliers remain the responsibility of the builder. These subcontractors and suppliers will not be “others” for these purposes.

Whenever something is specified (or agreed) to be supplied or arranged “by the owner” or “by others,” the builder’s warranties will not apply to that component; whether it involves some material, fixture, equipment, fixing, installation - or any combination of these. Similarly for any work carried out by the owner or others after completion of the builder’s contract.

4.9.2 Post- contract works by others

If, after completion, any other person (the owner or a contractor) carries out any work, that work will certainly fall outside any of the builder’s responsibilities and warranties.

Note however that – unless such work was done with the builder’s prior knowledge and consent – any interference by such work with that of any part or component of the builder’s work will also void the builder’s warranty in respect of the part/s or component/s affected – and possibly even void the whole of the builder’s warranty.

(Except if, and to the extent, that they may happen to also have some additional, separate contracts directly with the owner)

Owners need to be particularly mindful of the fact that many “landscaping” activities will impact, directly or indirectly, on the soundness of the building. For example, trees or shrubs planted too near the building will almost always affect the nearby walls and footings, resulting in cracks, settlement and/or moisture ingress. Similar considerations apply to poorly designed, located or poorly constructed or drained hard-standing areas: such as terraces, pavings, paths etc. In such cases the builder’s liability for any cracking, settlement etc. may be reduced or voided altogether.

4.9.3 Post-occupancy misuse, neglect or abuse

If owners or occupiers fail to use reasonable care in maintaining their homes, defects may arise that cannot be blamed on the builders. One obvious and frequent example is the failure by owners and occupiers to keep gutters and rainwater heads clear of leaves and other rubbish; which will eventually lead to storm water entering the roof space and below. This is not a defect for which the builder is responsible. Mechanical, electrical and similar installations and fittings usually require regular service and maintenance; if this is not provided, any warranty for those items may be voided.

Another frequent source of damage is abuse by owners, occupiers or by their guests and visitors. A crack in a bathtub is not a defect covered by any builder’s warranty if someone had dropped a brick in the tub.

4.9.4 Subsequent owners

Although the warranties “go with the land” and therefore continue to benefit subsequent owners, there is an exception to this benefit. In so far as any defects are evident, noticeable (or ought to be noticeable) at the time of the purchase of the land, the law will deem the new owner to have purchased “with notice” of those defects. In other words, the purchaser is assumed to have taken those defects into account when he or she arrived at the purchase price he or she was prepared to pay. Having a right to have those defects rectified later at no cost would amount to double-dipping by those purchasers.

4.9.5 Expiry

As mentioned elsewhere, the owner’s recourse concerning defects is normally to the builder. If a builder fails or refuses to rectify (or pay for the rectification of) a defect for any reason; or if the builder denies that a particular complaint constitutes a defect for which it is responsible; the owners’ only option is to seek to enforce their perceived rights by litigation; specifically by commencing action in VCAT.

This option expires after ten years. If a “building action” (or a “plumbing action”) has not been commenced on or before the tenth anniversary of the date of issue of the Occupancy Permit (or, where applicable, the date of issue of the Certificate of Final Inspection), then the matter in question may no longer be litigated.¹⁷ This effectively ends the warranty in respect of all defects that have not been referred to VCAT earlier.

Note however, that these limitations do not apply to public liability claims – namely claims for injury to, or the death of, any person or persons. Public liability claims (whether arising from a breach of a warranty or otherwise) are subject to different rules and may, at least in some cases, be litigated well beyond ten years.

4.10 DEPOSITS

Builders are permitted to insist on being paid a deposit before commencing work. However they are not

¹⁷ **Building Act 1993**; s134 (and s135) In the very rare cases where neither an Occupancy Permit nor a Certificate of Final Inspection has been issued, the trigger date will be the last day on which work had been carried out.

permitted to ask for or accept a deposit greater than

- 5% of the contract price where the contract price is \$20,000.00 or more; or
- 10% of the contract price where the contract price is less than \$20,000.00.

Nor are they permitted to ask you to pay the agreed deposit, or to accept the deposit from you until they have provided you with a copy of the *required insurance* policy or certificate.

4.11 COOLING-OFF PERIOD

4.11.1 Owners are generally allowed to withdraw from domestic building contracts within the first 5 days following their receipt of a copy of the executed contract. Owners who wish to exercise this right must serve a written notice on the builder, *within the permitted 5 days*, stating that they withdraw from the contract under these provisions.

Complying contracts contain the notice in a form mandated by law. If an owner wishes to exercise this right, part of that notice must be completed, signed and served on the builder within the time stipulated, all in accordance with the instructions set out in the Notice.

If this is done in time and by the correct notice, the owner will have no responsibility or liability to the builder in any way – except for \$100.00 and for any out of pocket expenses that the builder may have already incurred with the owner's approval. The builder must also return any deposit it may have received from the owner – minus the above amount/s.

4.11.2 Note that in some circumstances owners are not entitled to any cooling-off period. These circumstances are set out in the mandatory *Cooling-off period Notice* bound into each contract.

4.11.3 Note also that, if a major *domestic building contract* does not contain the mandatory *Cooling-off period Notice*, the owner retains his or her right to withdraw from the contract until 7 days after first becoming aware that the contract should have contained that *Notice*. In your case, you will forever forfeit this particular extra right 7 days after you first read this paragraph.

4.12 “NO CHARGING” CLAUSES

Any provision in a major *domestic building contract*, which attempts to give the builder an estate or interest in the land constituting the site of the works for the purposes of placing a charge or caveat on that land, will be void and unenforceable. This means that builders may not obtain, through any provision in the contract, any security over the site of the works for any of the owners' unpaid debts.

However, builders may seek to protect themselves by one or more of the following legitimate options:

- insist on receiving written guarantees of the owner's performance of his/her/its obligations under the contract. These guarantees may – and usually will - need to be backed by registrable securities over some land owned by either the owners or by their guarantor/s (if any);¹⁸ or
- insist on receiving unconditional “bank guarantees” to secure any debts by the owners; and/or
- taking prompt and resolute action (such as suspension and/or termination of the work within the contractually agreed terms) as soon as any payment is late or incomplete.

Despite the above, separate – so-called collateral – agreements or guarantees given by owners may also contain charging clauses over the land of the site. However, these provisions will also be declared invalid by the Courts if they are seen as an integral part of the building contract – namely if the builder refuses to enter the building contract unless such a collateral agreement is also entered by the owner.

4.13 FIXED PRICE AND COST-PLUS CONTRACTS

One of the aims of the legislation is to compel builders to give owners as accurate a picture of their final

¹⁸ The land needs to be unencumbered to the extent required to secure the owner's obligations. The guarantor may be the owner and/or any other party with the necessary means and security.

overall financial commitment as is reasonably possible at the time of signing the contract.

For this reason, builders must give reasonable estimates for certain fees which (although they do not form part of the contract or of the contract price) the owners will need to pay to some third parties; such as building permit fees or service connection fees. The contracts must also direct the owners' attention, by warning notices, to all of those clauses which may legitimately serve to vary the price.

Also for this reason, the contract prices must generally be fixed lump sum prices; not subject to adjustment for changes in the cost of labour or materials; or to other "cost escalation" provisions.

In particular, Cost Plus type contracts are prohibited, with only the following exceptions:

- where the contract price is likely to be at least \$500,000.00; or
- in the case of work in existing buildings, where it is not possible to calculate the cost of a substantial part of the work without first carrying out some domestic building work.

There are severe penalties for breaches of these provisions.

4.14 VARIATIONS

4.14.1 What are variations?

Strictly speaking, any change to any aspect of the work comprising "the Works" in the signed contract is a "variation". It may, for example, involve changing in any way

- the design;
- the extent or the nature of the work;
- the timing of the work or any part of the work;
- the sequencing or staging of work;
- the materials;
- the standard or quality of any material or process agreed upon;
- the appearance;
- the finishes;
- the dimensions;
- the levels

and so on.

Most (although not necessarily all) changes will involve changes to the contract price. In common parlance the term "variation" is used to refer to these price changes, or "variation prices". Note that some changes will result in a reduction of the contract price; these are the so called "negative (or credit) variations".

More often than not, the introduction of variations will involve delays to the work, and therefore they will necessitate extensions to the contract period. Sometimes even a credit variation may involve extensions of time – for example a change to a less expensive fitting will reduce the price, but the finding and ordering the newly specified product can still take longer than what had been allowed for at the time of the tender.

Almost all variations will involve changes to the scheme approved by the building surveyor in his or her building permit. Whenever these changes are of a magnitude or of a nature that has sufficient impact on the validity of the permit, the variation cannot proceed until it is first submitted to the *relevant building surveyor* for amendments to the permit, and the permit is then amended accordingly.

In some cases the impact of a proposed variation may be inconsistent with or contrary to the planning permit, as well. In these cases the planning permit must also be amended before amending the building permit.

The time involved in these processes will usually delay work and entitle the builder to extensions of the contract period.

4.14.2 What are the rules for variations under the DBCA?

The DBCA provides that, in most cases, variations may not be carried out unless and until all of the following steps have been taken:

- the proposed variation is described in a written notice; and
- the notice states
 - the reasons for the proposal;
 - the effect the variation will have on the work under the contract;
 - whether any permit will need to be varied;
 - a reasonable estimate of any delays that may be involved in proceeding with the variation;
 - the cost of and the price for the variation; and
- the owner gives a signed consent to the variation, attached to a copy of the notice.

Unless a variation falls within one of the permitted exceptions,¹⁹ a failure to follow the above sequence may deprive the builder from any legal right to be paid the amount he or she would otherwise claim for the variation. In some instances it may even deprive him or her from the right to **any** payment for the work in question altogether.

Owners must realise that for this reason builders will be well within their rights – and may even be obliged - to refuse to implement any variation unless and until they have received their signed approval in the manner set out above.

4.15 CLAIMS FOR PAYMENT

The Act severely restricts the timing and the amount of the progress claims that builders may make during and on completion of the work. The “default” method specified for payments is on a “stage completed” basis.

4.15.1 STAGING: DEFAULT POSITION (“METHOD A”)

Under the default provisions of the statute, work on a new home is divided into the following stages:

1. Base stage
2. Framing stage
3. Lock-up stage
4. Fixing stage; and
5. Completions

The Act provides the following definitions for these stages:

1. "Base stage" means:

- *In the case of a home with a timber floor, the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level;*
- *In the case of a home with a timber floor with no base brickwork, the stage when the stumps, piers or columns are completed;*
- *In the case of a home with a suspended concrete slab floor, the stage when the concrete footings are poured;*
- *In the case of a home with a concrete floor, the stage when the floor is completed;*
- *In the case of a home for which the exterior walls and roof are constructed before the floor is constructed, the stage when the concrete footings are poured;*

2. "Frame stage" means:

The stage when a home's frame is completed and approved by a building surveyor.

3. "Lock-up stage" means:

¹⁹ For example: where the variation will not require any amendment to any permit and the variation price will be less than 2% of the original contract price.

The stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary).

4. "Fixing stage" means:

the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

Note that the end of what would be the "completion (or final) stage" is not defined under these provisions. As a result of this vagueness in the legislation, the question of when the builder is entitled to claim – and receive – the final payment has led to a multitude of bitter and expensive disputes. Under one extreme interpretation, the work will not reach "completion" until the owner agrees that there are no remaining defects or incomplete items. However, VCAT tends to take a more sensible attitude and accept the works as completed – for the purposes of final payment – when:

- the occupancy permit (or, where applicable, the Certificate of Final Inspection) has been issued by the Relevant Building Surveyor and a copy supplied to the owner; and
- copies of all applicable mandatory certificates of compliance (electrical, plumbing, glazing etc) have been supplied to the owner; and
- there are no known defects or incomplete items remaining that cannot be rectified without undue interference with the owner's substantial enjoyment of the benefit of the works provided under the contract

4.15.2 AMOUNT CLAIMABLE UNDER THE DEFAULT STAGE

The default percentages that may be claimed for the above stages are ²⁰:

1	base stage	10% of the contract price
2	framing stage	15% of the contract price
3	lock-up stage	35%
4	fixing stage; and	25%
5	completion	the balance of the (adjusted) contract price

4.15.3 STAGED PAYMENTS: "METHOD B"

The parties may agree to use a different set of stages (sometimes referred to as "Method B"), but only on the following conditions:

- there must be good and sufficient reasons for deviating from the above method; and
- the owner must read a warning notice and sign a consent notice²¹ before agreeing to use a different method; and
- the (different) stages used must be sufficiently clearly defined in the contract.

One instance of good and sufficient reasons is where the standard stages are not applicable to the work in question – for instance in alteration work. Another may be where one or more of the standard stages involve large amounts of work and/or time, and need to be broken up into smaller units in order to avoid leaving the builder out of pocket to an unreasonable extent.

4.15.4 RESTRICTION AS TO TIMING OF CLAIMS AND PAYMENTS

Whenever staged payments apply, the builder is not permitted to claim, receive or retain **any** payment with respect to a stage until the stage is **completed**.

²⁰ This distribution applies in the majority of cases, where the contract is for constructing the whole of the project. If the builder is only contracted to provide partial services (say, only to completion of the lock-up stage), different rules will apply.

²¹ Both of which must be in the form prescribed in the statute, and both of which must be included in the Contract.

4.15.5 PERCENTAGE COMPLETION BASIS FOR CLAIMS AND PAYMENTS

Whenever an independent expert certifier – such as an architect – is involved in the administration of the contract, the legislation appears to permit a deviation from the staged payment regime; and rely instead on the certifier to protect the consumer’s legitimate interests. This enables architects to use the traditional “percentage completion” method for assessing progress and for authorising payment.

4.16 RESOLVING DISPUTES

4.16.1 VCAT

All disputes arising from or under *domestic building contracts* are defined as “domestic building disputes”. These include not only disputes between owners and builders, but also those between owners and their own consultants (architects etc), or between owners and the builder’s sub-contractors, suppliers and consultants - as long as the disputes concern contracts for *domestic building work*. The principal forum for resolving all *domestic building disputes* is the Victorian Civil and Administrative Tribunal [“VCAT”].

If, by chance, a party refers a *domestic building dispute* to a Court instead of VCAT, then the other party is normally entitled to apply to have the matter struck (i.e. thrown) out by that Court. Such applications are in the main successful; and the originating party will then have to pay everyone’s costs involved in the futile litigation. If that party then still wants to go ahead with the claim, it must start again in VCAT.

4.16.2 BUILDING ADVICE AND CONCILIATION VICTORIA

Despite the above, an additional process for dealing with parts of *domestic building disputes* was introduced in 2002 by amendments to the **Building Act**. This process is known as Building Advice and Conciliation Victoria [“BACV”]; and is managed by CAV and the Building Commission. The process is not intended to replace the VCAT processes, only to complement them – by attempting to resolve or refine, by advice and conciliation, some disputes before they reach VCAT. If and when the process is successful, a reference to VCAT may become unnecessary.

It consists of the following steps:

1. A matter is referred (usually by an owner) to the CAV’s advice or conciliation service.
2. The conciliator notifies the other party and encourages both parties to reach a settlement.
3. If a settlement is reached, it will be put in a legally enforceable form; and then it will become binding on both parties.
4. If a settlement is not reached and the dispute involves matters of expert opinion or judgment, it is referred by CAV to the Building Commission.
5. The Building Commission appoints an independent expert, from a pool of such experts, to inspect the disputed matters of fact, to prepare a report and to make recommendations as to appropriate action where warranted.
6. The Report is forwarded to the parties. Note the following:
 - a. Any recommendations to the effect that the builder is to carry out rectifications become directions of the Building Commission; and the builder is obliged to comply with these - save in the event that the matter is referred to VCAT. In the latter event the BACV process is terminated, and the VCAT process takes over the resolution of the dispute.
 - b. A builder’s non-compliance will be regarded as a failure to comply with a direction of the Building Commission. This failure to comply will be referred to the BPB’s disciplinary processes.
 - c. The findings of the same Report are not binding on the owner. If the owner is dissatisfied with any of the findings, he or she may apply to VCAT to have the (original) complaint dealt with afresh.
7. In any event, the Report will be evidence in any subsequent VCAT proceedings.

It is important to remember that either party can always cut short and terminate the *BACV* process by taking the dispute to *VCAT*.

4.16.3 ALTERNATIVE DISPUTE RESOLUTION “ADR”

This term covers avenues for resolving disputes by private methods, rather than by litigation in Courts or Tribunals, which are all set up by Parliament. *ADR* methods include arbitration, mediation, conciliation and expert determination. Prior to the proclamation of the *DBCA* arbitration was a commonly specified and used method for dispute resolution in all types of building contracts.

Then section 14 of the *DBCA* introduced the following new provision:

“Any term in a domestic building contract or other agreement that requires a dispute under the contract to be referred to arbitration is void.”

This was initially interpreted as a total ban on the use of private *ADR* in all *domestic building disputes*. Later Court decisions made it clear that the ban applies only to compelling either or both of the parties to use *ADR*. Therefore it is quite legitimate to refer any dispute, after it has arisen, to *ADR* if, but only if, both parties agree to this. Of course, they must then also agree on the details of the process and ensure that the outcome will be binding and watertight.

It must be remembered that once *VCAT* starts to deal with a matter, the first step will be an attempt to mediate under the stewardship of the Tribunal. Having regard to this, and to the difficulties in setting up an agreed and effective private *ADR*, one questions the value of that option in *domestic building disputes*.

4.17 TRANSPARENT TIMETABLE

The legislation requires that, as far as it is practicable, the contracts must give owners a clear, accurate and binding account of the builder’s anticipated performance of the contract as regards timing.

As a result, the contracts must contain the following information:

- (a) When will construction work start on the site?

This may be done by specifying a calendar date – or by stating the start date with reference to the fulfilment of certain conditions precedent (such as the receipt of all necessary permits). The second option is by far the most prudent one; and it should be the one used unless there are weighty reasons for doing otherwise.

Note that, whenever the second option has been chosen, the builder must notify the owner in writing of the date on which work actually started on site. This should be done soon after the actual start.

- (b) When will the work be completed?

This, too, may be specified as a calendar date, or by specifying the “contract period” – namely the number of calendar days that may elapse between the actual start date and the date on which completion will be reached. Again, it is unnecessarily risky to name a specific date (i.e. option 1).

When the second option is used, the notice advising the owner of the actual start date should also specify the associated *date for completion* (calculated as the actual start date plus the “*contract period*”)

- (c) What allowances have been included in the *contract period*?

Builders must explain in the contract the derivation of the length of the *contract period*²². This must include:

- the number of working days required (and included) to carry out all of the works; plus
- the number of non-working days included – these being all intervening Saturdays, Sundays, gazetted public holidays and any other days on which the builder will not be operating (such as Rostered Days Off); plus
- the number of delay days (provisionally) included in the total *contract period* for reasonably estimated delays due to
 - inclement weather and consequent conditions;
 - the type or nature of the work; and
 - other foreseeable causes.

4.18 DISTINCTION BETWEEN THE BUILDER’S STATUTORY WARRANTIES AND THE STATUTORY “HOMEOWNERS’ WARRANTY INSURANCE”.

There is a great deal of confusion concerning these two matters; principally caused by the shared word “warranty”. They are, however, very different things.

Before turning to the differences, what does the word “warranty” mean? In its present use it means a binding promise by a person (the warrantor) that something will be done in a certain specified way; and if it turns out that the promise is not fulfilled in all respects (or at all) then the promisor will ensure that any gap between the outcome promised and the outcome achieved is filled at his or her cost.

4.18.1 THE BUILDERS WARRANTIES

Put in very simple terms, the legislation entitles owners to have all *defects* attributable to the builder, and all consequential damage, rectified at no cost to them, but by the builder or by others at the builder’s expense. The above entitlement can be enforced (if necessary) by owners through legal action, in most cases, for a period up to ten years.²³ The six-year period mentioned in the current “warranty” insurance policies is totally irrelevant here. Six years happens to be the maximum length of time during which the insurance company that issues the policy will come to the owner’s aid if – and only if – enforcement of the warranty from the builder has become an impossibility due to the builder’s death, insolvency or disappearance.

Therefore, when considering responsibility for rectifying an alleged defect after completion, the focus of the parties’ enquiries should not be how long ago the work was completed (unless it was more than ten years earlier); but the following questions:

- ▲ Is the alleged defect really a defect?
- ▲ If it is a defect, is it attributable to defective materials or workmanship provided by the builder under the contract?
- ▲ Is the observed deficiency a result of some unauthorised interference with the builder’s properly completed work?

²² This is the agreed number of calendar days during which the works of the contract must be carried out. It starts on the start date and ends on the *date for completion* (as it may have been adjusted from time to time).

²³ This is known colloquially as the statutory limitation period. See item 4.9.5. If legal action had commenced concerning any particular alleged defect or defects in a Court or VCAT before the expiry of the this period, then the limit will not apply to items found to be defective as a result of that litigation - regardless of when the Orders are made.

4.18.2 The “Warranty Insurance” Policy

(a) What is its nature?

It would be better to call this a “*required insurance*” policy, which is mandated by the legislation. It is a policy issued by an approved insurer for the benefit of the owner; and it has no relevance to the builder’s obligations. The builder’s only associated obligations are that it must

- hold eligibility for obtaining this insurance for its clients; and
- obtain, pay²⁴ for and deliver the policy relating to each contract to the client in question.

Once this is done, the insurance policy in its current form has no further application to the builder, or to the builder’s obligations to the owner.

(b) When and how does it apply?

It has no application at all as long as the builder is alive, solvent and traceable. In all of these cases the owner’s rights and the builder’s obligations are governed only by the Common Law and by legislation – in particular by the section 8 warranties; and owners must seek redress directly from their builder.

If and when the builder is dead, insolvent or has disappeared, it can have two principal applications:

- i. First, where the construction of a home is left incomplete by reason of premature termination of the contract. In this event the insurer will usually contribute to any excess that the costs of completing the Works will involve over and above what is the unpaid balance of the *contract price*. The upper limit of this contribution is currently 20% of the original *contract price*.
- ii. Secondly, once the Works of the contract have been completed, the insurer will be liable for the costs of rectifying any defective or incomplete work by the builder and for making good any consequential damage. The upper limit for this cover is \$200,000.00. The insurer’s liability is also limited in its duration, to:
 - six years, in the case of defects defined as “structural,” and
 - two years in all other cases.²⁵

Chapter 5 – UNDERSTANDING, PREPARING AND EXECUTING THE CONTRACT

You need to know and understand each contract before you enter it; as it will govern your rights and obligations during and after the work.

Meanwhile, there are some general rules that apply to most building contracts. One of their principal parts is a fixed text, which sets out the conditions considered necessary by the drafters for that type of contract.

²⁵ Of course, builders will have included the cost of obtaining the policy in question in their tender/contract price.

There is always another part, which is for the parties to complete in each case with the details that apply only to that particular contract.

5.1 FIXED TEXT

You need to remember that, generally speaking, the “fixed text” is not necessarily fixed. It is open to the parties to agree (if they wish) to delete, add to or modify these provisions. Deletions may be done by crossing out all of the words not required, and having each deletion initialled by each party. Additions or modifications may be done through the insertion of “*Special Conditions*”.

Usually contracts will contain some blank space for inserting *Special Conditions*. By the way, any blank spaces that are not used should always be crossed out and initialled. This will prevent fraudulent insertions later. Whenever *Special Conditions* are being considered, a construction lawyer should be consulted first; in order to identify and help avoid any unintended legal consequences. This is of particular importance when a special condition seeks to modify the standard text.

Having said this, some of the fixed text of the complying *major domestic building contracts* is mandated by the law; these may not be deleted or modified in any way without offending against the *DBCA*. Consulting with your construction lawyer will avoid the making of such a mistake.

5.2 DETAILS PECULIAR TO THE CONTRACT

This part of the contract is sometimes called “Appendix”, at other times “Schedule,” “Annexure” or some other name. In any event, it contains spaces that the parties themselves must fill in with the details that will apply to the contract in question. These include details negotiated and agreed by the parties before completing the contract agreement.

The factual information to be inserted includes the names, addresses and contact details of all the parties; the address and Title particulars of the land, and a concise description of the proposed work.

Typical examples of such descriptions would be:

- “erection of a new 20-storey apartment block;” or
- “construction of a new double-storey solid brick home;” or
- “extensions to existing brick-veneer residence;” or
- “repairs and improvements to existing kitchen and bathrooms” etc.

The balance of the Appendix will usually include the following items:

- (a) The contract price. You must ensure that you always:
 - either insert the GST-inclusive price (whether or not it is identified as such);or
 - if you insert a GST-exclusive price, the words “**plus GST**” are clearly stated next to that price
- (b) The amount of the deposit;
- (c) The commencement date (the date on which construction work is to start on the site);²⁵
- (d) The date for completion;
- (e) The *contract period* (expressed as the number of calendar days that will expire between the Commencement Date and the Date for Completion).
Note that the *DBCA* compels builders to include in this period a reasonable number of delay days of certain specific types (such as delays caused by inclement weather) and these must also be inserted in the Appendix.
- (f) Agreed damages payable to the owner for delays in reaching completion. These are usually called “*liquidated damages*”. If any such damages are agreed, they should be based upon the realistic likely costs to the owner in the event of delays. If an amount is inserted that bears no reasonable relationship to such costs, it will be regarded as not a genuine pre-estimate of likely costs but as a penalty. Since private penalties are unlawful, the Court (or *VCAT*) will disallow the contractual provision and it will award nothing by way of liquidated damages.

²⁵ For a discussion of this item, and its relationship to items 4.2(d) and (e) above, refer to items 4.16(a) and (b)

- (g) Damages may also be agreed to compensate the builder for delays caused by the owner. These are sometimes called *reverse liquidated damages*. These should likewise be based upon the realistic likely costs the builder will suffer or incur due to any such delays; otherwise they, too, will be considered penalties.
- (h) There will usually be schedules for Prime Costs and Provisional Sums. The parties need to consider whether they want to insert any items of provisional allowances. If so, they must agree and insert what these items are and, how much provisional allowance will be included in the contract Price for each of them. They also need to agree on the percentage to be added for the builder's margin on any adjustments to these allowances, and insert that percentage.

Major domestic building contracts must also include a mandatory Checklist. This must be read, completed and signed by each owner; and the Checklist page itself must *also* be initialled by the builder and by each owner. All of this should take place before you execute (sign, initial and date) the remainder of the contract.

5.3 INCLUSION OF OTHER COMPONENTS

The actual agreement between the parties comprises not only the text and the Appendix discussed above, but also a number of other documents, which define the scope of the work to be done by the builder. They are primarily the architectural and engineering drawings, specifications and schedules, and the engineering computations, all of which were used by the builder to arrive at the agreed contract price.

In order to ensure that these documents will, in fact, form part of the binding agreement, the following steps must be taken:

- Details of each drawing must be inserted in the Appendix. These details must include
 - the name of the architect, engineer or draftsman who prepared it; and
 - the date shown on the drawing; and
 - the drawing number – including the amendment number (for example drawing no “AR 345/C/1”) and the date of each amendment.
- Sufficient details of all other inclusions must also be inserted in the Appendix so that the document in question can be clearly identified. These details would typically include the title of the document, the author's name, the date and any document number appearing on the document, and the number of pages.
- When the contract is executed
 - each drawing must be signed and dated by each party; and
 - the front page of each other document must also be signed and dated by each party; and
 - each page of each other document must be initialled by each party.

5.4 EXECUTION SIGNING

Two identical sets of the contract must be prepared and executed. These are called “counterpart originals”. Each set must comprise the “contract” (namely the printed text and the completed Appendices), and a copy of all the other inclusions that form part of the contract - as discussed above.

Each party must sign and date the execution clause (often called “*Instrument of Agreement*”) in the contract. Note that section 31(2) of the *DBCA* states the following:

“A major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their authorised agents).”

In other words, any missing signature will make the contract unenforceable. This is nothing short of a disaster.

Each party must also initial each page of the “contract,” and deal with the inclusions as set out in 5.3 above. In addition, the DBCA requires that owners read, acknowledge and sign a number of mandatory warning notices inserted in the text and elsewhere in the contract. The parties must ensure that this is, in fact, done.

Finally, builders must give the owners one of the full, executed counterpart original contract sets. Section 25 requires this to be done

“... as soon as is practicable, but no later than 5 clear business days, after entering into [the] domestic building contract ...”

All of this sounds – and is – tedious; but whenever a required signature or initial is missing, parties in a dispute may be able to claim that the contract was not properly executed, or that they had not knowingly agreed to the terms in question. Having the documents fully and properly completed and executed will avoid such unwanted, unnecessary and very tedious complications.

5.5 AFTERWARDS

Your counterpart original is an extremely important set of documents. It will constitute the primary evidence of what the parties had, in fact, agreed upon when they entered the contract. This will be of critical importance in any dispute that may arise during construction or afterwards – right until the expiry of the 10-year period following the date of the Occupancy Permit.

You need to ensure that your set is kept safely and in a pristine condition during all of that time. Do not scribble on any of the papers or drawings forming part of the contract. Use something else for these purposes.

CHAPTER 6 – INSURANCES

6.1 INSURANCE MANDATED BY THE LEGISLATION (“REQUIRED INSURANCE”)

Unless an exception applies, the legislation requires builders to obtain for, and provide to, owners an insurance policy of a specified type whenever the price of a domestic building contract is greater than \$12,000.00. Note that if the initial contract price is below this threshold, but subsequently reaches or exceeds it - due to variations of one kind or another - the builder will need to obtain a policy as soon as the adjusted contract price reaches \$12,000.00.

The details of these policies are specified in Ministerial Orders, which are published from time to time in the Government Gazette.

The policy that is currently specified is often called last resort insurance, because it operates only if one of the following events has taken place:

- the builder has died (if an individual); or
- the builder has become insolvent; or
- the builder has disappeared.

6.2 EXEMPTIONS (WHERE THE ABOVE INSURANCE IS NOT “REQUITRED”)

6.2.1 *Multi-storey, multi-unit developments*

are exempt from the requirement for the above insurance. (See Item 4.5.2). Therefore it is important for intending purchasers in multi-unit developments to check whether the units they are about to buy are in fact covered by defects warranty insurance.

6.2.2 *Owner-builders*

are also exempted from the requirement to obtain this insurance – but only so long as they do not sell or otherwise transfer title to the land for six years and six months following the date of the Occupancy Permit (or Certificate of Final Inspection). If they wish to sell (etc) the homes any earlier, they must first:

- (a) obtain a report on the building from a *prescribed building practitioner*.²⁶ These reports must
 - contain matters that are set out in Ministerial notices published from time to time in the Government Gazette; and
 - be produced no more than 6 months before the owner-builder enters into the contract to sell the land (or building); and
 - have been supplied to the intending purchaser; and
- (b) obtain a *required insurance* for the unexpired portion of the *prescribed period*; and
- (c) give the purchaser a certificate evidencing the existence of that insurance; and
- (d) include the section 8 warranties in the Sale of Land contract.

Any contract for the sale of the property which is entered in contravention of the above requirements is voidable at the option of the purchaser at any time up until settlement.

6.2.3 *Other exemptions*

A person who enters into a *major domestic building contract* with a builder for the construction of more than 4 homes may, with the consent of the builder, apply in writing to the Director of Consumer Affairs Victoria to exempt the builder from the requirement to be covered by the *required insurance* in respect of that building work.

There are other specific exemptions in the *Building Act* but these are of very limited application, and are therefore outside the scope of this publication.

²⁶ Note however, that requirement (a) does not apply to those owner-builders who are also registered building practitioners.

6.3 ALL REGISTERED BUILDING PRACTITIONERS ARE REQUIRED TO BE INSURED

- 6.3.1 Section 3 of the **Building Act** defines a *building practitioner* as being any one of the following:
- (a) a building surveyor;
 - (b) a building inspector;
 - (c) a quantity surveyor;
 - (d) an engineer engaged in the building industry;
 - (e) a draftsman who carries on a business of preparing plans for building work or preparing documentation relating to permits or permit applications;
 - (f) a builder including a domestic builder;
 - (g) a person who erects or supervises the erection of prescribed temporary structures;
 - (h) a person responsible for a building project or any stage of a building project and who belongs to a class or category of people prescribed to be building practitioners;

The definition excludes Architects; but they must also hold substantial Professional Indemnity Insurance [“PII”] policies as a pre-condition of their registration as full practitioners by the Architects Registration Board.

- 6.3.2 All building practitioners must be registered with the Building Practitioners Board. [Architects are subject to separate legislation;²⁷ under which they must register with the Architects Registration Board].

The legislation also requires all *registered building practitioners* to be insured in one way or another. We have already dealt with the insurance mandated for domestic builders. A separate warranty insurance scheme is prescribed for commercial builders; this will not be discussed here.

Practitioners registered in the design categories (categories “a” - “e” above) must hold *PII* policies; which are also specified in Ministerial Orders. The current scheme requires these practitioners to be covered against claims for not less than one million dollars. This is an annual claims based policy.

- 6.3.4 Only natural persons can be registered under the **Building Act**; and each registration must be renewed annually. The registration will not be renewed unless the practitioner has a current mandated insurance policy; and it will be effectively suspended (or terminated) as soon as the practitioner ceases – for any reason - to have a current policy.

A company (or a partnership) will be permitted to carry out building work if – and only if – at least one of its directors or one of its partners (as the case may be) holds a current registration in the category of the work in question. In such cases the insurers will base their decision about providing the required insurances, and on the conditions under which they will do so, on a combination of the characteristics of the registered director and of the company (or partnership).

The carrying out of any building work without registration of the relevant kind is a prosecutable offence; and every proven breach is punishable by a heavy fine. Similar provisions apply to any representation that a person is registered, or that any person or company or partnership is qualified to carry out building work of any given kind, when this is not true.

6.4 OTHER INSURANCES

Builders are also required to hold other types of insurance. Some of these are also legal obligations, arising from more general type of legislation - such as Work Cover. Many other insurances are specified in the contracts the builders enter with their clients – such as *contract works policy* and *public liability policy* for each job. Of course, it would be most imprudent for builders not to have these policies, anyway.

²⁷ The **Architects Act 1991** and the **Architects Regulations 2004**

Other insurances that builders are likely to need include policies for vehicles, tools and equipment, all risks insurance for surrounding property and so forth. However, these are outside the scope of this paper.

CHAPTER 7 – SOME IMPORTANT TIPS FOR SUCCESSFUL CONTRACTING

7.1 ALWAYS NOMINATE ONLY ONE PERSON TO DEAL WITH YOU AND VICE VERSA

Owners will often be couples, groups or companies, and similarly, builders will often be partnerships or companies.

It is critical that one, and only one, person is always nominated by the builder to liaise with you; and that you also nominate a single person to liaise with the builder. Your nominee may be you, another owner (such as your spouse or partner), or any other person – preferably a person with some experience in managing building projects and building contracts.

The important thing is that the nominated person – and only the nominated person - is authorised to give notices and directions to the other party and to receive queries and communications from that other party. Otherwise the parties are likely give and receive conflicting directions, information or responses; resulting in chaos.

Unless expressly agreed otherwise, it is equally important to ensure that no-one – not even the nominated person of a party – is permitted to communicate directly with any of the other party's partners, consultants, employees, subcontractors, suppliers etc. Each nominated person needs to communicate exclusively through the other party's nominated representative – or at least only in his or her presence.

7.2 DO NOT INITIATE VARIATIONS UNLESS UNAVOIDABLE

Almost all variations will have an impact on both the contract period and the contract price. Mostly the impact will be an increase to the price, to the *contract period* or both. In some cases permit amendments will also be required before such a variation may proceed; this will involve further delays and costs.

Variations constitute one of the major sources of disputes. Parties will often end up arguing about whether

- compliance with a particular request or instruction constitutes a variation (or should it have been included in the builder's quoted price); or
- there was any need for a suggested variation; or
- the particular changes were appropriate solutions to the situation prompting them; or
- the price for the variation is appropriate and/or has been authorised by the owner

In an ideal world, neither party should seek variations. The greater the number of variations, the greater the cost blow-out and the greater the stress that will be brought to bear on the project. It is for this reason that the drawings and the specifications should be prepared with great care and precision, the less ambiguity in terms of design documentation, the lower the potential need for variations.

Builders should not entertain any variation unless they do so in a fashion that complies with the DBCA. Thus they need to ensure that the variation is in writing, is accurately scoped, described and costed; and stating the impact on the contract period. Next, the document must be signed by both parties. You need to realise that you may not insist on the builder's carrying out any variation unless and until you have authorised it in the above manner. If you fail or refuse to give this authorisation, the builder will usually be entitled to carry out the work as originally documented – that is: by ignoring the changes proposed.

7.3 PAY BUILDERS WHEN THEY ARE ENTITLED TO IT

The legislation gives consumers (i.e. owners) a large measure of protection in general; and in particular with respect to their obligations to pay their builders. One of the obvious protective measures is the prohibitory on deposits exceeding 5% of the *contract price* (or 10% where the *contract price* is \$20,000.00 or less)

More important still, are the severe restrictions on when, and what portion of the contract price, builders may lawfully claim by way of progress payments. Unless special circumstances apply, progress claims may only be made on the completion of the “stages” mandated by the legislation²⁸ Moreover, no part of the set price for a stage may be claimed by, or paid to, the builder until that stage is (in effect) 100% completed. This means that builders are compelled to advance what amounts to massive, interest-free credit to owners throughout the contract. Meanwhile, they are also compelled²⁹ to actually pay their suppliers and sub-contractors regardless of whether or when they receive payment for that work or those supplies from their clients (namely you). This imposes considerable strain on the finances of all but the largest of businesses.

It will therefore be unwise and unconscionable to further delay payments when they are in fact claimable, claimed, and due for payment. This will generally apply even when you think that there are some defects or incomplete work contained in the stage being claimed. Do not forget that, by the time payment is due for a stage, a considerable amount of work will normally also have been done by the builder on the next stage or stages – for which you have not paid, and for which you will not have to pay for some time yet. Therefore – unless there are serious defects or omissions in the work of the stage for which the claim is made – you will always be “ahead” financially, and should not refuse or delay payment on those grounds.

If you do not pay when the builder can reasonably expect it, its whole economic survival is threatened. This will, faster than any other single reason, lead to counter-measures; to which the builder is incidentally entitled under all normal contracts. These available counter-measures include suspension of the work and/or termination of the contract for your breach of your payment obligations. Disputation and litigation are very likely to follow this state of affairs.

But even if the builder does not take counter-measures, your failure to pay as and when due may well contribute to its becoming insolvent. This is definitely not in your interest. It will certainly involve serious delays to your project; almost certainly involve a blow-out to your budget; and most likely also lead to disputations with various other entities (liquidators, insurers and so on).

²⁸ See item 4.15 for details of the restrictions on payments.

²⁹ Under a different Act of Parliament.

CHAPTER 8 - KEY ACTIVITIES, TERMS AND JARGON

8.1 PLANNING PERMITS

Legislation, headed by the *Planning and Environment Act 1987*, requires in many situations that, before any other activity, a *planning permit* must be obtained for a particular proposed project. The answer to the question whether or not a *planning permit* is required in any given case is complex. It may happen for example that no planning permit is required for certain building work on a parcel of land, but it is required for identical building work on the abutting land. For this reason owners (and builders) must take positive steps to ascertain whether a planning permit is or is not required in each case. Since planning permits may only be obtained from the municipal authority in which the land in question is located, one reasonably safe way of ascertaining the answer is by asking the local planning officer to advise you of the answer - in writing. Planning consultants and lawyers specialising in planning matters should also be reliable sources.

Whenever a *planning permit* is required, no valid *building permit* may be issued unless and until

- a valid *planning permit* has been issued; and
- all conditions that may be stipulated in that permit have been satisfied by the scheme submitted for the *building permit*.

8.2 BUILDING PERMITS

It is a serious offense under the legislation to carry out any building (or demolition) work without the necessary, valid and current building (and/or demolition) permit.

- The general rule is that building permits are necessary for any activity involving building and construction activity; and demolition permits are required for any activity involving removal of any components or other items associated with buildings. There are a few, but only very few, exemptions from this requirement. Before you decide that an exemption applies to the work you are contemplating, you must obtain expert legal advice to confirm or deny this.
- An apparently valid building permit may be invalid if the issuer has overlooked some essential condition. Often this involves the lack of a required planning permit, or a failure to comply with a condition stipulated in the planning permit issued. (See **8.1** above).
- A building permit is current only within certain time limits. Unless the validity is extended in time, work must commence by a specified date and be completed by another specified date. These dates are shown on the permit document. If work has not started within the (extended) commencement deadline or completed within the (extended) completion deadline, the permit becomes void and a new application must be submitted. This will be assessed afresh - under whatever rules apply at the time of the second application.

8.3 RELEVANT BUILDING SURVEYOR [RBS]

Building permits may only be obtained from professionals who are registered by the *Building Practitioners Board* in the category of building surveyor. Consumers have a choice between engaging a private building surveyor or a municipal (council or shire) one. Furthermore, even if you choose to engage a municipal building surveyor, it need not be from the municipality in which the land is located.

Note that a building surveyor may only be engaged by the owner or the occupier of the land; and the resulting relationship is confined to these parties. It excludes the builder. Builders may only engage and instruct building surveyors as agents of the owners or occupiers. For these reasons it is unlawful for builders to engage building surveyors (or to apply for any permit on behalf of owners) unless they have first obtained a signed written authority to do so from the owner or occupier in question.

Once a building surveyor has been engaged for a particular project or scheme he or she becomes known as "*the relevant building surveyor*" [RBS] for that job, and will issue the *Building permit* when satisfied that the building – if constructed in accordance with the submitted drawings and specifications – will comply

with the legal requirements. (Note however that despite this, the *RBS* does not warrant, or guarantee, that this is in fact the case.)

The *RBS* is then normally expected to oversight the whole project and to eventually issue the *Occupancy permit* (or the *Certificate of final inspection*) as required by the *Building permit* issued by him or her. Changing from one building surveyor to another is not normally permitted; it may only occur with and subject to the Building Practitioners' Board's prior written consent. This consent is not likely to be granted unless the owner has good and proper grounds for wanting to change.

8.4 OCCUPANCY PERMITS AND CERTIFICATES OF FINAL INSPECTION

The *RBS* must normally issue an *Occupancy Permit* when, in his or her expert opinion, a new building has been completed to a standard where it is safe and fit to be occupied and used for its intended purpose.

It is unlawful for anyone to occupy any new building without an *occupancy permit*; and offending owners are subject to prosecution and fines.

The date shown in the *Occupancy Permit* is also the date on which time starts to run with respect to warranty insurance policies, as well as with respect to the 10 year limitation on commencing legal action.

Sometimes – notably where a building contract involves alterations, extensions or additions – an *Occupancy permit* will not be required. On completion of these works the *RBS* must issue a “Certificate of Final Inspection” instead. For most purposes this *certificate* will be treated in the same way as the *Occupancy permit* is for new buildings.

Building surveyors must lodge a copy of each *Occupancy permit* and of each *Certificate of Final Inspection* with the local Council. It needs to be remembered however that these permits and certificates do not in themselves constitute conclusive proof that everything was actually built in full accordance with the drawings, the specifications and all the relevant laws.

Note that the issuing of the *Occupancy Permit* or of the *Certificate of Final Inspection* (as the case may be) is not the same as “completion” for contractual and statutory purposes. The statute specifies “completion” as the stage when:

- the work has been completed in accordance with the plans and specifications
- AND
- the *Occupancy permit* (or the *Certificate of Final Inspection*) has been issued.

Under the legislation builders are not entitled to make a final claim – or to receive any amount for the completion stage – until the above criteria have been satisfied.

8.5 FIXED PRICE CONTRACTS

The legislation requires that – save for certain limited exceptions – the prices of all domestic building contracts be fixed lump sums. This means that the agreed contract price specified must cover all of materials and labour to be provided by the builder under the contract; and that it may not be changed otherwise than permitted under the statute.

Note the following:

- Despite the “fixed price” tag, the contract price may be changed (varied) in several permitted ways. These include *variations* to the contract, adjustments of any *Prime cost items* and of any *Provisional sums* that may be included in the contract. The legislation specifies the circumstances in which these changes to the contract price may be made, and also the steps that must be taken in order to make the changes permissible.
- Often some of the work shown on the building permit documents will not form part of a contract between a builder and the owner. It may be that the owner wants to let a separate contract for (say) all of the landscaping work. Sometimes owners may want to do some of the work themselves.

- In all such cases the builder's contract must clearly specify all work that is excluded from the contract (and therefore also from the contract price).
- Similarly, the building permit must be issued to reflect any division of responsibility; usually by breaking the permit into the appropriate "stages" and showing who is responsible for each of these. This will enable the builder to obtain an Occupancy permit (or Certificate of final inspection) – and thus final payment - as soon as his stage (or share of the work) has been completed; regardless of the progress or lack of progress by others on their share of the work. The builder's warranty insurance policy cover will then also be confined to the work for which he or she is actually responsible.

8.6 COST-PLUS CONTRACTS

These are the alternative to fixed price contracts. The DBCA forbids the use of Cost Plus contracts for domestic work, except in two circumstances:

- where the reasonably estimated cost of the completed work will be at least \$500,000.00; or
- Where the work involves alterations, extensions, repairs (etc) to existing buildings and it is not reasonably possible to estimate the full extent of the work involved until some work is done first.

Essentially a cost-plus contract is an agreement that the owner will cover whatever the builder's costs turn out to be (provided that the expenditure is properly documented), plus an agreed margin for the builder's overheads and profit. There is no upper limit to the final price in such contracts; therefore owners should not enter them lightly.

Note:

- the reasonable estimate must be made at the time the contract is entered; and it must be based on the information then available;
- the \$500,000.00 present lower limit is subject to change by Ministerial Order;
- care should be exercised before relying on the second exception, since the entitlement to do so is based on somewhat imprecise criteria, and which are therefore open to debate and challenge.

The reason for the general statutory prohibition on this type of contracting is that it is much more open to abuse than fixed price contracts. Prudent owners should seek competent professional advice (legal and otherwise) before deciding to follow this path. In any event, they should consider:

- what benefits they wish gain from doing it this way; and
- whether those benefits are likely to materialise and if so, will they outweigh the additional costs and risks involved in using cost-plus contracting; and
- What measures they may need or want to take to reduce those risks and manage those costs.

8.7 VARIATIONS ³⁰

Any change to the work after the execution of the contract is a *variation*. These may include changes to the quality, the dimensions, the type, the level, the position, the method of installation, or any other characteristic of any materials, components or processes; as well as any requirement or need to add to or delete from any of the work forming part of the contract.

It is important to ensure that, before variations are carried out, the owner and the builder agree to each variation and also agree on the associated *variation price*. The legislation requires that (except in limited circumstances) this prior agreement is documented in a written authorisation signed by the owner.

8.8 PRIME COSTS [PC] AND PROVISIONAL SUMS [PS]

These terms and their meanings cause much confusion. They are sub-sets of the "family" sometimes referred to as *provisional allowances*. These are amounts (*allowances*) included in the *contract price* of fixed price contracts, to nominally (provisionally) cover the anticipated cost of certain components which

³² See Clause 4.14

form part of the contract, but whose price – for one reason or another - cannot be calculated accurately at the time when the contract is entered.

8.8.1 Prime Cost [PC] Items

Some provisional figures refer (only) to the cost of purchasing and delivering certain products, materials or other goods. These *allowances* are defined in the DBCA as “**Prime Cost Items**” and therefore we will adopt the same definition.

These allowances need to be included for products where the exact number and/or type had not yet been decided when the contract is entered. For example the full details of the door- and window-hardware and furniture are rarely decided by owners this early in the process, but the design, material, colour, finish, master-keying etc. characteristics of each item are variables with significant influence on the price. Similar considerations often apply to plumbing fittings, light fittings, kitchen equipment and so on. Unless special circumstances apply, however, the cost of fixing these items in position on the site can be calculated in advance even without knowing the full characteristics. Therefore the cost of fixing/installing is already included by the builder in the fixed (non-provisional) component of the contract price.

Once the goods included in a *PC* have been selected and purchased, the *contract price* will be adjusted to cover the difference (if any) between the actual cost of purchase and delivery of the goods and the *PC* originally allowed for that item.

8.8.2 Provisional Sums [P5]

There are other instances, where the cost of installing, fixing or otherwise providing a component is incapable of being ascertained at the time when the contract is entered. The *provisional allowances* in these cases must nominally cover the cost of such fixing or installing (that is: the labour involved) or, in some cases, the entire cost of providing the component in question (that is: supply, delivery and labour). These are termed *Provisional Sums [PS]*.

For example, an air conditioning installation may not have been fully designed or specified at the time the contract is entered – here a *PS* amount will be included to cover the full cost of all materials and labour that will be involved. Once the design is completed, a single subcontract can be let for providing and installing the whole system, and the *PS* adjusted accordingly.

8.8.3 Notes:

- The DBCA stipulates that all the amounts included as *provisional allowances* by the builder must be reasonable under the circumstances at the time of pricing the contract. If challenged, the builder may need to demonstrate to the authorities how he derived those allowances and satisfy them that these processes were reasonable.
- Oftentimes *provisional allowances* are made (that is: determined for inclusion in the contract) not by the builder, but by the owner or by one of the owner’s consultants. Naturally, the builder cannot be held responsible for the reasonableness or otherwise of those allowances.
- The DBCA also requires the builder to provide to the owner copies of all invoices, receipts or other documents relating to the actual costs of *provisional allowances* “as soon as practicable” after the builder receives those documents.
- Since these *provisional allowances* are adjusted against the actual **net** costs incurred by the builder, the builder should also be entitled to adjust the *contract price* by a corresponding margin to cover its overheads and profit pertaining to the difference. This margin is expressed as a percentage of the net adjustment, and that percentage must be agreed on as part of the tendering or negotiating process. The agreed rate must be inserted in the contract before it is signed.

By way of example:

- *The PC for the gold taps is \$800.00; and the builder's agreed margin is 15% for any excess cost.*
 - *The owner later selects taps which cost \$1,000.00 each to purchase.*
 - *The builder is then entitled to have the contract price increased by \$230.00 for each tap. [Actual price - less PC allowance; plus 15% of the difference.]*
- The greater the number of PC and PS allowances included in a contract, the greater is the opportunity for the contract price to increase. Therefore it is in the owner's interest to minimise the number of these allowances in the contract – otherwise the notion of a “fixed price” can become illusory.

8.9 INCLEMENT WEATHER

In plain English this term means “bad weather.” In the building industry it refers to weather conditions that interfere with the builder's ability to progress the work as and when planned. The most common instance is wet weather, which makes certain outdoor activities – such as earthworks or excavating and placing footings - difficult or impossible. However, inclement weather can include excessively windy conditions, and sometimes also very hot weather. For example, standard concrete slabs should not be poured in temperatures over 35 degrees C, as the strength of the resultant product will be impaired.

It is important to remember that *inclement weather* is not relevant unless it actually interferes with the process. Internal painting, for instance, would not normally be affected by rain, wind or heat.

Another delaying factor can be “*conditions resulting from inclement weather*”. A common example occurs when heavy rain has stopped, but the trenches are still full of water and need to be pumped dry before any real work can resume inside them.

8.10 REGULATIONS

The ***Building Regulations 2006*** are authorised by and supplementary to the ***Building Act 1993***, and form the “nuts and bolts” part of the regulatory scheme governing building and construction activities in the State. All work must fully comply with all of the relevant regulations. Non-compliance is a defect. The *Regulations* also incorporate, by reference, the ***Building Code of Australia*** and, through this, a large number of ***Australian Standards***.

8.11 BUILDING CODE OF AUSTRALIA [BCA]

The *BCA* is a uniform national document that specifies minimum acceptable technical and performance standards for the design, manufacture and assembly (or construction) of buildings, building materials, equipment and other components. Note that, despite the national nature of this document, most states (including Victoria) have added their own “supplements” containing additional provisions; and these also apply in the state in question.

8.12 AUSTRALIAN STANDARDS [AS]

Standards Australia Ltd is charged by the Commonwealth Government to meet Australia's need for contemporary, internationally aligned standards and related services. It publishes a vast series of technical standards for a large variety of industrial, manufacturing, commercial and other activities. These are called *Australian Standards*, and are designated with the letters “AS” followed by a number. For example, AS 1684 is the code for Residential Timber Framed Construction.

The *BCA* includes a list of *Standards* which are considered relevant to setting the technical and performance requirements for buildings. Compliance with the *Standards* so specified is mandatory whenever they apply to any work. Non-compliance will constitute a *defect*.

CHAPTER 9 – WHEN THINGS GO OFF THE RAILS

Sometimes projects don't go according to plan. In our experience the vast majority of building disputes are traceable to the following causes:

- Lack of rapport or trust between the contracting parties;
- Confused and confusing channels of communications;
- Interference by owners in a manner, or to an extent, which is inconsistent with proper conduct of the project;
- *Defective* work;
- Incomplete work;
- Not carrying out work in accordance with the plans, specifications, permits or the applicable laws;
- Too many variations;
- Variations that were not
 - costed correctly; or
 - accurately described; or
 - documented in writing as and when required; or
 - Signed by the owner as and when required.
- Late payment, short payment or non-payment of the builder's entitlements;
- Advance payments.

Where any one or more of these circumstances arise, the whole project can be placed in jeopardy. As soon as any of these problems do occur you must, at the earliest opportunity, seek the services of a construction lawyer. It is essential to ensure that you consult an experienced construction lawyer; because only they have the background, knowledge and experience to deal with the peculiar nature of building disputation. It is not an area of law that sits comfortably with lawyers who do not have this specialised experience and expertise.

The construction lawyer will examine your legal position and options; and will make recommendations regarding the course of action that is likely to be in your best interests.

In dire circumstances it may be necessary to suspend or even terminate the contract. However, these are complex processes fraught with danger: if they are done incorrectly they will boomerang and hit you on the head. In this connection you must remember: DO NOT MENTION, let alone start, any suspension or termination without first consulting a construction lawyer. The very act of saying that you intend to suspend or terminate can, in many circumstances, already amount to a repudiation of the contract by you; and this will entitle the other side to end the contract for your default and to collect the associated damages from you.

Most contracts contain very comprehensive default, suspension and termination protocols. These procedures must be religiously observed, to the letter. Otherwise you will, again, find that you had unwittingly committed an act of repudiation.

Ordinarily you will first have to issue a Notice of Default. The notice must refer to and describe one or more of the default grounds that are specified in the contract as entitling you to issue such a Notice. Next the Notice must state a period of time (which the contract nominates) for the other party to rectify the defaults listed; together with a warning that in the event of any failure to rectify all of the defaults within that time you intend to use your right to suspend - or terminate (as the case may be) – the contract.

You must then ensure that the Notice is served exactly in accordance with what the contract requires for such notices. Sending a Notice by ordinary mail for instance, will be fatal to your case, if the contract states that this particular notice must be served by registered post (only).

If the defaults are not rectified within the designated number of days, then you will be entitled to suspend or end (as the case may be) the contract in accordance with the follow-up methodology set out the contract.

As mentioned, this whole area is fraught with risks, and the slightest mis-step will have the opposite result to what you had intended.

To graphically illustrate how things can go terribly wrong consider the true story of a lay couple, who took the matter of contractual termination into their own hands.

They had entered a contract with a builder, who was our client. After a while they formed the view that the builder had under-quoted on the job and was cutting corners in order to make up for this. (We never learned whether or not this view was justified, because the dispute was eventually fought on different grounds.)

What was on point was the fact that one day the owner screamed at the builder *“get the f*#% off the building site and don't X@f*#%ing well come back, and if you don't do it immediately, we'll get the police to evict you”*.

The owner then engaged another builder to finish the job. Inevitably this ended up costing a good deal more than the balance of the original contract price still held by the owners in fact many tens of thousands of dollars more. The owners then engaged a reputable law firm to sue the builder to recover these extra costs. If the builder's contract had been lawfully terminated for genuine defaults or misconduct, the owners would have been entitled to recover those costs. The critical question was: did they terminate the contract lawfully or not?

Two years later the matter went to trial.

We argued that the owner had not terminated lawfully and, by doing so unlawfully, he had in fact repudiated the contract by his conduct. The foul language was presented verbatim to illustrate the unceremonious and unambiguous nature of the owner's disregard of all reasonable processes. Our point was that such language and such emphatic directions were evidence of an intention to no longer be bound by the contract; and that, in turn, constituted repudiation. This argument proved successful.

The contract had contained termination provisions similar to those mentioned above; requiring articulation of the default, written notification of same, and the nomination of a period for the builder to rectify the default. Finally, the contract required the notice to specify that, once that period expired, the owner could/would terminate the contract if the default had not been rectified.

Instead of following these contractual steps, the owners saw fit to go about ending the builder's employment in a petulant manner entirely alien to the contract. Their attempted termination of the contract was therefore found unlawful, and the builder became the wronged party. The net effect of all this was that the owners could not recover from the builder any of the additional completion costs - as they had hoped to do. Instead, they had to pay the costs of two years' litigation, which would have come to some \$150,000.00.

The moral of the story is: don't even consider terminating (or suspending) a contract unless you first deploy an experienced construction lawyer.

CHAPTER 10 – DISPUTES AND THEIR RESOLUTION

Building litigation is not for the “faint of heart”, nor is it for the “poor man”. Building actions cost a great deal of money, by and large take a large amount of time to resolve and are both financially and emotionally debilitating. In a good many instances cases are fiercely contested, sometimes beyond any rationally justifiable reasons.

10.1 DOMESTIC BUILDING DISPUTES

The legislation declares that all disputes arising from a *domestic building contract* are *domestic building disputes*. However, some contracts which are otherwise not defined as *domestic building contracts* (such as those involving registered architects, engineers, draftspersons and other professional consultants; and also all sub-contracts) are also considered *domestic building contracts* for this purpose. Therefore all disputes arising from those contracts are also defined as *domestic building disputes* if the building in question is a *domestic building*.

10.2 PROPORTIONATE LIABILITY

This doctrine applies to all *domestic building disputes*. This means that if – for example – a defect occurred and caused damage; and the defect had been brought about by a combination of negligent acts by – say – the architect, the civil engineer, the building surveyor and the builder, then they will all be liable for their share of the damages in direct proportion to their share in the culpability for its occurrence. Courts and Tribunals are required to make these apportionments as part of their judgments.

It is important to remember that the Court or Tribunal will only apportion culpability and liability among those participants who are actually included as parties to the litigation. If – for instance – in the above example the owner sues the builder and the architect only (and the builder and the architect fail to drag in or “join” the others), the builder and the architect will, between them, have to pay 100% of the damages that are awarded by the Court or Tribunal.

Since many building disputes spring from some combination of poor design, poor execution; and/or negligent certification; it is necessary to ensure that multi-defendent proceedings are issued in such cases. It is essential that these proceedings involve all building practitioners who are likely to have contributed to the (alleged) defect/s through some shortfall in the performance of their obligations. On the other hand, if you attempt to join a practitioner as a party and this turns out to be unjustified, you are very likely to be ordered to pay their costs as well as the costs of others (including Court or VCAT costs) incurred in wasted litigation proceedings.

This is yet another illustration of why the initiation and conduct of such proceedings requires considerable skill and care, and the deployment of construction lawyers is paramount.

10.3 LITIGATION OF DOMESTIC BUILDING DISPUTES [VCAT]

Section 57 of the DBCA declares that the primary forum for resolution of *domestic building disputes* in Victoria is the Victorian Civil and Administrative Tribunal [“the VCAT”].³¹ To start litigation in this forum the applicant has to file (lodge) an application in the prescribed form, together with the prescribed fee, with VCAT.

³¹ There is another, optional, non-litigious process to which such disputes may also be referred, called Building Advice and Conciliation Victoria [“the BACV”]. This will be discussed later in this paper.

10.3.1 START OF PROCEEDINGS

Domestic building disputes may be dealt with in one of two branches (called “Lists”) of the Tribunal. One of these is the Domestic Buildings List, the other is the Civil Claims List. Generally it will be the persons heading³² these Lists, acting together, who will decide which matter will go to which List. The rule of thumb is that complex disputes or those involving large amounts will go to the Domestic Buildings List; the others to the Civil List.

In Civil List matters the process will be quicker and less circumspect. The parties will usually be ordered to attend a compulsory mediation session. If this session is unsuccessful by (say) the middle of the day, the dispute will go straight to a hearing; and the Tribunal will make a decision and issue Orders by the end of the day.

In Domestic Building List matters the Listing Registrar may first order a direction hearing; or else may direct that the matter go straight to mediation. Parties can appear without lawyers but in the main they prefer to retain them.

10.3.2 DIRECTIONS HEARING

The directions hearing is where a Tribunal member will, in co-operation with the parties and their advocates, generate orders regarding the way in which the matters will proceed and the time lines for process. In the main a mediation date will be specified, but the member may also set down orders that the applicant file a “statement of claim” - namely a document that spells out the nature and details of the dispute, and what the applicant wants to obtain if he or she is successful (called “the relief sought”)

The member may also order that the respondent generate a “statement of defence” or a “statement of defence and counterclaim” (as the case may be). The deadlines for completing and serving these “interlocutory instruments” will also be specified in the Orders made at the conclusion of this Hearing.

10.3.3 MEDIATION

The Tribunal will appoint a qualified mediator, at no cost to the parties. Mediators are mostly lawyers, but this is not a requirement. People from different backgrounds – such as building consultants, builders and engineers - may also be qualified as mediators. Indeed Kim’s father, the late Dr. Malcolm Lovegrove, was a mediator and a retired educationalist, having obtained his doctorate in Child Psychology.

Mediators are trained in the art of facilitation and the brokering of compromise. They try to impress upon disputants the virtues of early settlement; and conversely, the dangers of protracted litigation they are not permitted to provide a dissertation on the law or on the likely winner. Rather their objective is to encourage voluntary settlement through mediation.

Mediators will emphasise that what is said at mediation is confidential and without prejudice. If the matter is not settled at the mediation, no-one will know anything about what took place; and the parties may continue the litigation as if nothing had taken place.

They will also impress upon the parties that their respective positions and stances may need to be moderated. In the main matters only settle where both parties are prepared to compromise. If a matter does settle, the mediator will ensure that a “terms of settlement” document is drawn up and executed. This becomes a binding agreement, and the parties must adhere to the terms of settlement. Once a matter has settled the mediator notifies the Tribunal registrar and the matter is at an end.

If a party later reneges on an obligation under the settlement agreement, the matter can be re-submitted to VCAT for resolution. A reneging party will be in a poor position.

³² Their official title is “Deputy President”

10.3.4 HOW TO APPROACH MEDIATION

- (a) Go in very well prepared.
- (b) Be represented - or at least advised - by a construction lawyer.
- (c) Be prepared to compromise.
- (d) Be prepared to listen and take account of the other side's view of matters.
- (e) Be courteous and do not interrupt during anyone else's presentation.
- (f) Don't be hostile or belligerent; an intemperate disposition may sabotage settlement.
- (g) Do your mathematics and factor in the cost of trial vis-à-vis the cost of an early mediated outcome.
- (h) Never be motivated by vengeance or "the principle of the matter" and if you are, be mindful of the old Italian adage, "if you want revenge dig two graves".

In **our** experience financial settlements are normally the best ones. Once the agreed payments are made, the matter is over. On the other hand, when matters settle on the basis that the builder will come back to rectify alleged defects, further disputes will often arise concerning the builder's performance or non-performance of the work in question. As a result, the terms of settlement go off the rails and the matter goes back before the Tribunal.

Our strongest advice is to use your very best efforts to settle at mediation, if at all possible. A great deal of expense, time, effort, and stress can be saved this way. These factors must always be balanced against the amounts involved and your realistic chances of success if the matter needs to be decided at a hearing. Also remember that – unlike in Courts – costs in VCAT usually do NOT follow the judgment. It can cost you (say) \$10,000.00 in costs to win (say) \$11,000.00 after a long battle.

Of course, there will be circumstances where your case is very strong, and the amounts at risk will clearly exceed the foreseeable costs of going ahead. Even in these situations, you must first also satisfy yourself that your opponent is "a man of means" not "a man of straw". All the effort, expense and time will be to no avail if you cannot actually collect from the other party whatever judgment you may have obtained.

10.3.5 WHAT NEXT?

In matters in the Civil Cases List, an unsuccessful mediation will usually be immediately be followed by a hearing; and the matter will usually be heard and decided on that same day.

If the mediation is unsuccessful in a Domestic Building List matter, the case is referred back to be listed for a further directions hearing. This directions hearing will be presided over by a Tribunal Member.³³ Unless it had already been done earlier, the following types of orders will be generated at this hearing:

- (a) the date for filing³⁴ the applicant's statement of claim;
- (b) the date for filing the statement of defence and – if applicable – any counter-claim by the defendant;
- (c) the date for filing a reply to the defence and counter-claim;
- (d) the date for filing of expert witness statements;
- (e) the date for filing of affidavits or lists of documents. Each list must disclose all documents which are related to the building dispute and which in the possession or control of the party that prepares the list.

The Member may at this time also set a date for a compulsory conference; and possibly also a hearing (trial) date.

³³ VCAT is not a Court of Law; therefore (most of) the decision-makers are not judges. They are referred to as "Members"

³⁴ That is: lodging

10.3.6 DISCOVERY AND LIST OF DOCUMENTS

When the Tribunal makes an order for discovery, each party must generate a comprehensive and accurate list of all the documents that it will be relying upon at the Hearing.

Parties may not be selective about which documents they include and which they omit. All documents of whatsoever nature that relates to the building project must be listed and made available for inspection. One is not allowed to omit, conceal or destroy any such documents.

The process of discovery is tedious and expensive but it must be done, with a high degree of completeness and precision.

10.3.7 COMPULSORY CONFERENCE

Sometimes Tribunal Members will next order a compulsory conference. These conferences are similar to mediations in that the better part of a day will be put aside to try to resolve the dispute by agreement. There is one key difference, however. Whereas mediators are not allowed to provide their opinions as to who is likely to win, the Tribunal Member in charge of a compulsory conference can, and generally will, do this. This can be a very powerful inducement for the party with the weaker case to settle.

Although we are in favour of mediation and compulsory conferences, some reservations should be noted. First, "it takes two to tango" - and if one party is not genuine in its desire to settle a matter, then mediations and compulsory conferences are an absolute waste of time. Another, greater, concern is that they can be a frightening waste of money.

Furthermore, over the years one has encountered the occasional mediator³⁵ who attempted to bully parties into settlement. This is rare but it can happen; and your advocate needs to be alert, and provide detached and considered advice to ensure that you are not intimidated by such bluster.

We have encountered lengthy cases, in which four or five mediations and compulsory conferences had taken place; but all to no avail. When this occurs, it adds enormous delays and thousands of dollars to the dispute resolution dynamic; and is terribly counter-productive. What is even more problematic is that it can deplete a litigant's "war chest".

10.3.8 Hearing (trial)

It is indeed a sad state of affairs if a matter has to go to trial. Notwithstanding our guarded reservations about certain aspects of mediation, the Tribunal has a well documented history of successfully mediated outcomes. Indeed some 70% of cases settle before any trial if a matter does go to trial, be aware of the following:

- (a) It will be very expensive.
- (b) Ordinarily you will need to have both a solicitor and a barrister to appear for you.
- (c) Expert witnesses will often need to be retained. This will involve considerable cost.
- (d) The daily cost of trial could range from anywhere between \$2,000-8,000 a day.
- (e) The trial may run for weeks.
- (f) There is no guarantee of victory.
- (g) In VCAT there is no rule that the 'winner' will be awarded any costs. On the contrary, the general rule is that each party bears its own costs, regardless of the outcome.
- (h) In the minority of cases, where costs awards are nevertheless made, they will hardly ever cover the party's actual costs in full – more likely only some 60%-70% of those costs.
- (i) Only in exceptional circumstances will a successful party be awarded 100% of its costs back.
- (j) You need to ensure that, if and when you receive a favourable judgment, the other party has the capacity to pay.
- (k) The decision may be appealed, although this is unusual.

³⁵ We hasten to note for the record that none of these were in VCAT

(l) The trial will be very stressful and will test your financial and emotional resolve.

10.3.9 PREPARING FOR HEARINGS

Make sure that you use a very good construction law firm or construction lawyer, who is supported by a barrister with expertise in construction litigation in VCAT.

Independent technical experts - such as builders, architects, engineers or quantity surveyors - will need to be engaged (if not already engaged earlier). They need to assess the facts underlying the dispute, identify defects where these exist, give their opinions as to the responsibility for those defects, and quantify the costs of rectifying the defects and to deal with any consequential loss or damage.

Always ensure that your case is very well prepared; without regard to what the opposition's state of preparedness may or may not be.

Also ensure that you have made a reasonably accurate assessment of the cost of running the matter to its conclusion; and that you can afford pay – and possibly lose - this amount. If you cannot, then you should be prepared to make the necessary compromise to settle at mediation or at a compulsory conference. You need to remember, too, that a negotiated settlement is always possible right up until the time when Tribunal makes its decision.