Domestic Building Disputes – Key Issues in Bring Claims

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I am right
Me too

VCAT's Jurisdiction and DBDRV - s.56 DBC Act

(1) A party to a domestic building work dispute must not make an application to VCAT in relation to the dispute unless the chief dispute resolution officer has issued a certificate of conciliation to the party certifying that the dispute -

   (a) was not suitable for conciliation; or

   (b) was not resolved by conciliation.

(2) This section does not apply to proceedings for an order in the nature of an injunction.

Secure https://www.dbdrv.vic.gov.au

DOMESTIC BUILDING DISPUTE RESOLUTION VICTORIA

About us Contact us

We resolve disputes between builders and home owners. Free. Fair. Fast.

We are an independent government agency designed to help resolve domestic building disputes.

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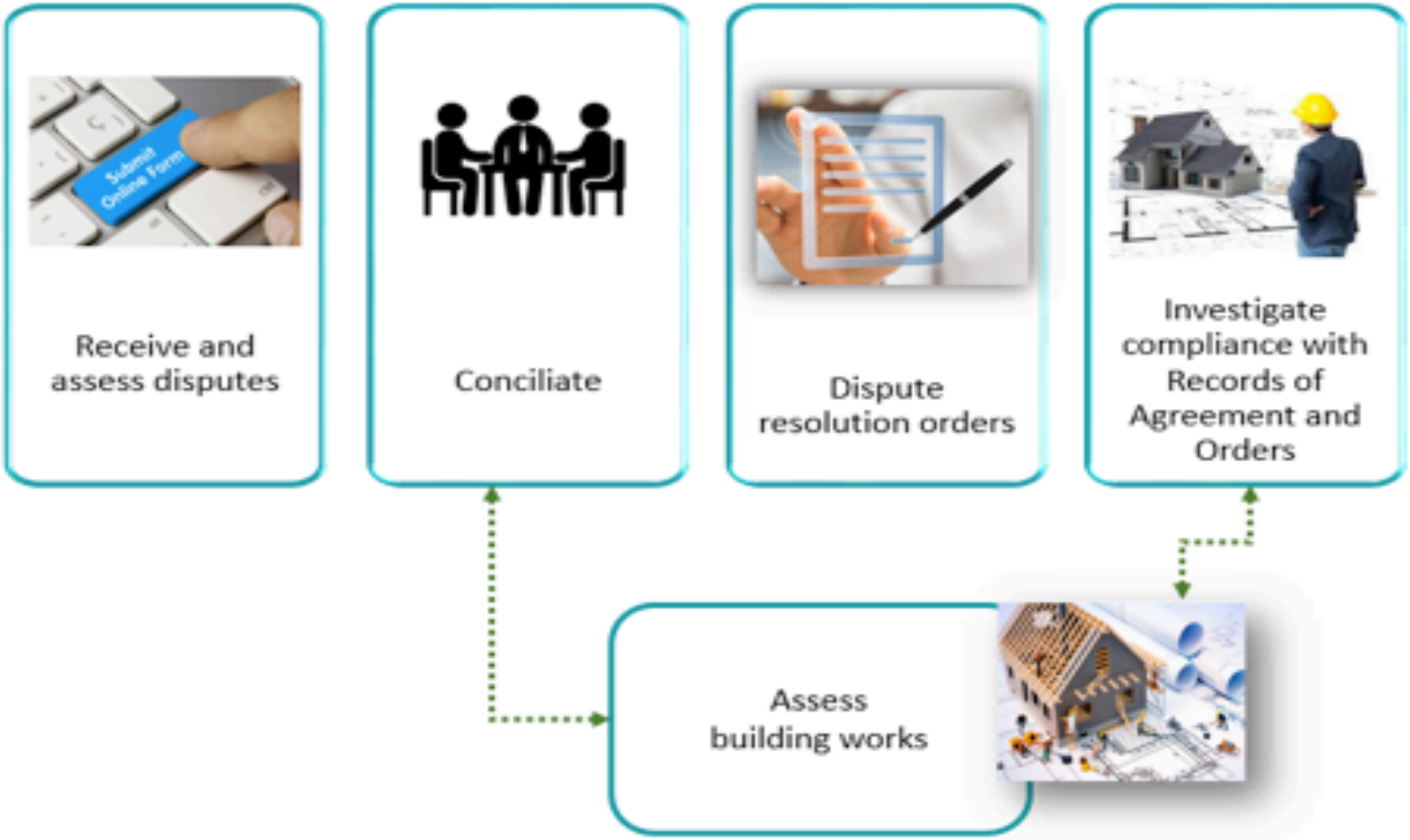
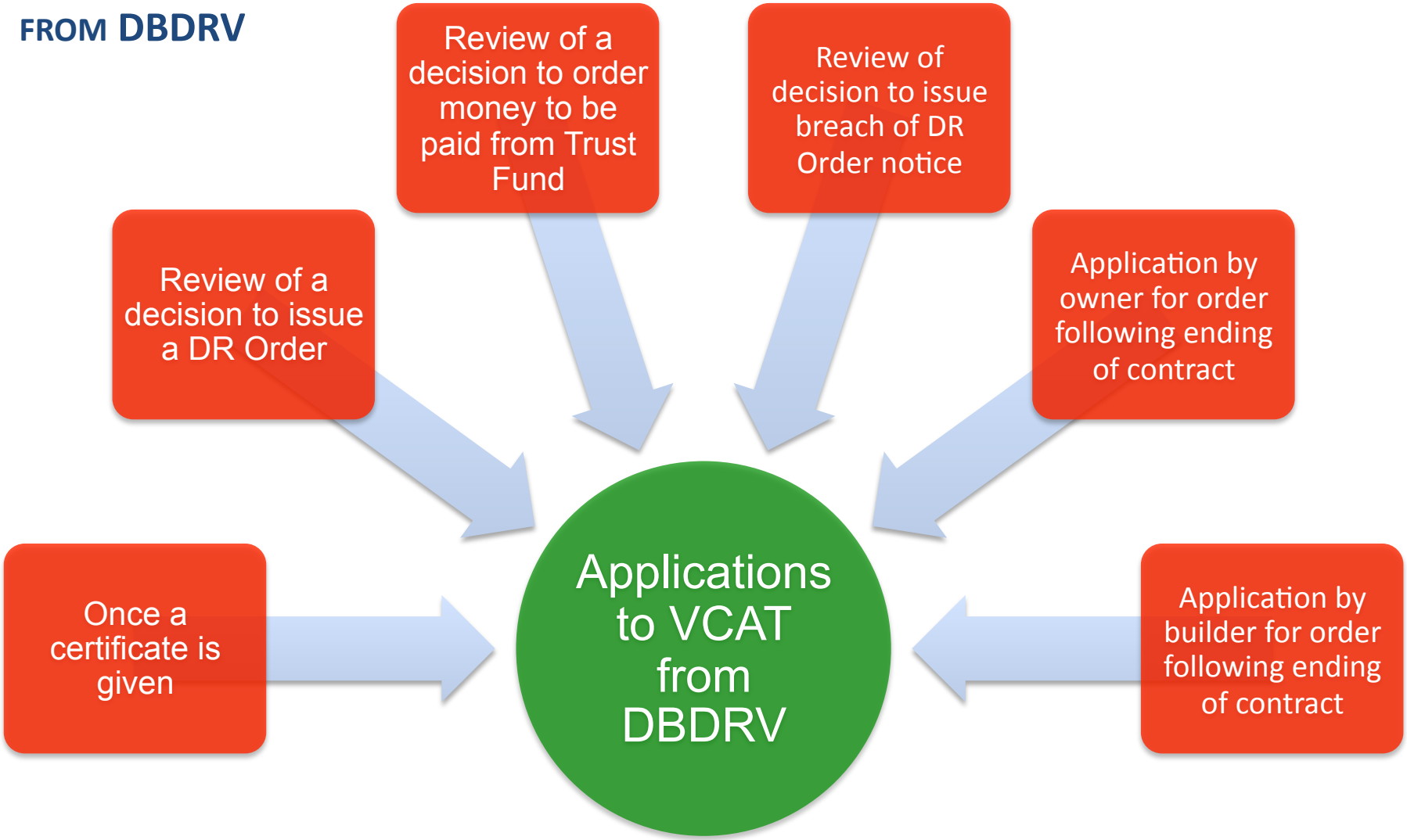
DBDRV

Dispute Resolution Process

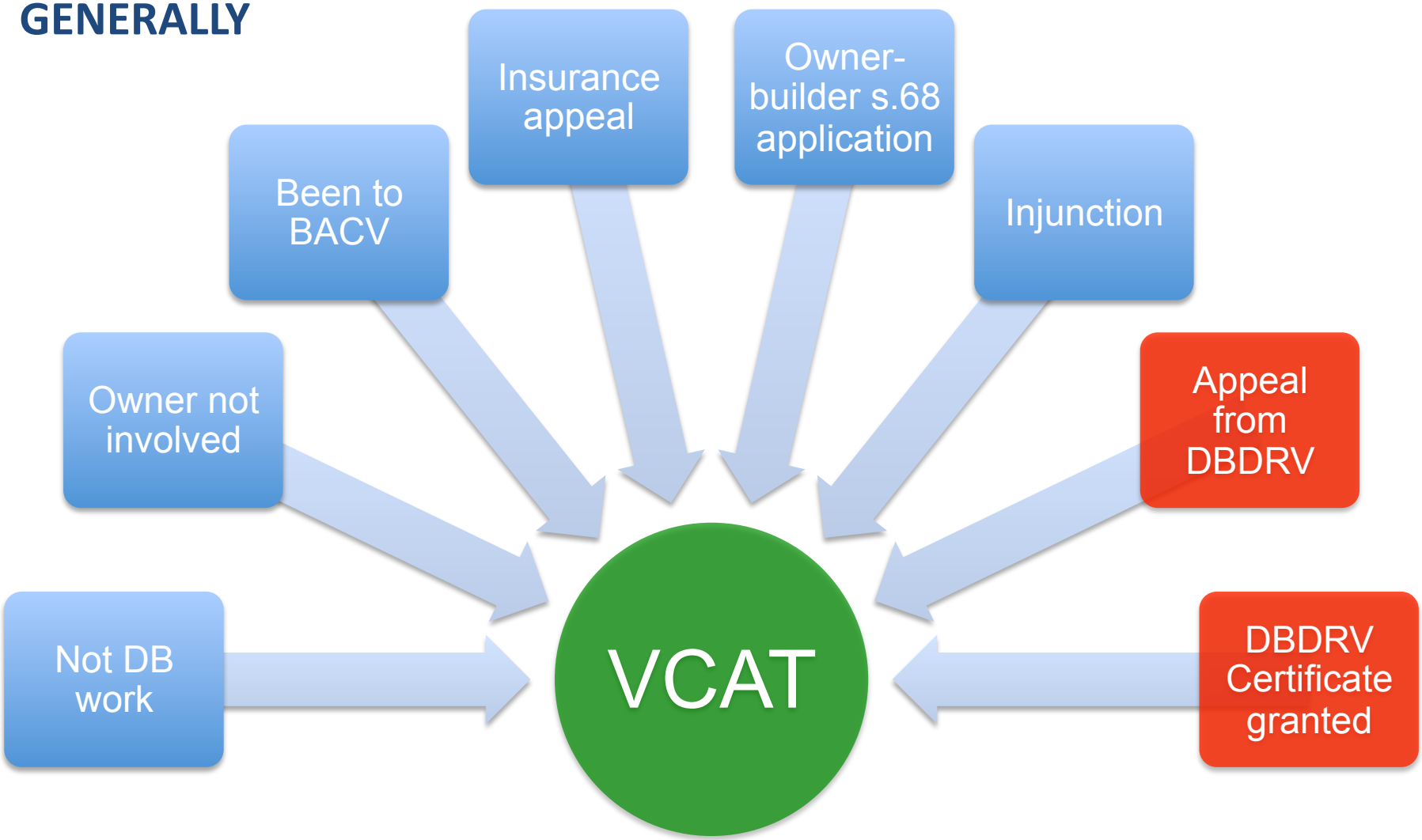


VCAT's Jurisdiction from DBDRV



VCAT's Jurisdiction

Generally



VCAT's Jurisdiction - s.57 DBC Act

(1) This section applies if a person starts any action arising wholly or predominantly from a **domestic building dispute** in the Supreme Court, the County Court or the Magistrates' Court.

(2) The Court must stay any such action on the application of a party to the action if—

(a) the action could be heard by VCAT under this Subdivision; and

(b) the Court has not heard any oral evidence concerning the dispute itself.

…

(4) If an action is stayed under this section, any party to the action may apply to VCAT for an order with respect to the dispute on which the action was based.

(5) If a person applies to VCAT under subsection (4) VCAT must notify the Court and on such notification the Court must dismiss the action.

WHAT IS A DOMESTIC BUILDING DISPUTE - s.57

(1) A domestic building dispute is a dispute or claim arising -

(a) between a building owner and -

(i) a builder; or

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

(iii) a sub-contractor; or

(iv) an architect -

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

(b) between a builder and -

(i) another builder; or

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

(iii) a sub-contractor; or

(iv) an insurer -

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

(c) between a building owner or a builder and -

(i) an architect; or

(ii) a building practitioner registered … as an engineer or draftsperson -

in relation to any design work carried out by the architect or building practitioner in respect of domestic building work; or

(d) between a lot owner or an owners corporation and an initial owner … of land in a plan of subdivision…

s.57 - Example 1

Presser v Ocean View Properties Pty Ltd [2006] VSC 143

- Sale by developer of penthouse apartment in residential complex
- Defective parquetry flooring
- Subsequent Settlement Agreement between purchasers and developer for developer to rectify outstanding defects
- Proceeding by purchasers against developer for breach of Settlement Agreement
- Addition of parties, including builder, sub-contractor and architect
- Order: Proceeding stayed
  - the Settlement Agreement was a "domestic building dispute" per s.54 as one party was to carry out domestic building work
  - And if it was not, then because all of the other claims made in the proceeding were domestic building disputes, looked at as a whole the proceeding was now an "action arising ... predominantly from a domestic building dispute" per s.57(1)

s.57 - Example 2

Nettleton v Vero Insurance Ltd & Anor [2008] VSC 554

- Vero Insurance issued a policy of domestic builder's warranty insurance for domestic building works carried out by a builder.
- The plaintiff subsequently purchased the property.
- She made a claim under the policy alleging defective building works
- Claim was not resolved and she commenced a proceeding in the County Court against Vero seeking damages or indemnity under the policy.
- Vero applied to the County Court for a stay under s.57.
- The County Court allowed the application and the plaintiff appealed to the Supreme Court.
- Order: Proceeding stayed - a dispute between an owner and an insurer is not
  - a "domestic building dispute" under s.54, nor
  - does it "aris[e] wholly or predominantly from a domestic building dispute" under s.57(1)

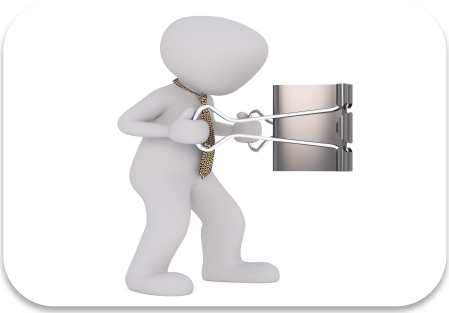
Common Building Disputes

Defective work

Delay and LDs

Changes in price

Non-payment



Suspension / Termination

Common Causes of Action

- Breach of s.8 warranties
- Breach of contract
- Negligence
- Australian Consumer Law
- Other torts

s.8 The Builder Warrants That:

a) the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications;

b) all materials … will be good and suitable for purpose …;

c) the work will be carried out in accordance with all laws and legal requirements including, the Building Act and Regulations;

d) the work will be carried out with reasonable care and skill and will be completed by the date specified by the contract;

e) … the home will be suitable for occupation at the time the work is completed;

f) if … the owner relies on the builder's skill and judgement, the work … will be reasonably fit for that purpose…

EXAMPLE 1:

Kettyle v E. Cheong Garden Pty Ltd & Ors [2012] VCAT 1097

Owners = Mr & Mrs Kettyle
Developer = E Cheong Gardens Pty Ltd
Contracted Builder = Ma Constructions
Director of Developer = Ms Xiao
Actual builder = Mr Ming

Findings:

1. The developer was liable for breaching the term of the Contract of Sale that it would engage a registered builder to construct the unit. It was liable for the full amount of the owners' damages of $181,499.

2. Ma Constructions was liable for any breach of the s.8 warranties, but only insofar as the defect relates to the limited scope of work that it undertook. It was found in fact that he had no liability.

3. Mr Ming owed a duty of care to the Owners, since he took it upon himself to carry out the building works without using a registered builder and the Owners were vulnerable.

   The standard of care required of him was to use reasonable care to avoid economic loss to the Owner from a failure on his part to construct the Unit properly and according to the plans. "Properly" in this context means in a proper and workmanlike manner and using good and sufficient materials.

   He breached that duty. His share of the damages was $159,901.

4. Ms Xiao was found liable for negligence (like Ming) and also for misrepresentation, misleading and deceptive conduct under the *Fair Trading Act* (the precursor to the ACL), as she had provided false information to the estate agent to be passed on to intending purchasers about the quality of the unit. Her share of the damages was $159,901.

EXAMPLE 2

Carlier v Evans Plumbing Pty Ltd & Ors [2012] VCAT 1839

- Owner contracted with Builder to renovate two bathrooms
- Builder purchased floor and wall tiles chosen by Owner from Retailer
- Builder's tiling subcontractor laid them
- Common ground that the wall tiles were not pre-sealed and that the grouting process stained the tiles.

Findings:

1. A breach by Builder of the s.8 warranty to supply materials which would be suitable for their intended use (i.e. sealed tiles), even though he did not know that the tiles were unsealed.
2. Retailer's conduct was misleading because when displaying the tiles for sale it failed to disclose that it would require special treatment before it was laid, in breach of s.18 ACL:

   A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive

LIMITATION PERIODS – S.134 BUILDING ACT

- *Despite any thing to the contrary in the Limitation of Actions Act 1958 or in any other Act or law, a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work (whether or not the occupancy permit is subsequently cancelled or varied) or, if an occupancy permit is not issued, the date of issue under Part 4 of the certificate of final inspection of the building work.*

- Brirek Industries Pty Ltd v McKenzie Group Consulting (Vic) Pty Ltd [2014] VSCA 165

PUBLIC AND PROFESSIONAL INVESTIGATIONS

- **Victorian Building Authority (formerly Building Practitioners Board)**
  - Investigates complaints about registered building practitioners made directly to it
  - Assesses
    - Building work that does not comply with the *Building Act* 1993, *Building Regulations* 2006, and *Building Codes* and *Australian Standards*
    - Concerns about potential breaches and offences of building legislation by building practitioners
    - Concerns by an adjoining owner in relation to the protection of their property where building work has commenced or is due to commence
    - Concerns by an adjoining owner in relation to building work which might affect their privacy or access to daylight due to height, building setback or overlooking.
    - Incidents of an unregistered person carrying out building work or holding out to be registered when they are not
  - For example:
    - where a builder has carried out domestic building work without required insurance or building permits,
    - where a builder has permitted an unregistered builder to use his registration,
    - where a builder has breached the building contract (eg, requested excessive deposit or premature progress payments),
    - where a building surveyor has improperly issued a permit
    - or has failed to issue a Building Notice or Order

Public and Professional Investigations

- **Show Cause process**
  - Complaint made
  - Investigation takes place by VBA
  - Show Cause Notice issued
  - Practitioner has the chance to make submissions
  - Decision then handed down
  - Right to apply for internal review
  - Appeal right to VCAT

- **Penalties:**
  - reprimand the practitioner
  - order the practitioner to pay costs
  - require the practitioner to give an undertaking
  - order the practitioner to undertake further study
  - impose a fine
  - suspend registration for up to three years
  - cancel registration

PUBLIC AND PROFESSIONAL INVESTIGATIONS

- **Architects Board**
  - Similar to VBA
  - Investigates breaches of *Architects Act* and *Regulations*
- **Prosecutions by VBA – summary offences**

  For example, breaches of :
  - s.16 *Building Act* – carrying out work without a permit
  - s.11 *DBC Act* – demanding or receiving deposit of more than 5% of contract price
  - s.29 *DBC Act* – entering into a contract when not registered

WARRANTY INSURANCE

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Domestic Building Insurance

About Domestic Building Insurance

VMIA offers domestic building insurance (DBI) in Victoria, which provides cover to homeowners for incomplete or defective building work.

Builders in Victoria are required by law to take out domestic building insurance, also known as builder's warranty insurance, for work valued at more than $16,000.

Visit our dedicated website, www.dbi.vmia.vic.gov.au, for more information about the scheme, including how to make a claim — for homeowners, and how to apply for insurance — for builders and brokers.

VMIA has offered domestic building insurance in Victoria at the direction of the State Government since May 2010.

Important changes to VMIA DBI

The way in which DBI is purchased and managed changed from 1 July 2017. Find out what has changed >

MINISTERIAL ORDER

Victoria Government Gazette

No. S 98 Friday 23 May 2003
By Authority. Victorian Government Printer

SPECIAL

Building Act 1993

DOMESTIC BUILDING INSURANCE MINISTERIAL ORDER

I, Mary Delahunty, Minister for Planning make the following Order:

PART 1—INTRODUCTORY

1. ***Purposes of this Order***

(1) This Order specifies the insurance that a builder is required to be covered by in order to carry out or manage or arrange the carrying out of domestic building work under a domestic building contract of a specified kind.

(2) This Order specifies the insurance that a person who constructs a building and to whom section 137B of the **Building Act 1993** applies is required to be covered by before entering into a contract to sell that building.

2. ***Authorising provisions***

This Order is made under sections 135, 137A and 137D of the **Building Act 1993**.

3. ***Commencement***

This Order takes effect on 1 July 2003.

4. ***Revocation***

MAKING A CLAIM

vmia
Risk Management and Insurance

DOMESTIC BUILDING INSURANCE

CLAIM FORM

Important information

Please read this page first.

Making a claim

To help us process your claim quickly and accurately, please ensure that you:

- Answer all questions honestly.
- Tell us everything that you know about the claim.
- Cooperate with any investigations or enquiries we need to make. This includes giving us our nominated builder and your builder access to inspect, rectify or complete the work (unless you have reasonable grounds to refuse access).
- Do not make any admissions, offer, promise or payment in connection with the claim.
- Keep us informed about any information that changes after you have submitted this claim.

When to use this claim form

This claim form should be used by homeowners when the builder has died, disappeared or is insolvent or, for Certificates of Insurance issued on or after 1 July 2015, where the builder fails to comply with a Tribunal or Court Order.

NOTE: If the domestic building insurance policy was issued before **31 May 2010**, the VMIA will NOT be the insurer and you will not be able to use this form. Please visit our website for information about how to identify who the insurer is, **www.dbi.vmia.vic.gov.au**

Examples of Insurance Cases

- **OC Plan No… -v- VMIA**
  - Claim by 10 owners and OC
  - Units had been built by 2 different builders
  - 10 insurance policies issued by QBE for 1st builder's works, then 10 by VMIA for 2nd builder
  - VMIA accepted claims for works carried out under its policies
  - Owners disputed decision, saying 2nd builder had carried out more work than VMIA allowed
  - Matter at VCAT went to compulsory conference and settled
- **Home owner in country Vic -v- VMIA**
  - Claim by owner for defective works
  - Owner provided a quote from local builder to repair at $25,000
  - VMIA accepted claim and approved $25,000
  - Owners appealed the decision, and provided a new quote for $70,000 and said their original quote was not complete
  - Matter at VCAT went to compulsory conference and settled with VMIA approving more money

Examples of Insurance Cases

- **OC Plan No… -v- QBE**
  - Claim by 18 owners and OC
  - Large block of flats
  - Some defects discovered within 6 years of completion and claim approved
  - During rectification, further defects discovered and claim made
  - Rejected as outside period of insurance
  - Matter before VCAT for determination

- **Home owner in suburban Vic -v- VMIA**
  - Claim by owner for incomplete and defective works
  - Building contract was with building company A
  - Some work was carried out by A and Owner paid A
  - However application for insurance was made to VMIA by building company B
  - Building insurance was provided by VMIA for work done by B
  - VMIA therefore rejected the claim as its policy did not respond.
  - Went to VCAT but Owner withdrew

Parting Advice

In the words of one of Victoria's pre-eminent building lawyers, the Hon David Byrne QC:

I leave you now with some more words, which might have come from the past, which I have adapted for this occasion. I offer you a new Decalogue – Ten Commandments for Building Dispute Practitioners

1. *Honour thy client and its managing director, that thy professional days may be long upon the land.*
2. *Thou shall not adulterate a good claim with dodgy causes of action, spurious variations or exaggerated defects lists.*
3. *Remember thou, that there is a time for every construction activity under the heaven; time is therefore precious … and often extendable.*
4. *Respect always the condition of the field upon which the builder has laboured; latency lies in the eye of the beholder.*
5. *Value co-operation over conflict. Remember who it is that dies by the sword.*
6. *Withhold not discoverable documents; nor snowstorms create.*
7. *Strive for win-win situations, and for alternatives which best achieve these ends. Remember that there are other values besides legal ones.*
8. *When you rise from the negotiating table, always leave some crumbs behind.*
9. *Treat change as an ally to be carefully watched; not as something to be feared.*
10. *Love always the judge, whose immanence serves to concentrate the mind.*

Lecture given by the Hon David Byrne QC to the BDPS Annual Dinner 20 July 2011, published in Part 42 (2011) BDPS News