

# DOMESTIC BUILDING DISPUTE RESOLUTION VICTORIA (DBDRV)

A seminar presented by Suzanne Kirton, Barrister, List S

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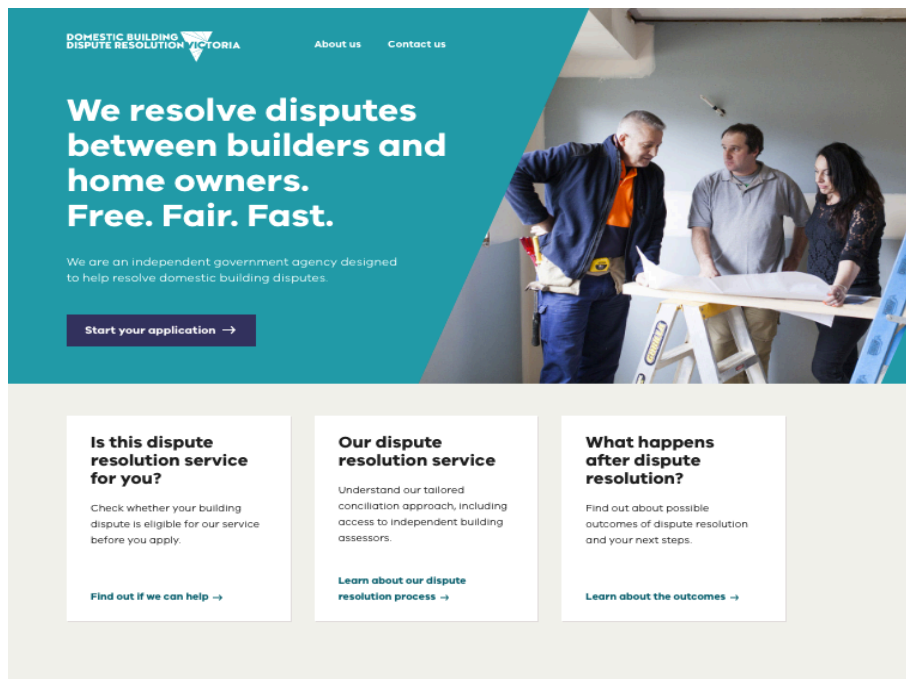
The *Building Legislation Amendment (Consumer Protection) Act* 2016 (“the BLA(CP) Act”) introduced significant changes to the *Domestic Building Contracts Act* 1995 (“the Act”), most notably the introduction of a new mandatory dispute resolution process for most domestic building disputes - called Domestic Building Dispute Resolution Victoria (DBDRV).

This paper will focus on the main change, being the DBDRV process. However it should be noted that the BLA(CP) Act has introduced other changes, including abolishing the Building Practitioners Board, amending s.16 of the Building Act, introducing a new Guide to be given with all domestic building contracts, increasing scrutiny of building surveyors and giving VCAT greater costs powers<sup>1</sup>.

The DBDRV scheme commenced on 26 April 2017<sup>2</sup>. There was little publicity or notice beforehand and only mild publicity following.

DBDRV is a business unit of the Department of Justice and Regulation.

It is established under Part 4 of the DBC Act. The old Part 4 provisions relating to the appointment of inspectors by the VBA (sections 44-50) have been repealed and replaced with the new sections 44 - 52.



In summary (and leaving out many of the procedures and powers), the process contains the following steps:

**(1) DBDRV is established (s.52) and consists of:**

- the Chief Dispute Resolution Officer (“CDRO”) appointed under s.52C; and

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<sup>1</sup> For more details on these see my articles published on the Gordon & Jackson website

<sup>2</sup> by Special Gazette dated 27 March 2017, ss 3, 6-13, 14(2), 15 and 59-68 of the BLA(CP) Act came into operation on 26 April 2017 i.e. the Domestic Building Dispute Resolution Victoria (DBDRV) process.

<sup>3</sup> www.dbdrv.vic.gov.au home screen as at 25 May 2017

- the conciliation officers appointed under s.52E - note that DBDRV calls these people "Dispute Resolution Officers" rather than conciliation officers - so I will use the same name ("DROs"); and
- the assessors ("assessors") appointed under s.48

The CDRO is Gina Ralston, formerly the Director of the Dispute Settlement Centre of Victoria. The DROs were recruited from within and outside CAV. They are mostly trained conciliators and mediators. At present there are about 20 DRO's with more starting this week. The government held a recruitment drive for assessors in December/January and have employed 10 full time, with a panel of a further 30+ sessional assessors. These include architects and registered building practitioners.

## **A REFERRAL TO DBDRV**

### **(2) *A domestic building work dispute is to be referred to the CDRO (s.45)***

A domestic building work dispute is defined at s.44 as a domestic building dispute arising between a building owner and

- a builder, or
- a building practitioner as defined in the Building Act, or
- a sub-contractor, or
- an architect

in relation to a domestic building work matter.

A domestic building work matter is defined at s.44(2) as meaning any matter relating to a domestic building contract or the carrying out of domestic building work, including

- an alleged breach of a s.8 warranty;
- an alleged failure to maintain the standard or quality of building work specified in a domestic building contract;
- an alleged failure to complete the works (at all or on time);
- an alleged failure to pay money for domestic building work performed under the contract.

Note that there must be an owner involved. The on-line application process will not allow the application to proceed if an owner is not involved.

### **(3) *A DRO will conduct an initial assessment of the dispute (s.45A)***

This is a jurisdiction check - a DRO will evaluate whether:

- the dispute is a domestic building dispute,
- it was made within time,
- at least one of the parties appears willing to participate in conciliation in good faith, and
- proceedings have not commenced elsewhere.

During this step, the DRO may contact either party to obtain further information.

### **(4) *They will then decide whether to accept or dismiss the referral (s.45C).***

The DRO will assess the referral against the list of suitability criteria found in section 45C(3). It will not be suitable for conciliation if:

- the referral does not comply with s.45(2) (i.e. uses the appropriate form and provides required information);
- the referral was not made within the required time;
- the referring party has not provided any information, documents or evidence requested or required or has not provided them within the time required by the DRO;
- the referring party has failed without reasonable excuse to take reasonable steps to resolve the dispute before the referral;
- all issues arising out of the dispute have been or are the subject of proceedings before VCAT or a court;
- there is no reasonable likelihood of the dispute being settled by conciliation for any reason other than because no other party is willing to engage in the conciliation;
- the referral is frivolous or otherwise lacking in substance; or is vexatious; or was not made in good faith; or
- the dispute has been resolved.

The decision must be communicated within business 10 days of being made (s.45E).

**(5) *If the CDRO assesses the dispute as not suitable for conciliation, then she will issue a certificate (s.45F)***

The certificate - called a Certificate of Conciliation - must be issued within 10 business days of being made and must contain reasons.

A party may apply to VCAT for review of a failure by the CDRO to issue a certificate under this section.

**(6) *A party may seek to withdraw a referral to DBDRV but requires leave of the CDRO (s.45G)***

The CDRO may refuse leave if she considers that the dispute has disclosed evidence of a contravention of the DBC Act or the Building Act or regulations. A Certificate of Conciliation cannot be issued if the referral has been withdrawn.

**CONCILIATION**

**(7) *If accepted, a DRO will conciliate the dispute (s.46) in accordance with the procedures set out at ss.46A - 46H***

If accepted for conciliation, a DRO will ask a party to provide further information, contract documents, emails and letters.

**Section 46A** allows a DRO to conduct a conciliation conference by attendance on site or at a convenient location and/or by post or teleconference or other electronic communication.

**Section 46B** provides that a conciliation must be conducted in accordance with the "conciliation rules". These are required to be posted on the CAV website (s.46B(4)). However as at the present date DBDRV is still refining them and has decided not to post them as yet.

**Section 46C** makes inadmissible in subsequent proceedings anything said or done during a conciliation, except for:

- any written communication from the DRO to any of the parties

- anything said or done by an assessor
- any report produced by an assessor
- use in disciplinary proceedings.

**(8) *If no agreement is reached following conciliation, the CDRO will issue a certificate (s.46D and s.46E)***

If the dispute is not resolved, s.46D requires the CDRO to notify each party that she intends to issue a certificate, the reasons why the dispute was not resolved and give them the opportunity to make submissions in relation to the content of the proposed certificate.

Section 46E requires the CDRO to issue a certificate after considering any submissions received if she still considers the dispute is not resolved. The certificate must include a statement of the reasons why the dispute was not resolved, which may include that a party did not participate in good faith.

A party may apply to VCAT for review of a failure by the CDRO to issue a certificate under this section if it is not issued within 20 days of the date for submissions.

**(9) *If an agreement is reached, this must be recorded (s.46F)***

The DRO must prepare a written record of agreement setting out its terms. Each party has the chance to correct any error or omission on the record. This record is then evidence of the terms of the agreement.

**(10) *If an agreement is breached, a party may notify the CDRO and the CDRO must take action (s.46G and s.46H)***

If the CDRO determines there was a breach, then the record of agreement ceases to have effect and she must give notice to each party.

## **STOP WORK ORDERS**

**(11) *Division 4 allows the CDRO to require a builder to stop work (s.47, 47A-47D)***

At any time after a referral, the CDRO may by written notice require a builder to stop all or part of the work, if she considers that:

- there is a reasonable possibility of evidence being lost or impractical to obtain, or
- for any other reason.

A stop work notice has effect for no more than 30 days, but may be extended for up to a further 30 days.

A builder must comply with the order - penalty of 60 penalty units.

It ceases to have effect if cancelled or on the issuing of a certificate of conciliation.

## **ASSESSORS**

**(12) *Division 5 - an assessor may be appointed to assess whether the work is defective or incomplete***

An assessor has the following functions (s.48A):

- to assess whether domestic building work is defective or incomplete
- to carry out any other function conferred on him/her

By s.48B, the CDRO may in writing direct an assessor to inquire into a domestic building work dispute, to examine the work performed by the builder in order to determine whether it

is defective or incomplete, and to provide an estimate of the number of business days required to rectify or complete the work.

It seems that normally there will be no cost for a report or any tests (e.g. s.48J(3)) but the cost may be ordered to be paid by a party if that party failed to participate in a conciliation conference and a dispute resolution order is issued against them (s.48K).

By s.48C, a party to a dispute may ask the CDRO to appoint an assessor even if the original referral was rejected or it was not resolved by conciliation. In such cases, the assessor may carry out tests or obtain expert advice (s.48L) with the permission of the requesting party. A fee may be payable for an assessment under this section (s.48C and s.48M).

**(13) *An assessor has wide powers***

An assessor has wide powers, including to:

- enter the site (s.48D)
- demolish or open up any work (s.48E)
- require a person to give information or produce documents (s.48F)
- carry out tests (s.48J)
- obtain expert advice (s.48J)

It is an offence to refuse or fail to comply with a requirement of an assessor or to hinder or obstruct an assessor - penalty of 60 penalty units.

**(14) *An assessor must provide a report***

Section 48O seems puzzling.

After conducting an examination, subsection 1 requires an assessor to give a report to each party to the dispute and the CDRO. Subsection 2 requires the report to be in writing. However by ss.3, the assessor is not required to give a report if the examination was for the purposes of a conciliation conference and an agreement was reached at the conference. It is hard to see what purpose there is in an assessment if it is not used at a conciliation conference. And how will the assessor know whether or not to put it in writing before he/she knows if an agreement has been reached?

Further, if there is a breach of the agreement, then the CDRO may direct the assessor to provide a written report. In this event, each party is given 5 days to make submissions to the CDRO following receipt of the assessor's report. It seems that there is no similar opportunity to make submissions in cases where there is no agreement or no breach.

The content of the report is set out at s.48P - 48Q. It must:

- specify the building work that is defective or incomplete, including any defects that may adversely affect the health or safety of people or the amenity of the building;
- specify any other defects in the building work that are incidental to, but not the subject of, the dispute;
- if required by the CDRO, include an estimate of the number of business days required to rectify or complete the building work.

Further, in the report the assessor may:

- specify the cause of the defective or incomplete building work;

- recommend a preferred method by which the defective or incomplete work may be rectified or completed;
- include a statement that the assessor is of the opinion that the building work is so defective that it would not be appropriate to allow the builder to rectify or complete the work.

In addition to the report, if the assessor thinks that there has been a breach of the Building Act or Regulations, then he/she must provide a written report to the VBA (s.48R). The VBA may then notify the relevant building surveyor or Council.

An assessor's report under s.48O is admissible in VCAT or other legal proceedings (s.48T).

## **DISPUTE RESOLUTION ORDERS**

### **(15) *The CDRO may issue a dispute resolution order ("DR Order") to a builder or owner (s.49)***

If the dispute has been referred to DBDRV and it has not been resolved and the dispute relates to one or more of the following:

- an alleged breach of a s.8 warranty;
- an alleged failure to maintain the standard or quality of building work specified in a domestic building contract;
- an alleged failure to complete the domestic building work required by a domestic building contract;
- an alleged failure to complete the domestic building work required by a domestic building contract within the times specified in the contract;
- an alleged failure to pay money for domestic building work performed under the contract;

then the CDRO may issue a DR Order to either a builder or an owner. There are matters specified which the CDRO must/may consider before issuing a DR Order (s.49A), including:

- any change in the nature of the dispute or the circumstances of the parties since the copy of the assessor's report was given, including the extent of any partial performance of an action specified in a record of agreement;
- the conduct of the parties during the conciliation (if applicable);
- any direction to fix building work given under Division 2 of Part 4 of the *Building Act*;
- whether the issuing of a dispute resolution order to a person would be unfair or unreasonable in the circumstances.

If an assessor's report has been received, then a DR Order must not be issued any earlier than 10 business days after the report is given to the parties (s.49(2)).

Generally speaking, once issued, an Order takes effect immediately (s.49(4)).

Note that there is no power to issue a DR Order to an architect or sub-contractor, even though DBDRV may conciliate disputes between these.

### **(16) *There are wide powers in respect of a dispute resolution order (s.49B - 49X)***

By s.49B, a DR Order may require a builder to whom it is issued to:

- rectify any defective work,

- rectify any damage caused or
- complete the work

It may require an owner to comply with any specified conditions in the order, including to:

- refrain from doing anything which may prevent or restrict the builder from carrying out its work,
- pay money into the trust fund set up for this purpose, called the DBDRV Trust Fund.

By s.49C, a DR Order may require:

- an owner to pay an amount to the builder
- an owner to pay an amount into the Trust Fund which will be paid to the builder upon completion
- the builder to pay the reasonable cost of another builder employed by the owner in circumstances where the Order has included a finding that the work of the original builder is so defective that it would not be appropriate to allow it to rectify or complete the work.

**(17) *A DR Order may include findings by the CDRO which then are evidence in any proceedings by the builder for the recovery of money and may be taken into account in any proceedings in VCAT or a court in determining costs or damages (s.49D)***

A DR Order may include a finding by the CDRO that:

- the building work is not incomplete or defective; or
- the work is so defective that it would not be appropriate to allow the builder to rectify or complete the work.

In those circumstances, the finding is evidence in any proceedings by the builder for the recovery of money; and may be taken into account in any proceedings in VCAT or a court in determining costs or damages.

**(18) *Amendment or cancellation of dispute resolution order (s.49H - s.49O)***

A party can ask the CDRO to consider amending or cancelling a dispute resolution order (s.49J) if it does so within 10 business days of receiving the order and there has been a substantial change in the nature of the dispute or the circumstances of the parties since the assessors report was prepared. The CDRO has 5 days to consider the request (s.49L) and may make further inquiries or obtain further information.

The CDRO can also amend or cancel an order at any time on her own volition, including if the Order has not been complied with (s.49H, 49I).

**(19) *Breach of a DR Order (s.49P - 49T)***

Once a builder gives notice that it has completed the works in the DR Order (s.49P), an owner may dispute that the work has been done (s.49R) and the CDRO may check by appointing an assessor (s.49S). If the assessor finds that works are outstanding, then the CDRO may give the builder further time, if she is satisfied that the failure to comply was due to factors outside the control of the builder (s.49T).

Alternatively, (s.49U), the CDRO must issue a “breach of dispute resolution order notice” if she receives an assessor’s report that states that the builder has failed to comply with a DR Order. This Notice then gives an owner the right to end the building contract (s.49W) (subject to any appeal by the builder).

A builder has the right to end the building contract (s.49X), if:

- the owner is in breach of a DR Order directed to them,
- they have not appealed or have failed in an appeal,
- the builder has complied with anything in the Order directed to it; and
- the DR Order included a finding that the building work was not defective or incomplete.

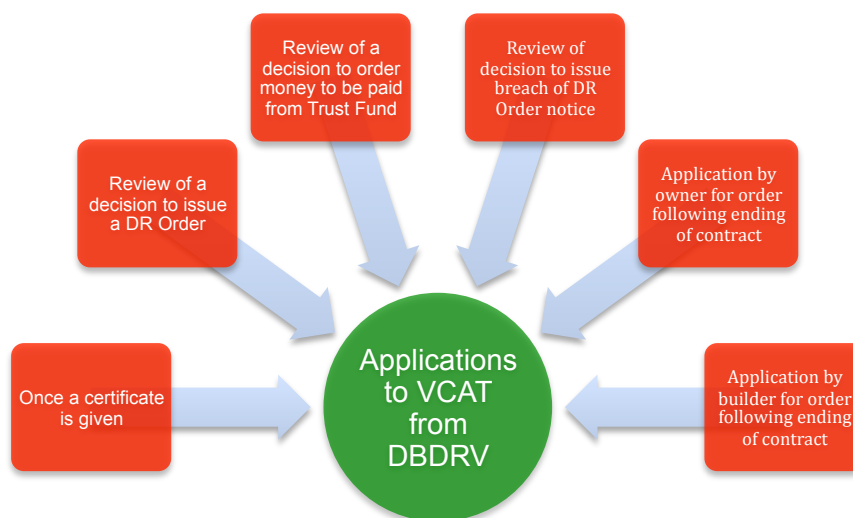
**(20) Confidentiality (s.52l)**

A DRO or an assessor must not disclose to any person any information obtained in the course of carrying out any function - penalty of 60 units.

However a DRO may disclose information if the disclosure is made—

- for the purpose of carrying out a function under the Act; or
- to the Director of Consumer Affairs; or
- to the Victorian Building Authority; or
- to the Victorian Managed Insurance Authority; or
- with the written consent of each person to whom the information relates.

**VCAT'S JURISDICTION FROM DBDRV**



**(21) VCAT's jurisdiction under the DBDRV process**

Part 5 of the old DBC Act has been amended - with new headings and new terminology -

<i>Old heading</i>	<i>New heading</i>
Part 5 - Functions of Tribunal	Part 5 - VCAT jurisdiction
Division 2 - What can the tribunal do?	Division 2 - Proceedings before VCAT



Sections 53 - 55 are unaltered, other than a change in name from “the Tribunal” to “VCAT”.

Section 56 has been inserted (there was previously none) and this provides that a certificate of conciliation is required to bring proceedings in VCAT, except for proceedings for an order in the nature of an injunction.

The new section 57A mirrors s.56 in part but in relation to proceedings in a “court”. It provides that either a certificate of conciliation or leave of the court is required to bring proceedings, except for proceedings for an order in the nature of an injunction. The section is confusing as “court” is not defined; it is written with a lower case “c”, in contrast to the word “Court” used in s.57.

New sections 63-67A have been inserted under the heading “Subdivision 3 - Matters relating to dispute resolution orders”. These are as follows:

**(22) *A person who is required to comply with a dispute resolution order may apply to VCAT for review of the decision to issue or amend the dispute resolution order (s.63).***

The application must be made within 20 business days after the later of -

- the day on which the applicant was given a copy of the DR Order; or
- if under the VCAT Act the applicant requests a statement of reasons, the day on which the applicant receives that statement of reasons or the applicant is informed that a statement of reasons will not be given.

An application to VCAT must be made on the ground (ss.3) that -

- the description in the DR Order of the domestic building work that is defective or incomplete is incorrect; or
- the period specified in the DR Order for carrying out the rectification or completion work is not reasonable; or
- a requirement in the DR Order to take a specific action or to refrain from taking action is not necessary or is not reasonable.

It is yet to be seen how VCAT will interpret this section. Will it allow a full review of the merits of the decision? Despite the narrowness of ss.3, VCAT is given wider powers at ss.4 and 5:

*“In determining an application for review of a dispute resolution order, VCAT may also make any order it considers fair in relation to the domestic building contract to which the dispute relates.*

And further, VCAT may vary any term of the domestic building contract (including the completion date, the contract price, a provisional sum or the amount to be paid for a prime cost item), declare that a term of the contract is, or is not, void under section 132, declare void any unjust term of the domestic building contract, or otherwise vary the domestic building contract to avoid injustice.

**(23) *Application for review of decision to pay money out of Domestic Building Dispute Resolution Victoria Trust Fund (s.65)***

A party may apply to VCAT for review of a decision by the Director under section 49G to pay money out of the Domestic Building Dispute Resolution Victoria Trust Fund. An application must be made within 10 business days after the party received written notice of the Director's decision.

**(24) *Application for review of decision to issue breach of DR Order notice (s.66)***

A builder may apply to VCAT for review of a decision to issue a “breach of dispute resolution order notice” under Part 4.

The application must be made within 20 business days after the later of -

- the day on which the applicant was given a copy of the Notice; or
- if under the VCAT Act the applicant requests a statement of reasons, the day on which the applicant receives that statement of reasons or the applicant is informed that a statement of reasons will not be given.

An application to VCAT must be made on the ground (ss.3) that the assessment made in the assessor’s report on which the notice was based -

- was not correct; or
- is no longer correct because the DR Order has since been complied with.

By subsection 4, in addition to DBDRV and the builder, the building owner may make submissions to the proceedings at VCAT in relation to -

- whether there has been a failure to comply with the DR Order; and
- the nature of the failure to comply with the DR Order.

**(25) Application by owner for order following ending of contract (s.67)**

If an owner ends a contract following a failure to comply with a DR Order, they may apply to VCAT for an order against the builder. VCAT must consider -

- the contract, including any plans and specifications set out in it; and
- any assessor’s report; and
- may make any order it considers fair in the circumstances.

VCAT may order the builder to pay a sum of money to the owner:

- if the money is found to be owing to the owner by the builder;
- by way of damages;
- by way of restitution;
- to refund money paid under the contract, including any money paid by the owner in excess of the requirements of the contract.

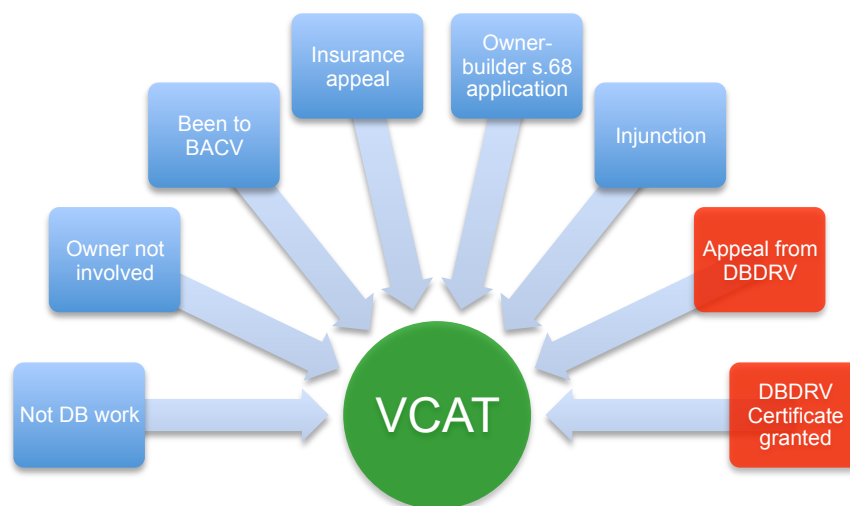
An order must provide for a builder to receive a reasonable price for work carried out under the contract, not being more than the builder would be entitled to recover under the contract.

**(26) Application by builder for order following ending of contract (s.67A)**

If a builder ends a contract following a failure to comply with a DR Order, they may apply to VCAT for an order against the owner. VCAT may make any order it considers fair in the circumstances, including to pay a sum of money to the builder:

- for work performed under the contract; and
- by way of damages for loss of work as a result of the ending of the contract.

## VCAT'S JURISDICTION APART FROM DBDRV



Of course VCAT still has jurisdiction in many areas, including:

- an application for an injunction to VCAT or a court does not require a certificate to first be issued - s.56(3) and 57A(2)
- where the works are not domestic building works (as defined in the DBC Act) - i.e. only one of the following:
  - attaching external fixtures
  - electrical work
  - glazing
  - installing floor coverings
  - insulating
  - painting or plastering
  - tiling (wall and floor)
  - gas fitting, draining work or any other plumbing work listed in section 221C of the Building Act 1993
  - erecting a chain wire fence to enclose a tennis court
  - erecting a mast, pole, antenna, aerial or similar structure.
- Where the owner is not involved
- An insurance appeal
- Where the parties have already been to BACV
- An application for exemption by an Owner-builder under s.68
- Once a DBDRV Certificate has been granted

## CONCLUSION

There are a number of unanswered questions about the process and as much of it is a work in progress, we will have to wait and see how it develops. Some of the issues I can foresee include the following:

1. What role will lawyers have in the process?
2. At present there are no published written guidelines or procedures in place which influence how a decision is made. I understand that there are internal documents to guide the DROs,

and that applicants are being given information from the DROs. DBDRV intends to share these as they develop and try out different methods of conciliation. However this may leave open grounds for challenging the process (administrative review?); further what is the effect of the non-compliance with s.46B?

3. If the dispute involves a multi-unit development with multiple owners - can this be conciliated? In my view there is no reason why not, in cases where all parties are in agreement and the facts lend themselves to conciliation. For example, where a builder intends to offer to rectify leaking balconies and all owners (or the OC) are involved.
4. Is a special resolution required (under s.18 OC Act) for claims by OC's? I doubt that DBDRV is a "legal proceeding" within the meaning of the OC Act; although DBDRV does need to be sure that all parties in a conciliation have authority to settle.
5. And if an OC wishes to appeal a decision of DBDRV, it has 10 days to appeal - but will need longer than that to obtain a special resolution. Presumably VCAT will allow for that as it does now by treating the failure as a procedural deficiency only.
6. The dispute may be suitable for conciliation even though it involves multiple parties, such as an architect or building surveyor and a builder and an owner. However only a builder and owner are subject to DR Orders etc. If an agreement is reached, how is it enforceable against other parties?
7. How is an agreement enforceable between the parties? If it is breached, that may lead to a DR Order or breach of DR Order, but that is not the same as enforcing the original agreement.
8. And if it is not enforceable, then releases (if given) will also be of no effect.
9. Note that a building surveyor is a building practitioner as defined in the Building Act, but is not listed on the DBDRV website as a possible respondent. Accordingly VCAT must refuse an application against a surveyor, but an owner cannot take them to DBDRV as the online application does not allow this.
10. If a party has purported to terminate the building contract, will DBDRV order works to continue under that contract - and if so, what about renewing the warranty insurance, building permit etc? I understand that DBDRV is unlikely to make any orders that are at odds with the parties' legal position, but there seems to be no reason why the parties could not reach an agreement to resume the contract through conciliation (as they do now at VCAT).
11. If assessor's reports do not include an estimated cost to fix/complete, parties will be forced to obtain further evidence in VCAT hearings for damages etc.
12. Assessor's are required to notify VBA if they observe any breaches of the Building Act or Regulations. This will lead to the end of the handyman - as anyone carrying out work without being registered or licensed will be reported.
13. How wide can a DR Order be - will it include an order to hand over the property, keys etc on payment of money - or is that considered outside the scope of s.49B?
14. A DR Order that a builder must pay money is only to be made where the work is so defective that it is not appropriate for a builder to complete or fix (s.49C(1)(c)).
  - a. What about if the standard of work is OK but there is a complete breakdown in the relationship between the parties - will a DR Order be made requiring them to continue working together?
  - b. Or what about the situation where plumbing work is required to be rectified. A builder cannot legally carry this out. Nor would it (usually) have to pay its own subcontractor plumber to rectify. And a DR Order cannot be addressed to a plumber. What are the appropriate orders?

15. If a DR Order is appealed to VCAT, what role will DBDRV take in the appeal? It would be contrary to the intention of the scheme for it to leave it to the respondent to defend its decision, and so I expect it will participate much in the same way insurers do in an insurance appeal. The Tribunal will undoubtedly make orders joining all interested parties - in the same way it does in insurance matters.
16. An appeal of a DR Order is on limited grounds only (s.63)-
  - a. the description in the DRO of the work that is defective or incomplete is incorrect; or
  - b. the period specified in the DR Order for carrying out the rectification or completion work is not reasonable; or
  - c. a requirement in the DR Order to take a specific action or to refrain from taking action is not necessary or is not reasonable.

It is yet to be seen how VCAT will interpret this section. Will it allow a full review of the merits of the decision? It seemingly has wide powers (at ss.4 and 5) -

- a. it may make any order it considers fair
  - b. it may vary any term of the contract (including the completion date, the contract price, a provisional sum or the amount to be paid for a prime cost item);
  - c. declare that a term of the contract is, or is not, void under section 132;
  - d. declare void any unjust term of the contract, or otherwise vary the domestic building contract to avoid injustice.
17. How will VCAT treat a dispute? There is a discrepancy between it exercising its review jurisdiction in respect of an application from DBDRV and then exercising its original jurisdiction to hear evidence and make the orders set out above. A logical answer could be for it to join the owner/builder under s.60 VCAT Act as an interested party on the review proceeding and then to require a separate proceeding to be issued in its original jurisdiction - in which multiple parties, apportionment defences, etc would be made. The two proceedings would presumably be listed together to avoid duplication.
18. However there is still the risk of contradictory findings - e.g. VCAT may find that a DR Order against a builder was correctly made, given the information it had at the time, but at the same time, in the original proceeding find that the builder owes no liability to an owner. And what of the costs consequences?
19. Because DBDRV only applies to domestic building work disputes, it excludes single trades such as electricians, carpet layers, tilers, painters (as set out in the DBC Regulations). Claims against these still need to go to VCAT, whereas DBDRV would be ideal to resolve these. VCAT's website has new application forms for such claims.
20. How does s.56 compare with s.57A - does the word "court" in s.57A include VCAT? If so, may a party apply to VCAT without a conciliation certificate "with leave"?
21. DBDRV is required to notify and consult with VMIA and the VBA. How will that work - what issues of privacy, confidentiality, etc. And what will VMIA and/or VBA do with the information received? Will VMIA notify brokers?
22. Payments out of the Trust Fund are reviewable (s.65) but the decision to pay is made by the Director of Consumer Affairs (s.49G). How will VCAT treat his/her role compared to the role of the CDRO of DBDRV?
23. Time limits -
  - a. By s.45(3)(a) a domestic building work dispute must be referred to the CDRO within 10 years after the date of issue of the Building Permit, a Certificate of Final Inspection or the date of practical completion. The effect of this is that if a defect is

noticed on the last day of the 10 year period, the referral to DBDRV must be made that same day.

- b. And what happens if the referral is made within 10 years but a certificate is not given until after 10 years - would the date of making the initial application to the DBDRV suffice to "stop the clock" for the purpose of s134?

These questions (and others) will undoubtedly be answered in time - whether through VCAT rulings or DBDRV's actions. There will undoubtedly be new avenues of work for lawyers, even as some of the traditional sources dry up. Teething issues are to be expected, but the government is committed to making the scheme a success. VCAT has already had great success in conciliating and settling domestic building disputes - and this process aims to make that happen at an earlier stage and before large costs are incurred. Lawyers can be a valuable part of the process in providing advice, in challenging decisions when they are inappropriate, and in representing parties if conciliation fails.

Suzanne Kirton  
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