

## Practice Note 12

# Matters referred to the Tribunal by the Building Commission under section 11(1)(d) of the *Building Services (Complaint Resolution and Administration) Act 2011*

### What is this document?

1. This document is a practice note issued by the Rules Committee of the Tribunal under section 33 of the State Administrative Tribunal Act 2004 (WA).
2. This document describes important aspects of the Tribunal's practice and procedure in dealing with building complaints referred by the Building Commissioner for determination by the Tribunal. This document does not describe the Tribunal's practice and procedure with regard to applications, made by a party to a building dispute, for review of decisions made by the Building Commission, or for the internal review of a decision made by the Tribunal, which are dealt with in Practice Notes 2 and 13.
3. If you need help in understanding this document, please contact the Tribunal on (08) 9219 3111 or 1300 306 017 (STD callers) or email the Tribunal at [info@sat.justice.wa.gov.au](mailto:info@sat.justice.wa.gov.au)

### Referral to the Tribunal

#### What matters may be referred?

4. Where a person makes a complaint to the Building Commissioner pursuant to section 5(1) of the Building Services (Complaints Resolution and Administration) Act 2011 (WA) about regulated building services that have not been carried out in a proper and proficient manner or that are faulty or unsatisfactory, the Building Commissioner may refer the complaint to the Tribunal for the purpose of deciding whether a building remedy order should be made or not.
5. Where a person makes a complaint to the Building Commissioner pursuant to section 5(2) of the Building Services (Complaints Resolution and Administration) Act 2011 (WA) about a matter referred to by section 17, 20 or Schedule 1 clause 5 of the Home Building Contracts Act 1991 (WA), the Building Commissioner may refer the complaint to the Tribunal for the purpose of deciding whether a HBWC order should be made or not.
6. In each case, upon referral to the Tribunal of the complaint made to the Building Commissioner, the complaint is dealt with as an application to the Tribunal. The complainant is referred to as the applicant, and the person against whom the complaint is directed is referred to as the respondent.

#### What documents are provided on referral?

7. Upon the referral of a complaint made to the Building Commissioner pursuant to section 5 of the Building Services (Complaint Resolution and Administration) Act 2011 (WA), all of the documents lodged with the Building Commissioner by the parties, together with any documents generated by the Building Commissioner's office concerning the complaint, will be transferred to the Tribunal by the Building Commissioner.

## Initial directions hearing

8. Upon the referral of the complaint to the Tribunal and receipt of the transferred documentation from the Building Commissioner, the application will be listed for an initial directions hearing before a member of the Tribunal, within approximately two to three weeks of the referral. The Tribunal will give written notice to the parties of the time, date and place of the initial directions hearing in the Tribunal.
9. Parties may attend the initial directions hearing, and any other directions hearing, by telephone if they live outside the Perth metropolitan region or have difficulty in attending in person. In order to arrange for attendance at a directions hearing by telephone, parties should contact the Tribunal on the telephone number or email address set out at paragraph 3 above as soon as possible after receiving notice of the directions hearing.
10. Where a special need arises to accommodate a party's attendance at the initial directions hearing, and at any other directions hearing, such as the need for video conferencing, the need of the services of an interpreter, the need for wheel chair access or the provision of a hearing loop, the party requiring these arrangements should contact the Tribunal on the telephone number or email address set out at paragraph 3 above as soon as possible after receiving notice of the directions hearing so that appropriate arrangements can be made by Tribunal staff.
11. At any directions hearing, the presiding member will make directions for the speedy and fair conduct of the proceedings.
12. At any directions hearing, each party or its representative must have sufficient familiarity with the matter and, in the case of a representative, sufficient instructions from the party to be able tell the Tribunal the party's position as to each of the matters set out in paragraphs 14 and 15 below.

## What will the Tribunal consider at the initial directions hearing?

13. At the initial directions hearing, the Tribunal will consider:
  - (a) the current status of the dispute which is the basis of the application and whether the parties have resolved any particular items or aspects of the dispute;
  - (b) whether the issues of fact and any issues of law have been sufficiently identified by the parties to facilitate the identification of all of the issues of fact or law that the Tribunal may have to determine at the final hearing of the application;
  - (c) whether the parties have considered or had sufficient time or opportunity to consider all of the issues to be determined by the Tribunal;
  - (d) whether the parties have considered or had the time or opportunity to consider the nature and extent of the evidence or information that the parties will be required to provide to the Tribunal so that the application is determined in accordance with the Tribunal's statutory objectives and according to law;

- (e) the number of witnesses who might be called by each party to give evidence at the final hearing of the application and any special requirements that may be necessary for the Tribunal to take that evidence;
- (f) whether either party intends to obtain any or any further expert evidence to support their respective positions, and if so, the need to provide the Tribunal and the opposing party with a copy of any expert reports and documents upon which the calling party may rely at the final hearing of the application;
- (g) whether any expert or other witnesses shall be required to attend the final hearing;
- (h) whether, in the case of an inspection and report undertaken by the Building Commissioner's Inspector, the Inspector is required to attend the final hearing of the application to expand upon, explain or answer any questions concerning the observations and conclusions referred to in the report;
- (i) whether the parties intend to file any further documents upon which they intend to rely at the final hearing of the application;
- (j) whether any party requires disclosure of any relevant documents by the opposing party to assist them in advancing or resisting the application, as the case may be;
- (k) whether a view or inspection of the matter the subject of the application is necessary by the Tribunal;
- (l) if a view or inspection outside the Perth metropolitan region will be required, or if parties or witnesses reside outside the Perth metropolitan region, where the hearing should most conveniently take place;
- (m) the likely length of the hearing;
- (n) whether telephone, video link or any other system or method of communication will be required at the hearing;
- (o) whether an interpreter will be required at the hearing;
- (p) whether the parties have explored the possibility of settlement of the dispute underlying the application; and
- (q) whether it is possible for the parties to achieve a settlement of the dispute during the course of the directions hearing - if so, the presiding member will assist the parties as far as possible to achieve resolution, but if settlement is not reached, the presiding member may be disqualified from being part of the Tribunal which is constituted to determine the application.

14. At the initial directions hearing and at any subsequent directions hearing, and subject to the considerations referred to in paragraph 16 below, the Tribunal will also consider:

- (a) whether the matter should be referred to mediation before a member of the Tribunal (as to which see paragraphs 23 - 25 below); or
- (b) whether the matter should be referred to a compulsory conference before a member of the Tribunal (as to which see paragraphs 26 - 28 below).

### **What orders will the Tribunal usually make at the initial directions hearing?**

- 15. If it has not been possible to settle the matter at the initial, or any subsequent, directions hearing, the matter will usually be programmed to a final hearing at the very earliest possible date. Usually a matter will not be referred to a formal mediation, or compulsory conference, unless that course is warranted by reason of the complexity of the application, the expected length of the final hearing of the application and the objective indications that there is a reasonable prospect of settlement.
- 16. The Tribunal will make orders that will facilitate the parties presenting their evidence and information to the Tribunal efficiently so that the application may be heard and determined as quickly and simply as possible.
- 17. To this end, the Tribunal may make orders for the parties to disclose documents, file and serve documents, and file and serve witness statements or summaries of the evidence witnesses are expected to provide to the Tribunal.
- 18. In a case where expert evidence is involved, the Tribunal may make an order that the experts to be called by the parties confer with each other before the hearing and file with the Tribunal a joint statement of all matters agreed between them, matters not agreed and the reasons for any disagreement.
- 19. The Tribunal will make orders that the documents filed by the parties be compiled into a booklet for use at the hearing. Where the applicant is legally represented, the Tribunal may make an order that the applicant is to file three copies of such booklets with the Tribunal, serve one copy on the respondent and have an extra copy available at the hearing for witnesses. In that case, the Tribunal may reserve the costs associated with the production of the hearing books to the final hearing of the application. Where the parties are not represented the Tribunal will usually direct the Tribunal's Executive Office to attend to the production of the hearing books and arrange for the parties to collect the books or, if a party is situated in a remote area, will post the hearing book to that party.

### **What happens at a final hearing?**

- 20. Any witness statement which is filed with the Tribunal and given to the other party in accordance with the Tribunal's orders will usually be admitted into evidence by the Tribunal as the evidence of the witness. The presiding member may permit the witness to give any additional evidence. Alternatively, where a summary of the witness' evidence was filed pursuant to an order of the Tribunal, the presiding member will allow the witness to give evidence. In either case, the other party is permitted to cross-examine the witness.
- 21. The expert witnesses in each field will usually give evidence at the hearing concurrently. This involves the witnesses being:

22. (a) called to give evidence together;
23. (b) asked questions by the Tribunal;
24. (c) given an opportunity by the Tribunal to ask each other any questions which they consider might assist the Tribunal; and
25. (d) asked questions by the parties or their representatives.
26. Where the experts have provided a joint statement it will be admitted into evidence by the Tribunal at the hearing and expert evidence inconsistent with any agreement in the joint statement will be allowed only if the Tribunal permits.

## **What is mediation?**

27. Mediation is a structured negotiation between parties, facilitated by a trained mediator. Its purpose is to achieve a mutually acceptable settlement of a dispute or to narrow the issues in dispute. Mediation often allows for a creative solution.
28. All mediations in the Tribunal are conducted by a member who is also a mediator. If the mediation does not result in settlement, the member who conducted the mediation cannot take any further part in the proceedings, unless all of the parties agree.
29. The Tribunal may order the parties to attend mediation without their consent.

## **What is a compulsory conference?**

30. The purpose of a compulsory conference is to identify and clarify the issues and to promote resolution by settlement.
31. If the compulsory conference does not result in settlement, the member who conducted the conference cannot take any further part in the proceedings
32. Attendance at a compulsory conference is compulsory.

## **Who attends a mediation or compulsory conference?**

33. The parties must attend the mediation or compulsory conference in person. Where a party is a corporation, a senior officer must attend. A lawyer or other person permitted by the State Administrative Tribunal Act, Regulations or Rules to represent a party may also attend. If a party wishes to bring along another person, it must advise the presiding member and the other party at the directions hearing at which the matter is referred to mediation.
34. An officer who attends on behalf of a party must be able to identify, clarify and narrow the issues and have authority to settle the proceedings.

## **What happens if a matter is settled between the parties?**

35. Where proceedings are resolved between the parties a minute of the consent orders sought must be filed in hard copy, signed by each of the parties or their representatives, and in electronic form if possible.
36. The Tribunal will make an order by consent only if it is satisfied that it has power to do so.

37. The applicant requires the leave of the Tribunal to withdraw the proceedings. Where the settlement provides for the respondent to carry out remedial building work the Tribunal will usually require that this be reflected in an appropriate building remedy order to be commenced and completed within an agreed time period, rather than permit the proceedings to be withdrawn, so that if there is any later dispute about whether the remedial work has been properly carried out that can be dealt with by the Tribunal without a fresh complaint having to be made to the Building Commission.

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