How to engage with mediation/ compulsory conference for building disputes at VCAT

Fact sheets

This fact sheet covers:

- Key words
- Strategies for alternative dispute resolution
- Negotiation
- Mediation
- Compulsory conference
- Calderbank offers and offers of compromise
- Settlement
- Next steps if matter fails to settle through ADR

1. Key words

Negotiation, mediation and compulsory conferences are processes which provide an opportunity for people involved in building disputes to reach a settlement.

- **Alternative dispute resolution**: Negotiation, mediation and compulsory conferences are all forms of alternative dispute resolution or "ADR".
- **Negotiation**: is an informal process where the parties involved in a dispute have discussions to try to reach a settlement. Negotiation can occur between parties at any time before a dispute is resolved at the Victorian Civil and Administrative Tribunal (**VCAT**), including the day of a hearing.
- **Mediation**: is a formal, confidential process, and is used by VCAT to assist parties to resolve disputes. At mediation the parties have the opportunity to discuss issues and try to agree to a settlement. Nothing that is said by the parties during mediation can later be used as evidence in a VCAT hearing.
- **Compulsory conference:** a compulsory conference is very similar to a mediation at VCAT; however, these are conducted with the help of a VCAT member. The VCAT member won't make a decision about the dispute, but will help both parties agree on a fair resolution. If a matter settles at compulsory conference, the VCAT member can make orders which adjourns or disposes of the case

as appropriate. If the matter doesn't settle, the VCAT member can make directions to prepare the case for final hearing.

Benefits of Alternative Dispute Resolution

Avoiding a VCAT hearing can have very important benefits, including:

- ✔ **Costs** – VCAT hearings can be very expensive, and there is a risk of costs being ordered against you if you lose. There are also non-financial costs of VCAT proceedings, including having to take time off work to attend the hearing, and stress and anxiety.
- ✔ **Time** – VCAT proceedings can take a long time to finish. You are likely to have to prepare a number of documents and attend a number of different hearings. Further, the VCAT Building & Property list can be very busy and sometimes your case may be listed months after it is started.
- ✔ **Creative settlements** – VCAT is limited in relation to the types of decisions it can make. Negotiation, mediations and compulsory conferences are not restricted in the same way. This can lead to more creative settlements which may be more satisfying for everyone involved.
- ✔ **Preserving relationships between the parties** – if you need to continue your relationship with the other party (for example, if the works at your house aren't finished), negotiation, mediations and compulsory conferences are less likely to harm the relationship beyond repair.
- ✔ **Certainty** – if your case goes to a VCAT hearing, you cannot be certain as to the decision the Tribunal will make. Cases are risky and there is no guarantee that you will win.

VCAT PRACTICE NOTE

VCAT has published a practice note about "alternative dispute resolution" (which covers both mediations and compulsory conferences). You should read the practice note before you participate in ADR at VCAT.

2. Strategies for ADR

Preparation is the key to a successful negotiation or mediation. Preparation includes 3 key aspects:

1. **Analysing** the facts and issues
2. **Deciding** what you want and what you will accept; and
3. **Communicating** to the other party what you want.

2.1 Analysing the facts and issues

To prepare for ADR you should think about how you will explain the issues in dispute. This includes what you are claiming, or what your response to the other side's claim is.

> **TIP**
>
> Bring copies of any documents relating to the dispute to mediations and compulsory conferences.

To analyse the facts, you could think about:

- preparing a timeline of events which will help you to compare your side of the story with the other party's version
- comparing your evidence in relation to the dispute with the other party's evidence, and
- identifying the issues in dispute and the key points of agreement and disagreement.

Your analysis will help you to identify the strengths and weaknesses of your case.

"POSITION PAPERS" AT VCAT

VCAT may require you to prepare a "position paper" before a mediation or compulsory conference.

This is a document that sets out:

- the background to the dispute, including relevant facts
- your position about the dispute
- your response to the other party's position, and
- how you think the dispute could be resolved.

2.2 What do you want to achieve through ADR

Before you begin negotiating a settlement, you should think about what you want to achieve from the process. I.e. You should consider what it will take for you to be satisfied with the outcome.

For example:

- If you still have a good relationship with the builder, you could agree to the builder coming back to finish the work or rectify defects.
- If the relationship with the builder has broken down, you might just want enough money to fix the problems at your house. You should try to work out how much it will cost to do this and ask the builder to pay you that much money.

You can be creative in what you ask for during a negotiation, but once the negotiation process is over you can only obtain outcomes that VCAT is able to award, such as compensation from the builder (e.g. the cost of fixing defects or finishing the work) and an allowance for the cost of obtaining expert reports.

SETTLEMENT IS A COMPROMISE

- You may want to think about a 'best case' scenario that you want and 'worst case' scenario of what you are willing to accept.
- It may also be useful to create a list for yourself of the outcomes you are seeking under two headings – What you want to obtain and what you need to obtain.
- You may need to consider accepting something less than you feel you are entitled to, so that you avoid the risks, uncertainty and delay in going to a hearing.

2.3 Preparation

Even when you are not required to prepare a formal "position paper", it can be helpful to prepare a short document you can read to highlight the key points in your case.

If there are documents that are necessary to your case, you should bring copies of them to the mediation. You should have spare copies for the other party and for the mediator or VCAT member.

Be prepared that you may be confronted with new information during the mediation, so you will need to be flexible and adjust your expectations as the mediation goes on.

2.4 Communication

You should tell the other party everything you are seeking at the start of the negotiation – this will help to avoid surprises later.

Your first offer should be reasonable. But you should think about starting with a higher offer than the amount you would ultimately be willing to accept to settle your case. This gives you room to negotiate down.

TIP

Don't be surprised, upset or discouraged if the other party makes a very low opening offer, they may also be giving themselves room to negotiate.

When making offers, it's best not to impose unrealistic deadlines to pressure the other side (e.g. by saying things like "this offer is only open for ten minutes"). You should avoid saying things like "this is my final offer", unless the offer you are making *actually* is your final offer.

3. Negotiation

Negotiation can take place:

- face-to-face
- in writing, or
- by telephone, video or web conferencing.

! CAUTION

Use the words "without prejudice" verbally and in writing to make sure negotiations will be confidential.

Negotiation that is conducted outside of formal VCAT processes (i.e. in mediations or compulsory conferences) takes place between the parties involved in the dispute.

Negotiation offers an opportunity for parties to resolve their dispute by themselves, without the help of an independent third party. It is:

- **Flexible:** The parties can decide how they want to run it.
- **(Generally) confidential:** This means that anything said cannot be revealed outside of the negotiation, including at a hearing. When you are involved in negotiation you should state to the other side verbally (and in writing if you're writing to the other side) that the negotiation is "without prejudice". This means that the negotiation is to be confidential.

To conclude the negotiation process, the parties may agree on terms of settlement. However, it is important to remember that negotiation is a voluntary process and the parties are not required to agree on a compromise.

EXAMPLE - WRITTEN SETTLEMENT OFFER THROUGH NEGOTIATION

"I would be happy to accept payment of $10,000 for my claim. This offer is made without prejudice and is open for acceptance until 5pm on Friday, 7 July 2017."

If your offer is in writing, you should request the other side confirm they have received it.

After making the offer, the other side might respond by:

✔ accepting the offer

✖ rejecting the offer, or

☐ making a counter offer.

4. Mediation & compulsory conferences

4.1 Mediations

In a mediation, an impartial, specially-trained mediator helps the parties discuss their issues and work out a solution. The mediator can either be a VCAT member or an accredited mediator appointed by VCAT.

The mediator will try to assist the parties to narrow the issues in dispute and to try to reach an agreement on some or all of those issues.

Mediations are confidential and the discussion cannot be raised later in VCAT hearings.

4.2 Compulsory conference

At VCAT, compulsory conferences are conducted with the help of a VCAT member. The VCAT member won't make a decision about the dispute, but will help both parties to agree on a fair resolution.

The key difference between VCAT mediations and compulsory conferences is that the VCAT member can make orders on the day of the compulsory conference:

- If a matter settles at compulsory conference, the VCAT member can make orders which adjourns or disposes of the case as appropriate.
- If the matter doesn't settle, the VCAT member can make directions to prepare the case for final hearing.

Compulsory conferences are useful to help resolve more complicated legal issues.

4.3 The process

The process for mediations and compulsory conferences is much the same (except that orders can be made on the day of compulsory conferences by the VCAT member, and VCAT members can have more involvement in compulsory conferences).

Open session

Usually, the process begins with all of the parties (including the VCAT member or mediator, legal representatives and support people) in a large room.

- The mediator will explain the process for the mediation and ask the parties to give a short summary of their cases, usually starting with the Applicant (the person who has brought the claim to VCAT). Each party takes a few minutes to highlight the key parts of their case.
- Try not to interrupt too much during this process so that both parties have the opportunity to speak. While you can ask questions (and questions can be asked of you), you are not compelled to answer any questions and you cannot make the other party answer your questions.
- When speaking, try to maintain eye contact with all the representatives from the other party, if there is more than one – it may not be clear who the decision-maker is.

Break-out

When each party has had the opportunity to speak, the mediator may work with the parties in the same room or separate the parties by asking them to move into private rooms.

- The mediator will then visit each party individually, discussing potential issues and trying to reach a resolution.
- Usually, one side will make an offer, the other side will make a counter offer, and so on until the matter settles or the mediator decides that there is no chance of reaching settlement. Don't be frightened to make the first offer – it's usually good to have the offer process started.

During the mediation

Do:

- ✔ **Highlight** the key points of your case
- ✔ **Present your arguments** and give the other side an opportunity to present their arguments.
- ✔ **Ask questions** and listen to the responses given
- ✔ **Maintain eye contact** when you are speaking and when you are being spoken to
- ✔ **Listen and take notes**
- ✔ **Have an open mind** and consider all offers

Don't:

- ✖ **Interrupt the other side while they are speaking** – you will be given the opportunity to present your side of the story.

5. Calderbank offers and offers of compromise

A party to a dispute may make a written offer of settlement in an attempt to resolve a VCAT proceeding. The offer may take the form of a "Calderbank offer" or an "offer of compromise".

CAUTION

If a party rejects a settlement offer but receives an outcome which is not as good as the offer, VCAT can order the party that rejected the offer pay the legal costs of the other party from the date the offer is made.

You should consider any offer of settlement that is identified as a "Calderbank offer" or "offer of compromise" very carefully!

Example: Party B offers Party A $10,000 to settle the matter. Party A rejects the offer. VCAT orders that Party A receive $5,000, but requires Party A to pay Party B's legal fees fixed at $3,000 from the date of the offer.

6. Settlement

If you reach a settlement through negotiation or mediation, it is likely that you will be asked to sign a document called 'Terms of Settlement', 'Deed of Release' or a 'Deed of Settlement' (**Deed**).

A Deed is a document that outlines the terms of the settlement you have reached and prohibits you from taking further action in relation to your claim.

Deeds usually contain terms about:

- **Payment** - This may include details of any agreed payment of funds, how it will be paid, what bank account it should be paid to and by what date it should be paid.

- **Payment of legal costs** (if any) – If one of the parties in the proceeding has a lawyer, the Deed will usually indicate who will pay that parties legal fees. This can be done by stating that the settlement sum "inclusive of all costs and GST (where applicable)".

- **Release and discharge** - This will state that both parties have no rights to bring future claims against one another in relation to the matter that was in dispute, except for certain rights that may be excluded from the release. In domestic building disputes, parties can only release each other from defects which are presently known, and "ought not reasonably be known" at the time of entering the deed. This covers where there is a "latent" defect (a hidden defect but is not discoverable through general inspection) in the builders works.

- **Indemnity clauses** - This may require you to pay for any claims which may be made by you or third parties against the other party in relation to the same subject matter. The primary purpose of this clause is to protect the other party from third party claims. If you are concerned by this clause, you can ask for it to be removed from the Deed.

- **Non-admission of liability** - The parties agree that the Deed is made without admission of any liability. This means that the other party does not admit to breaching the law (for example, the builder may not want to admit it performed defective building works). This clause is commonly used in deeds. If you want the other party to admit that they breached the law then you may have to prove this in VCAT and obtain a judgment in your favour.

- **Confidentiality** - This will state that the terms of the agreement between the parties are to remain confidential and not to be disclosed to any third parties, unless a party is required to under law or if they are disclosing to their lawyer or financial advisor.

- **Non Disparagement** - This will state that neither party can disparage or denigrate the other party. This means that you cannot say disrespectful or derogatory things about the other party. For example, this would prevent you from posting negative comments about your experiences with the builder in online forums.

- **What will happen to the proceeding** – The case will finish when the Deed is signed by both parties and the Tribunal receives either signed proposed consent orders or a signed notice of discontinuance. Proposed consent orders asks the Tribunal to dismiss the claim on terms agreed by all the parties. Alternatively, the party who started the proceedings can file a notice of discontinuance. This document is a notice to the Tribunal that the applicant is withdrawing their claim.

CAUTION

The Deed is a binding agreement which requires the parties to comply with the terms of settlement. You should read the Deed very carefully before signing it. If there are terms you don't understand you may wish to get legal advice before signing.

If either party breaches a term of the settlement (e.g. by not providing the agreed payment) an application can be made to VCAT to enforce the Deed.

7. What if my matter fails to settle through ADR?

If your matter does not settle through negotiation, at mediation or at compulsory conference, you can continue your case to a hearing.

FURTHER READING

For information about what to do at VCAT hearing, you may find the following resources useful:

- Domestic Building Legal Service Factsheet - Going to VCAT
- Domestic Building Legal Service Factsheet – Tips for hearing day
- VCAT website – How to prepare for your hearing

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