

Practice Note 13

Review proceedings under 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 identifies important aspects of the Tribunal's practice and procedure in proceedings involving the review of decisions of either the Building Commissioner or the Tribunal.
3. If you need assistance 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.

In what circumstances is there a right of review?

4. There are a number of provisions of the Building Services (Complaint Resolution and Administration) Act 2011 (WA) (BS(CRA) Act) which give rise to either an automatic right to seek a review, or a right to apply for leave to seek a review of a decision either of the Building Commissioner or the Tribunal.
5. The following identifies where there is an automatic right of review of a decision of the Building Commissioner, that is, leave of the Tribunal does not need to be obtained before a review of the decision will take place:
 - a. Under section 57(1) of the BS(CRA) Act, in respect of the following decisions of the Building Commissioner;
 - i. an interim building service order;
 - ii. an interim disciplinary order;
 - iii. a variation of either an interim building services order or of an interim disciplinary order;
 - iv. a final building remedy order;
 - v. a final Home Building Works Contract (HBWC) remedy order; or
 - vi. a costs order.
 - b. Under section 84 of the BS(CRA) Act, in respect of the following decisions of the Building Commissioner:
 - i. the issue of a remediation notice by an authorised person; and
 - ii. the review by the Building Commissioner of the issue of a remediation notice.

6. The following identifies where a party is entitled to seek leave to review a decision of the Building Commissioner or of the Tribunal, that is, the right of leave is not automatic and discretion lies with the Tribunal to grant leave:
 - a. Under section 57(2) of the BS(CRA) Act, in respect of the following decisions of the Building Commissioner:
 - i. a decision to refuse to accept a building services or HBWC complaint; and
 - ii. a decision to refuse to accept a disciplinary complaint.
 - b. Under section 58(5)(a)(i) of the BS(CRA) Act, in respect of the following decisions of the Tribunal:
 - i. a decision made by the Tribunal (the constitution of which did not include a judicial member), to make, or decline to make, a building remedy order; and
 - ii. a decision made by the Tribunal (the constitution of which did not include a judicial member), to make, or decline to make, an HBWC order.

Review proceedings where an automatic right of review exists

7. Building matters in which there is an automatic right of review will be dealt with by the Tribunal in the same manner as review applications are dealt with in other areas of jurisdiction of the Tribunal.
8. A detailed explanation of the process and procedures of review proceedings in the Tribunal is contained in Practice Note 2 - Review Proceedings, which can be found at www.sat.justice.wa.gov.au or a hard copy of the Practice Note can be obtained from the staff of the Tribunal.

Review proceedings where leave of the Tribunal is required

Time Limits

9. Applications seeking leave to review the decisions referred to in paragraph 6(a) above must be made within 28 days after the day on which the order which is sought to be reviewed was made. Applications seeking leave to review the decisions referred to in paragraph 6(b) above must be made within 30 days after the day on which the order which is sought to be reviewed was made.
10. Applications received after the relevant time period may proceed but only if the Tribunal grants an extension of time. Whether an extension of time will be granted depends upon a consideration of the extent of the delay, whether the delay is fully and satisfactorily explained, the prospects of success of the proposed review and prejudice to the other party.

What documents should be included with the application?

11. The applicant should, as a minimum, include:
 - the decision sought to be reviewed; and

- any written reasons provided relating to that decision.
12. If the applicant requires an extension of time to file the application(s), reasons why an extension should be granted must be included in the application form or on a separate sheet of paper attached to the application.
 13. If application is made for a stay of the order sought to be reviewed, a statement explaining fully all facts and circumstances relied upon to establish that it is appropriate for a stay to be granted, including an outline, in summary form, of the basis for review in order to establish an arguable case, must be included in the application form or on a separate sheet of paper attached to the application.

Giving notice of the application to the other party

14. The applicant must give a copy of the application(s) (including supporting documents) to the respondent as soon as possible and, in any event, not more than 7 days after filing it.

Initial directions hearing

15. When an application is filed, it will be listed for an initial directions hearing in approximately two to three weeks. The Tribunal will give written notice to the parties of the time, date and place of the directions hearing.
16. Parties may attend the initial directions hearing, and at 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 as soon as possible after receiving notice of the directions hearing.
17. At any directions hearing, the presiding member will make directions for the speedy and fair conduct of the proceedings.
18. 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 to tell the Tribunal the party's position as to each of the matters set out in paragraphs 19 and 20.

What will the Tribunal consider at the initial directions hearing?

19. At the initial directions hearing, the Tribunal will consider:
 - a. whether the nature of the issues raised is such that there needs to be a preliminary hearing of the application for leave to review the decision together with any application for the decision to be stayed, or whether it is appropriate that the application for leave and the application for review be heard together;
 - b. whether the reasons for the decision, the transcript of evidence or any other necessary documents are available;
 - c. whether the documents that are available are sufficient to enable the proper hearing of the application(s), and if not, what steps need to be taken to ensure that the appropriate materials are provided to the Tribunal to enable it to determine the application(s);

- d. the likely length of the hearing;
 - e. whether telephone, video link or any other system or method of communication will be required at the hearing;
 - f. whether an interpreter will be required at the hearing;
 - g. whether a view or inspection by the Tribunal of the building will be required; and
 - h. 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.
20. At the initial directions hearing and at any subsequent directions hearing 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 28 - 30 below); and
 - b. whether the matter should be referred to a compulsory conference before a member of the Tribunal (as to which see paragraphs 31 - 33 below).
21. It is not the Tribunal's usual practice to refer an application to mediation or to a compulsory conference prior to determining the application for leave.

What orders will the Tribunal usually make at the initial directions hearing in cases where it determines that an application for leave and/or an application for a stay shall be heard at a preliminary hearing?

22. Unless the presiding member determines otherwise, at the initial directions hearing, the following directions will be made:
- a. Within 14 days, the applicant must file and give to the respondent a signed statement on which the applicant wishes to rely in support of the application for leave to review the decision in question/ the decision to be stayed.
 - b. Within 28 days, the respondent must file and give to the applicant any signed statement in opposition on which the respondent wishes to rely.
 - c. Not less than 14 days before the hearing date of the application(s), the applicant must file and give to the respondent a written outline of submissions.
 - d. Not less than 7 days before the hearing date of the application(s), the respondent must file and give to the applicant a written outline of submissions.
 - e. The application(s) for leave/ for a stay is (are) set down for hearing on a specified date and time.

What orders will the Tribunal usually make at a directions hearing when leave has been granted or when the leave application and application for review are heard together?

23. Unless the presiding member determines otherwise, at the initial directions hearing or at a directions hearing subsequent to the grant of leave to have the decision reviewed, as the case may be, the following directions will be made:

- a. The applicant must immediately apply to obtain a transcript of the evidence in the proceedings relating to the decision, and, as soon as it is obtained, file it and give a copy to the respondent.

(If the application relates to a decision made by the Building Commissioner)

- a. Within 7 days of this order, the applicant must:
 - i. serve a copy of the application(s) together with a copy of this order on the Building Commissioner; and
 - ii. file a declaration of service in accordance with this order.
- b. Within 28 days of service of the application and order on the Building Commissioner, the Building Commissioner must file a bundle, in chronological or other logical order, of the documents it is required to file under section 24 of the State Administrative Tribunal Act, namely:
 - iii. a statement of the reasons for the decision; and
 - iv. other documents and other material in its possession or under its control which are relevant to the Tribunal's review of the decision.
- c. Within a further 14 days, the applicant may inspect the documents provided by the Building Commissioner and at the applicant's cost make copies of any such document.

(In all matters)

- d. Within:

(if the application relates to a decision of the Building Commissioner) the time stated in (d) above,

(otherwise) 14 days of the directions hearing or the date on which the transcript of evidence is expected to be available to the applicant, the applicant must file and give to the respondent:

 - v. a statement of issues, facts and contentions it says arise in relation to the decision under review; and

- vi. an indexed and paginated bundle, in chronological or other logical order, of the documents on which the applicant proposes to rely in the proceedings.
- e. Within a further 14 days, the respondent:
 - (if the application relates to a decision of the Building Commissioner)
 - vii. may inspect the documents provided by the Building Commissioner to the Tribunal and at the respondent's cost make copies of any such document;
 - (in all matters)
 - viii. must file and give to the applicant its own statement of issues, facts and contentions;
 - ix. must file and give to the applicant an indexed and paginated bundle, in chronological or other logical order, of any documents on which the respondent proposes to rely in the proceedings which are not in the applicant's bundle.
- f. If any party proposes to give evidence or call any witness including any expert to give evidence at the hearing it must no less than 14 days before the hearing date file with the Tribunal a signed statement of the witness' evidence and give a copy of the statement to the other parties.
- g. Any document referred to in a witness statement that is contained in a bundle of documents filed by any party must be identified by reference to the relevant bundle and page number in the bundle and must not be attached to the witness statement. Any document referred to in a witness statement that is not contained in a bundle of documents filed by any party must be attached to the witness statement.
- h. At least 7 days before the hearing any experts on whose evidence the parties propose to rely shall confer with each other in each field and at least 5 days before the hearing shall file with the Tribunal a joint statement of all matters agreed between them, matters not agreed and the reasons for any disagreement.
- i. The Tribunal will specify in its orders the number of copies of documents that the parties or the expert witnesses will be required to file.
- j. The application(s) be set down for hearing on a specified date and time.

What happens at a final hearing?

- 24. Any witness statement which is filed with the Tribunal and given to the other party in accordance with the Tribunal's order 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. The other party is permitted to cross-examine the witness.

25. If a party does not wish to cross-examine a witness whose witness statement has been given to the party it must advise the Tribunal and the party that gave the witness statement at least two days before the hearing. Where that occurs the witness does not need to attend the hearing unless required to do so by the Tribunal.
26. The expert witnesses in each field will usually give evidence at the hearing concurrently. They will be:
 - a. called to give evidence together;
 - b. asked questions by the Tribunal;
 - c. given an opportunity by the Tribunal to ask each other any questions which they consider might assist the Tribunal; and
 - d. asked questions by the parties or their representatives.
27. Any experts' joint statement referred to in paragraph 23(h) 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?

28. 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.
29. 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.
30. The Tribunal may order the parties to attend mediation without their consent.

What is a compulsory conference?

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

Who attends a mediation or compulsory conference?

34. 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.

35. 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?

36. 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. If plans, photographs or maps are attached or annexed to the minute of consent orders, sufficient copies of these documents, namely one plus the number of parties, must be filed.
37. The Tribunal will make an order by consent only if it is satisfied that it has power to do so.
38. The applicant requires the leave of the Tribunal to withdraw the proceedings.

[Issued by Rules Committee on 17 October 2012]