

# Disputes and Compensation proceedings in respect of Part 7 of the *Building Act 1993* (Protection Work)

## PRACTICE NOTE 8A - 2021

1. This practice note provides guidance in respect of dispute proceedings in relation to:

- a. emergency protection work pursuant to a declaration made under s 89(1) of the Act, which may be referred to the Board under s 151 of the Act;
- b. the nature or cover of insurance or the amount to be insured as required under s 93 of the Act, which may be referred to the Board under s 152 of the Act;
- c. how or when a survey is to be carried out or the adequacy of a survey as required under s 94 of the Act, which may be referred to the Board under s 153 of the Act;
- d. costs of supervising protection work, which may be referred to the Board under s 154 of the Act; or
- e. any other matter arising under Part 7 of the Act, which may be referred to the Board under s 155 of the Act. This includes disputes in relation to costs of assessing proposed protection work.

2. The practice note also provides guidance in respect of:

- a. compensation proceedings in respect of inconvenience, loss or damage suffered during the carrying out of protection work,

applications of which may be made under s 159 of the Act.

3. This practice note should be read in conjunction with [Practice-Note-8B-2021-Appeal-proceedings.pdf](#) ([buildingappeals.vic.gov.au](http://buildingappeals.vic.gov.au)).
4. In any proceeding, having regard to the rules of natural justice, the Board may at its discretion vary the operation of a practice note by direction or order.
5. This practice note has been approved by the Chairperson of the Building Appeals Board.

Word	Definition
Act	<i>Building Act 1993</i>
Regulations	<i>Building Regulations 2018</i>
Board	Building Appeals Board
Owner	The owner of the building site.
Adjoining owner	The owner of the adjoining property, 'which is so situated in relation to the site on which building work is to be carried out as to be at risk of significant damage from the building work.' <sup>1</sup>
Contract of Insurance	All documents setting out the terms and conditions relating to insurance provided under s 93 of the

<sup>1</sup> *Building Act 1993*, s 3(1)

	Act including the policy schedule and product disclosure statement or policy terms and conditions as well as a certificate of currency.
<b>Dispute proceeding</b>	A proceeding consisting of a dispute or disputes arising under Part 7 of the Act that is or are referred to the Board.
<b>Compensation proceeding</b>	A proceeding consisting of a compensation application made to the Board in respect of a claim for suffering inconvenience, loss or damage during the carrying out of protection work.
<b>Dispute and Compensation proceeding</b>	A proceeding consisting of a dispute referred to the Board and a compensation application made to the Board.
<b>Applicant</b>	The owner or adjoining owner who refers a dispute or the adjoining owner who makes a compensation application.
<b>Respondent in a dispute proceeding</b>	The owner or adjoining owner with whom the Applicant cannot agree in relation to a matter arising under Part 7 of the Act.
<b>Respondent in a compensation proceeding</b>	The owner
<b>Directions</b>	Orders of the Board made as to the future conduct of the proceeding.
<b>Expert Witness</b>	A person who has specialised knowledge based on the person's

	training, study and/or experience.
<b>RBS</b>	Relevant building surveyor

## Background

6. Part 7 of the Act lays out the process and governs what is required when it is determined by the RBS that protection work is required.
7. Under Division 3 of Part 10 of the Act (ss 151 – 155), the Act provides that a dispute may be referred to the Board if the dispute concerns a matter arising under Part 7 of the Act.
8. An owner or adjoining owner may refer a dispute to the Board.
9. Under Division 4 of Part 10 of the Act (s 159), the Act provides that an application for compensation may be made to the Board if the application is in respect of inconvenience, loss or damage suffered during the carrying out of protection work.
10. An adjoining owner may apply to the Board for compensation.
11. The Board must consider and determine a matter referred or application made to it and may make any order that it considers appropriate in the circumstances.
12. The same application form may be used for multiple disputes referred to the

Board and for an application for compensation.<sup>2</sup>

**What documents should the Applicant file with the Board and provide to the Respondent with their application?**

13. To avoid delay, the Applicant should file with the Board and provide to the Respondent the following documents with the referral or application:

- a. A copy of a recent title search of the owner's property and of the adjoining owner's property.<sup>3</sup>
- b. Authority to act form (if a representative is acting on the Applicant's behalf).<sup>4</sup>
- c. A document specifying the nature of the proceeding, the grounds for commencing the proceeding and the relief sought.<sup>5</sup>
- d. Form 6 – Determination that Protection Work is Required;
- e. Form 7 – Protection Work Notice (inclusive of all documents provided with the Form 7);
- f. Form 8 – Protection Work Response Notice (if applicable);
- g. Form 9 – Notice of Determination under Section 87 of the Act (if a Determination was made).

**What additional documents should the Applicant file with the Board and provide to the Respondent?**

Emergency protection work – s 151

14. In a dispute concerning emergency protection work, the Applicant should also provide the s 89 declaration.

Insurance – s 152

15. In a dispute concerning insurance, the Applicant should provide the proposed contract of insurance (if one has been proposed). The proposed contract of insurance must cover two areas of risk:

- a. Damage by the proposed protection work to the adjoining property; and
- b. Any liabilities likely to be incurred to adjoining occupiers and members of the public during the carrying out of the building work and for 12 months after completion.

16. To determine whether those risks are covered by the contract of insurance, it may be necessary to consider:

- a. The indemnity clauses and any relevant endorsements to the clauses;
- b. Any relevant definitions; and
- c. The effect of the Schedule and/or Certificate of Currency.

17. Further, the proposed contract of insurance should:

- a. Be site specific;

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<sup>2</sup>[Application form to refer Disputes and make Compensation Applications](#)

<sup>3</sup> These may be obtained at the [Landata](#) website

<sup>4</sup> [Authority to Act form](#)

<sup>5</sup> [A Points of Claim may be used for this purpose and if filed with the Application form may help to shorten the duration of the proceeding.](#)

- b. Be an amount agreed to by the adjoining owner;
- c. Identify the adjoining owners as the insured entity;
- d. Identify the adjoining property
- e. Be lodged with the adjoining owner;
- f. Include an acknowledgement of the relevant protection work; and
- g. Ensure coverage can be provided for at least 12 months after the completion of the building work.

Survey – s 153

18. In a dispute concerning a survey of the adjoining property, the Applicant should provide the survey (if one has been prepared) and any other independent survey (if any). To meet the requirements of the Act, the survey must:

- a. Make a full and adequate survey of the adjoining property;
- b. Record in writing, preferably with photographs, all existing cracks and defects in the adjoining property; and
- c. Be signed or otherwise acknowledged by the Owner and the Adjoining Owner as an agreed record of the condition of the adjoining property before any protection work commences.

19. The survey report is evidence of the condition of the adjoining property at the time the report is made.

20. The survey report should:

- a. Encompass all physically accessible areas of the entire adjoining property, both internal and external

(not just the areas confined to the immediate vicinity of the protection work);

- b. Adequately record or refer to the locations and directions in which the photographs were taken on a plan;
- c. Include a scale or reference to visually indicate the length and width of cracks indicated in the photographs;
- d. Describe in writing notable matters depicted in the photographs (for instance, the length and width of observable cracks); and
- e. Indicate whether, but for anything depicted in the photographs, the adjoining property is otherwise free of visible cracks, damage and defects.
- f. Not include any comments regarding the history of origin of any defect.

21. Costs of supervising protection work – s 154 and costs of assessing proposed protection work – s 155 (s 97) In a dispute concerning costs of supervising protection work or costs of assessing proposed protection work, the Applicant should also provide quotations or invoices in relation to those costs.

22. Those quotations or invoices should itemise each cost claimed including:

- a. Details for assessing and/or supervising the protection work to be conducted/ conducted at the adjoining property;
- b. Details regarding any work performed for the assessing and/or supervising the protection work conducted at the adjoining property;

- c. How the amount claimed was calculated or derived. This should address how any hourly work or billing rate was applied to assessing the protection work in detail;
- d. The reason why (for what purpose) the costs were necessarily incurred; and
- e. Identify any material in support of the amount claimed, such as emails or reports.

Compensation for inconvenience, loss or damage – ss 159 and 155 (s 98)

- 23. In a compensation application, the Applicant should provide quotations, invoices and/or [expert reports](#) in relation to any inconvenience, damage or loss suffered.
- 24. The application may be accompanied by a *Points of Claim* which sets out in numbered paragraphs:
  - a. any relevant facts which give rise to the claim;
  - b. details of the *inconvenience, loss or damage* alleged to have been suffered;
  - c. the amount claimed and how that amount has been calculated or derived;
  - d. the grounds upon which the claim is based; and
  - e. detail as to how the claimed loss, damage or inconvenience allegedly occurred during the carrying out of protection work.

**Directions**

- 25. Dispute and compensation proceedings made to the Board are assigned a proceeding number upon their filing.
- 26. After the assessment of the proceeding, Directions are made by the Board, or in more complex proceedings a directions hearing will be listed before the Board's Chair, Deputy Chair or a member of the Board who will hear from the parties and then make directions as to the future conduct of the proceeding.
- 27. If there are other persons who may be directly and immediately affected by the outcome of the proceeding, an order may be made to join those persons as interested parties to the proceeding.
- 28. The Directions also set time limits for the filing of material, which may support or oppose the claims put before the Board.
- 29. Other parties may be disadvantaged if you do not comply with the time limits set out in any Directions or Orders. If you require more time to comply, you should notify the Registrar and the other parties as soon as possible.<sup>6</sup>
- 30. If the time limits for filing material are not strictly observed, the Board may decide to:
  - a. Not have regard to the material filed beyond the time limit; or
  - b. Adjourn the hearing and order that any wasted costs incurred by any of the other parties are paid by the party that has failed to comply with the time limits.

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<sup>6</sup> [Application for orders in the proceeding and Consent orders request are located here on the Board's website](#)

## **The Hearing**

31. The hearing proceeds as either:

- a. A 'paper hearing', where the dispute or application is considered on the material that has been filed; or
- b. An 'oral hearing', where the parties or their representatives appear before the Board (remotely or in-person). At the hearing, the Board is usually constituted by a panel of three Board members.

32. The Board may inform itself in any manner it thinks fit.

33. The Board is not bound by any rule or practice as to evidence, however, it is bound by the rules of natural justice.

## **Expert Evidence**

34. In some compensation proceedings, expert evidence may assist in supporting the Applicant's claim or the Respondent's defence.

35. If an expert is retained, regard should be had to Practice Note 5 – Expert Evidence.<sup>7</sup>

36. You should ensure that the author of any expert report or other expert material filed with the Board is available to appear at the hearing and answer questions asked by the parties to the proceeding or the Board.

## **The Determination**

37. After the hearing, the presiding panel will consider the claims, any defences and the

evidence and hand down a written determination, which may contain reasons for the determination.

38. In making a determination the Board may make any order that it considers appropriate in the circumstances.

39. The determination may include any other incidental order or direction that the Board considers is necessary.

40. Unless the Board determines otherwise, a party to a proceeding must bear his, her or its own costs.

41. If the Board does determine otherwise, the determination may include any order as to costs that the Board considers is just.

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<sup>7</sup>[Practice Note 5 \(2020\) - Expert Evidence](#)