

### **NEW FORUM FOR CONSTRUCTION AND ENGINEERING DISPUTES IN THE VIC SUPREME COURT—17 JUNE 2009**

Adam Peters, Senior Associate

Mallesons Stephen Jaques, Melbourne

#### **INTRODUCTION**

Victoria is about to see a new forum for the resolution of construction and engineering disputes. On 19 June 2009, the Technology, Engineering and Construction List (TEC List) will be introduced as a new judge-managed list in the Supreme Court.

The TEC List replaces the existing Building Cases List, recognising the often considerable overlap between technology, construction and engineering disputes.

The Court expects that parties will approach TEC List cases like a technical, engineering or construction project itself, with time and cost budgeting being considered by the parties and canvassed before the Court.

The TEC List covers any legal dispute involving technology, engineering or building construction works (TEC works). Matters which may be commenced in the TEC List are broadly defined and include:

- the design, supervision, inspection or carrying out of TEC works;
- the manufacture or provision of any materials for inclusion in TEC works; and
- the supply, sale or performance of anything produced, manufactured or constructed as a result of TEC works involving matters of a technical nature.

The TEC List adopts many of the features of the pilot program introduced in the Building Cases List in early 2008, with the aim of reducing the time, resources and expense required to resolve traditionally complex construction, technology and engineering cases.

The Technology, Engineering and Construction List replaces the existing Building Cases List, recognising the often considerable overlap between technology, construction and engineering disputes.

## FEATURES OF THE TEC LIST

The Court's objective is to achieve just and efficient determination of TEC List cases, especially by identifying as early as possible the substantial questions and controversy between the parties.

At an early stage in the proceeding, a judge will be assigned to assume responsibility for management of the case. That judge, who will hear the eventual trial if the dispute does not settle, will exercise case management powers proactively to ensure quick and efficient resolution.

For example, the judge will be mindful of the need to avoid applying the resources of the parties or the Court unnecessarily, or in a manner out of proportion to the matters in issue. The judge will expect the parties to focus solely on the central issues in the case.

The main features of the TEC List are:

- The Court expects the parties to engage in serious settlement discussions before the commencement of proceedings.
- A resources conference will be convened at an early stage in the proceeding, chaired by an associate judge (formerly called a master). Matters to be addressed may include the resources likely to be allocated to the litigation by each party and the Court, any limits which should be imposed upon such resources including limits on discovery, and the range of possible outcomes for each party (including a best case/worse case scenario for each party after factoring in costs). One aim of the resources conference is to decide upon issues appropriate for mediation, and identify any information or investigations required for effective settlement discussions at the earliest possible opportunity.
- At the conclusion of the resources conference, the associate judge will prepare a report of matters discussed (identifying those which were agreed), which will be provided to the trial judge, who can refer to it in making case management decisions and resolving questions of costs.
- Directions hearings should be as limited as possible. The first directions hearing should focus on whether the parties have attempted to resolve the dispute by mediation or otherwise, and if not, whether to order an immediate mediation. Other issues to be addressed include the nature of the substantial questions in issue, and whether each party has sufficient information to properly understand those questions.
- The Court may appoint an assessor to assist in dealing with any matters of a technical nature. An assessor may attend the whole or any part of the trial, and can be directed to prepare a report for the judge in relation to any issue relevant to the assessor's skill and experience. The Court is not bound by an assessor's opinion or findings.
- The Court has the power to impose time limits for the trial itself, or for any aspect of witnesses giving evidence or a party presenting its case orally (including by way of the 'chess clock' time limits used in the Federal Court Fast Track List and in many arbitration hearings).
- The judge has broad discretion in awarding costs, including on an issues basis. This may include disallowing recovery of costs to, or awarding costs against, a successful party, in respect of unsuccessful issues, unnecessary discovery or unnecessary use of resources.

The Supreme Court has released the Rules governing the TEC List, which will come into effect 19 June 2009, and a Practice Note explaining the TEC List.

---

Adam Peters' article was previously published in Mallesons Stephen Jaques' *Construction Alert*—June 2009. Reprinted with permission.

---