



**ARBITRATION VICTORIA**  
Fast, final and affordable justice

## *User Manual 2022*

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# Arbitration Victoria User Manual 2022

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## Introduction

1. This User Manual applies to the Arbitration Victoria Arbitration Rules, dated April 2022, (**Rules**), and is the User Manual referred to in the Rules.
2. This User Manual is to assist the parties and the Arbitrator in the conduct of arbitrations conducted under the Rules. A copy of the Rules is available for download at the Arbitration Victoria website at: [www.arbitrationvictoria.com](http://www.arbitrationvictoria.com)
3. Parties to a dispute who agree to have their dispute determined pursuant to the Arbitration Victoria Rules will usually agree to select one of the Arbitrators from the Panel of Arbitrators maintained by Arbitration Victoria (**Panel**) (see [www.arbitrationvictoria.com](http://www.arbitrationvictoria.com)). If the parties cannot agree, they have two options. First, they can ask Arbitration Victoria to select an arbitrator from its panel of arbitrators (“the Secretariat” or office of secretary makes this decision).<sup>1</sup> Second, the parties can agree to appoint another person (not on the Panel) as Arbitrator. The advantage of appointing an Arbitrator from the Panel is that each member of the Panel is a qualified arbitrator and experienced arbitration practitioner. However, if the parties want to conduct the arbitration under the Rules, all Arbitrators must abide by the fee caps and other requirements as spelled out in the Rules and this User Manual.
4. Arbitrations involving a sum in dispute not exceeding \$40,000 are usually conducted on a “Documents-Only” basis. This is directed to ensure that the cost of the arbitration is kept to a minimum (no fees incurred in connection with any hearing) and commensurate with the sum in dispute. However, if an Arbitrator decides not to conduct an arbitration on a Documents-Only basis, for a sum not exceeding \$40,000.00, the applicable cost and fee caps shall continue to apply.
5. The Arbitration Victoria Rules can be applied to most (but not all) types of civil and commercial disputes, although the streamlined procedure is designed to expedite the resolution of less complex claims. Besides the traditional areas of arbitration, including commercial and building disputes, the Rules can also be used to arbitrate disputes with respect to contracts, partnerships, supply agreements, commercial leases, franchises, mortgages and securities, farm debts, trusts, corporations matters, renovation works, media, sports law, entertainment and travel, amongst others.

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<sup>1</sup> The Secretariat of Arbitration Victoria is a person appointed by Arbitration Victoria from time to time to act as the Secretariat.

6. Importantly, there are limitations on the referral to arbitration of some specific civil or commercial matters. For example, VCAT has jurisdiction to hear and determine Domestic Building Disputes (as defined) under the *Domestic Building Contracts Act 1995* (Vic) (**DBCA**). Section 14 of the DBCA proscribes parties from referring any Domestic Building Disputes which may arise (in the future) to arbitration. However, Domestic Building Disputes that are already on foot may be referred to arbitration by agreement.<sup>2</sup> This means that parties to a Domestic Building Dispute that is underway in VCAT may decide, by agreement, to have that dispute resolved by arbitration instead. Retail tenancy disputes, on the other hand, may not be referred to arbitration<sup>3</sup> and must instead be determined by VCAT, despite any agreement either before or after the dispute occurs. In addition, there will be some other types of disputes that are not readily capable of resolution by arbitration.<sup>4</sup> Nevertheless, and while these important exceptions need to be recognised, the vast majority of commercial disputes are capable of resolution by arbitration under the Arbitration Victoria Rules.

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## Referring disputes to arbitration

7. Disputes may be referred to arbitration under the Rules by agreement between the parties in the following circumstances:
- (a) (**court referral**) where a dispute is before a court in Victoria and the parties agree in writing, the Court may order, by consent, to refer the dispute to arbitration under these Rules; and/or
  - (b) (**prior agreement**) where, before (or after) a dispute between the parties arose, the parties agreed in writing that any disputes, or disputes of a particular type or nature, would be resolved by arbitration under the Rules.
8. In order to refer an existing dispute, which is before a court in Victoria to arbitration under the Rules (i.e. where paragraph 7(a) above applies), the parties may complete the form entitled

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<sup>2</sup> *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307 at [37], [38], [43], [49]-[51] and [56]-[57]; see also *ASADA v 34 Players and Support Person* [2014] VSC 635; see also *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221. Parties who wish to refer a Domestic Building Dispute from VCAT (or which would otherwise fall within VCAT's jurisdiction) may do so by agreement.

<sup>3</sup> See sections 89 and 94 of the *Retail Leases Act 2003* (Vic) and *Subway Systems Australia v Ireland* [2013] VSC 550 (18 October 2013) per Croft J at [64].

<sup>4</sup> Some types of matters, like, for example: marriage, citizenship, some disputes about intellectual property rights (for example, whether a patent or trade mark ought be granted), taxation (disputes with the ATO), competition, workplace disputes, bankruptcy and corporate insolvency, illegality and fraud, and possibly trade practices and consumer protection, are likely to be outside the realm of arbitration. See Hockley J, Croft C, Hickie, K and KQ Ho, W, *Australian Commercial Arbitration*, LexisNexis Butterworths, 2015, at p 200.

“Agreement to refer a dispute before the County Court to arbitration under the Arbitration Victoria Rules”, which form is available below at **Annexure A**.

9. In order to refer a potential future dispute to arbitration under the Rules (i.e. where paragraph 7(b) above applies) the parties may insert into their contract an arbitration clause in the following terms:

*“Any dispute arising out of or in relation to this contract including, without limitation, any question concerning the contract’s existence, validity or termination, or any question concerning a party’s conduct before or after entry into the contract, must be determined by arbitration in Victoria in accordance with the Arbitration Victoria Rules applicable at the time the arbitration is commenced.”*

10. Where a claimant wishes to refer a dispute to arbitration which dispute is not presently before a Court (i.e. where paragraph 7(b) above applies) then, to commence an arbitration, the claimant will need to file with Arbitration Victoria, and serve on the other (putative respondent) party a notice of arbitration in the form of the document set out at **Annexure B**.

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## **Court referral to arbitration**

11. The Rules apply to any proceeding referred from a Court to arbitration. However, the procedures in the Rules may be modified by agreement of the parties. Further, the Arbitrator has the authority to conduct the arbitration as is appropriate in the circumstances consistent with the *Commercial Arbitration Act 2011* (Vic). If there is any inconsistency between the Rules and this User Manual, the Rules shall apply to the extent of the inconsistency.
12. The Arbitrator should convene a preliminary directions hearing (in person or by video link) as soon as reasonably practicable after his or her appointment. At the preliminary directions hearing, the Arbitrator and the parties should consider the manner in which the Dispute is to be heard and determined in the arbitration. The following may also be considered at the preliminary directions hearing:
  - (a) where the Sum in Dispute is \$40,000 or less then Rule 3 applies (Documents-Only arbitration);
  - (b) the further conduct of the proceeding so as to resolve the dispute quickly and cost-effectively with the object of obtaining an Arbitral Award within 120 days from the commencement of the arbitration; and
  - (c) any jurisdictional or other preliminary issues that need to be addressed.

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## Arbitration Victoria scale of fees for Arbitrators

13. For sums in dispute (claim plus counterclaim) of \$40,000 and less, the Arbitrator's fees shall be no more than 10% of the total sum in dispute, subject to a minimum fee of \$2,000 (ex. GST). Therefore, the maximum fee payable to the arbitrator for such a dispute is \$4,000.00 (ex. GST) and the minimum is \$2,000.00 (ex. GST). Where the arbitration is terminated before the Final Award is published, the Arbitrator may charge a reduced fee, taking into account the circumstances of the case, including the stage at which the arbitration is terminated.
14. For sums in dispute (claim plus counterclaim) of \$40,000 and more, the Arbitrator's fees (ex. GST) shall be calculated by reference to the amount in dispute and the time spent by the Arbitrator working on the arbitration as follows (**all amounts ex. GST, and subject to the cap described in paragraph 15 below**):
- (a) for amounts in dispute of \$40,001 up to \$150,000, the Arbitrator shall be entitled to charge \$225 per hour or \$2,250 per day;
  - (b) for amounts in dispute of \$150,001 up to \$300,000, the Arbitrator shall be entitled to charge \$300 per hour or \$3,000 per day;
  - (c) for amounts in dispute of \$300,001 up to \$500,000, the Arbitrator shall be entitled to charge \$3,500 per hour or \$3,500 per day;
  - (d) for amounts in dispute of \$501,000 and above, the Arbitrator shall be entitled to charge \$400 per hour or \$4,000 per day, or otherwise by agreement between the parties).
15. **However, the Arbitrator's total fees are subject to a maximum of 10% of the sum in dispute** (claim plus counterclaim, unless otherwise agreed for amounts in dispute above \$500,000). So, for example, if the claimant claims \$100,000 and the defendant counterclaims for \$40,000 then the sum in dispute is \$140,000, in which case the Arbitrator would charge \$225 per hour/\$2,250 per day and the Arbitrator's fees would be capped at \$14,000 (plus GST).
16. A claim for interest is not to be taken into account for the calculation of the amount in dispute, unless the Arbitrator, after consulting with the parties, concludes that doing so would be appropriate.
17. If the amount in dispute is not quantified, the Arbitrator's fees shall be fixed by agreement between the Arbitrator and the parties, or, if no agreement can be reached, by the Secretariat of Arbitration Victoria, taking into account the circumstances of the case.

18. Where the Arbitrator and the parties agree there are exceptional circumstances, the Arbitrator's fees may depart from the amounts set out above.<sup>5</sup>
19. An Emergency Arbitrator's fees shall be based on the scale of fees set out in paragraph 14 above.
20. An Arbitrator or Emergency Arbitrator is entitled to request a deposit for the Arbitrator's fees and Rules 22-25 of the Rules shall apply as appropriate.

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## **Code of Conduct for Arbitrators**

21. Arbitrators who conduct arbitrations under the Victorian Arbitration Rules must at all times comply with the Chartered Institute of Arbitrators' Code of Conduct (but the Code of Conduct does not form part of the Rules).

Dated: **16 May 2022**

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<sup>5</sup> The clear aim of the scheme is to cap the fees payable to arbitrators. But there may be **exceptional** cases in which the parties and the arbitrators agree that the capped fees should not apply. If the parties and the arbitrator form the view that a seven day hearing is necessary, for example, maintenance of the capped fees for arbitrators would impose an unfair and uneconomic burden on the arbitrator.

## Annexure A

*[Arbitration Victoria's Template Arbitration Agreement – an agreement to refer a dispute which is currently before the Court to arbitration under the Arbitration Victoria Rules]*

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### Agreement to refer a dispute before the County Court to arbitration under the Arbitration Victoria Rules

Between:

**First Party (plaintiff/claimant):** \_\_\_\_\_  
[insert name(s) of plaintiff/claimant party (or parties)]

First Party's legal representative: \_\_\_\_\_  
[insert name and contact details]

and

**Second Party (defendant/respondent):** \_\_\_\_\_  
[insert name(s) of defendant/respondent party (or parties)]

Second Party's legal representative: \_\_\_\_\_  
[insert name and contact details]

(together, the **Parties**)

1. The Parties are in dispute before the **County Court**<sup>6</sup> in proceeding number [insert] (**Proceeding**).
2. The Parties have filed/served the following pleadings in the Proceeding:
  - (a) [insert e.g. statement of claim] dated [insert date];
  - (b) [insert e.g. defence] dated [insert date];
  - (c) [insert further (reply, counterclaim etc) as applicable].

(together, the **Pleadings**)

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<sup>6</sup> If the proceeding is to be referred from a Court other than the County Court then this clause should be modified as appropriate.



3. The Parties hereby agree:

- (a) to refer all disputes or differences arising out of or in connection with the Proceeding, as described in the Pleadings (the **Dispute**), to arbitration pursuant to the Arbitration Victoria Rules;
- (b) that the County Court<sup>7</sup> is to have jurisdiction (to supervise the Dispute as permitted) under section 6(2) of the *Commercial Arbitration Act 2011* (Vic);
- (c) that the Pleadings, as drafted, will stand as the Statement of Case, Statement of Defence [insert further e.g. Statement of Reply, Counterclaim etc] in the arbitration;
- (d) that the order of the Court to refer the Dispute to arbitration will stand as the Notice of Arbitration for the purposes of the Rules;
- (e) that they seek to appoint and hereby appoint (upon acceptance in writing of the nominated arbitrator):
  - (i) [insert name], a panel member of Arbitration Victoria, as Arbitrator, or, if that person is not available;
  - (ii) [insert name], a panel member of Arbitration Victoria, as Arbitratorof the Dispute; and
- (f) [insert anything further agreed between the parties in connection with the arbitration or referral to arbitration]

**Signed by:**

First Party: \_\_\_\_\_  
[Signature of plaintiff/applicant or their legal representative]

Date: \_\_\_\_\_

Second Party: \_\_\_\_\_  
[Signature of defendant/respondent or their legal representative]

Date: \_\_\_\_\_

\_\_\_\_\_

<sup>7</sup> If the parties wish to choose a supervisory court other than the County Court then they may do so.

## Annexure B

[Notice of Arbitration]

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### **NOTICE OF ARBITRATION UNDER THE VICTORIAN ARBITRATION RULES**

[Name of Claimant] hereby gives Notice of Arbitration to [Name of Respondent] under the Victorian Arbitration Rules.

#### **Parties to the Dispute**

<b>Name of the Claimant:</b>	_____
<i>Address including full contact details:</i>	_____
<i>Claimant's Solicitor (if any):</i>	_____
<i>Address including full contact details:</i>	_____
<b>Name of Respondent:</b>	_____
<i>Address including full contact details:</i>	_____
<i>Respondent's Solicitor (if any):</i>	_____
<i>Address including full contact details:</i>	_____

#### **The Dispute**

[Describe the underlying contract or subject matter that gives rise to the dispute]

#### **Reference to the agreement by which the dispute is to be referred to arbitration under the Arbitration Victoria Rules**

[Insert arbitration clause here, whether it is based on a clause in the parties' contract or an agreement recorded in correspondence or in any other document]

#### **Claimant's proposed arbitrator (in order of preference)**

- (1) [Name/contact details of first proposed Arbitrator].
- (2) [Name/contact details of second proposed Arbitrator].
- (3) [Name/contact details of third proposed Arbitrator].

**A copy of the Arbitration Agreement**

Please **enclose** a copy of your Arbitration Agreement (including the contract which contains the agreement to resolve disputes by arbitration).

**Claimant’s concise Statement of Case signed by on or behalf of Claimant**

Please **enclose** a copy of the concise Statement of Case, which describes the four corners of the dispute.

**Non-refundable administrative fee of \$300**

Ensure payment is made to Arbitration Victoria of the non-refundable administrative fee of \$300.<sup>8</sup>

Dated:

\_\_\_\_\_

Name of Claimant or Claimant’s Solicitor and Firm:

For and on behalf of Claimant

[The Notice of Arbitration must be served on the Respondent and filed with Arbitration Victoria]

To:

- (1) Respondent and/or Respondent’s Solicitor.
- (2) Arbitration Victoria – by email to: [secretariat@arbitrationvictoria.com](mailto:secretariat@arbitrationvictoria.com)

A **Word** version of is this document is available for download at the Arbitration Victoria website here: [www.arbitrationvictoria.com](http://www.arbitrationvictoria.com)

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<sup>8</sup> The \$300.00 administrative fee is payable for new arbitrations but not for disputes previously before the Court and which have been referred by consent to arbitration. **No administrative fee applies for these Court-referred arbitrations.**