ALTERNATIVE DISPUTE RESOLUTION: THE QUEENSLAND BUILDING TRIBUNAL

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Abstract

In 1992, the Queensland Building Tribunal was established with the specific goal of obtaining quick, inexpensive and simple resolutions to building disputes by means of mediation and/or tribunal hearings instead of the more usual forms of arbitration or litigation. This paper describes research aimed at gauging the success of the Tribunal in achieving its goal.

Two postal questionnaire surveys were carried out, one being for those who had resolved their disputes through the mediation process and the other for those who had taken the matter to the Tribunal's hearing process for a ruling by determination. Out of 168 questionnaires despatched, a total of 61 completed forms were returned and analysed. The results are described under four headings (1) fairness and impartiality, (2) formality and expediency, (3) credibility and public awareness, and (4) commercial reality.

The majority of those surveyed thought the mediation process to be sufficiently impartial, expedient, informal and knowledgeable. In contrast, the hearing process, as expected, was perceived to be less expedient and more informal and intimidating. There are significant areas of concern over the absence of 'of right' legal representation and the reasons for settlement at the mediation stage. It is suggested that mediators receive some training or at least some guidelines are issued on the mediation process, that "duty lawyers" are made available for consultation with the parties, and that mediators may, with common consent, act as adjudicators when circumstances require.

Keywords: Arbitration, dispute resolution, mediation, Queensland Building Tribunal, questionnaire survey.

1 Introduction

The "Home Building Review", was established in 1990 by the Queensland Government in response to the failure of the Queensland Builders Registration Board to resolve matters relating to building disputes. One of the major recommendations was that "there is a need for a quick, inexpensive dispute resolution process with simple procedures [and that] for this purpose a domestic building tribunal should be established to resolve all the disputes between parties in the home building industry" [1]. This recommendation was realised the following year under the Queensland Building Services Authority Act with the establishment of the Queensland Building Tribunal, whose exclusive duty it is to hear and determine matters relating to domestic building disputes. Under the Act, the Queensland

Building Tribunal may appoint a mediator or mediators to endeavour to achieve a negotiated settlement of a domestic building dispute and the Tribunal has opted to use mediation as a precedent wherever possible in the settlement of disputes.

The process is simple enough. Upon a domestic building dispute becoming evident, a party may make application to have the Tribunal hear the matter. The applicant must then deliver a copy of the application form to the respondent who, in turn, must notify the Tribunal's Registrar and the applicant of his address for service of documents. The Tribunal then proceeds to arrange a mediation meeting between the parties and issues a notice of mediation to both the applicant and the respondent. The mediation is then conducted at which time both parties are brought together with a mediator to attempt to reconcile the parties and settle the dispute. If an agreement is reached, the mediator reports on the terms of such agreement or settlement to the Tribunal. The Tribunal may then make a determination in terms of the settlement, and may make consequential orders or directions on the basis of the mediator's report. Should no agreement be reached, the Tribunal directs that statements be filed by the parties and all other witnesses. The Tribunal then directs that a pre-hearing conference of directions hearing be held at which time the Tribunal inquires as to whether or not the parties have reconciled or would wish to rediscuss the matter with a mediator. If the parties advise that no reconciliation has occurred, the Tribunal allocates a date at which time the matter is heard and the dispute determined. A member conducts the hearing at the appointed date and, based on the evidence, makes a determination in respect of the dispute.

The width of the Tribunal's power is extraordinary and its duties similar to that of a court. In the exercise of its jurisdiction, the Tribunal may exercise any one or more of the following powers:

- order the payment of a monetary sum to be owing by one party to the other;
- award damages, including exemplary damages, and damages in the nature of interest; order restitution;
- avoid any unjust contractual term or otherwise vary a contract to avoid injustice;
- avoid a policy of insurance under the statutory insurance scheme;
- order rectification of defective or incomplete building work; and
- award costs.

Under this Tribunal system, the mediator has the protection and immunity of a member of the Tribunal. Evidence of anything said or done in the course of an attempt to settle a domestic building dispute is not admissible in any proceedings before the Tribunal or in related proceedings. If a dispute is settled, the mediator reports the terms of the settlement to the Tribunal and the Tribunal may make a determination in terms of a settlement, and make consequential orders or directions. There is however, under the Act, no clear definition of who may be a mediator, the process of mediation or of what mediators may do. The minimum qualifications of the mediator are not specified nor is the person identified with the authority to appoint mediators.

Perhaps the most controversial aspect of the system is that the use of arbitration is specifically excluded as a means of dispute resolution. In Australia, where such issues are high on the political agenda, the specific exclusion of one particular industry group is tantamount to unfair discrimination. The main problem is not that mediation is included but that arbitration is specifically excluded under section 61 of the Act [2]. The reasoning

behind this rather dramatic measure is to be found in the Home Building Review Report, which condemned the then current practice of arbitration as (1) lacking impartiality, (2) being prohibitively costly in both money and time, and (3) abusive of procedures. The extent to which this statement is actually true is not known at this time.

2 Survey questionnaire

In order to measure the degree of 'success' of the Queensland Building Tribunal mediation system of dispute resolution, some kind of feedback from its participants is necessary. In other words, the perceptions of those parties who have actual experience of the Tribunal and its proceedings need to be studied. For this purpose, a survey questionnaire was undertaken.

The Tribunal was contacted and a total list of all applicants and respondents that had been through the system up to that time (1993) was provided to the researchers. As a result, a total of 200 potential respondents were identified. Of these, approximately 90 were contacted by telephone to gauge their initial response to being surveyed and their acknowledgment that they would complete and return a postal questionnaire.

Two questionnaires were developed - one for those respondents who had resolved their dispute through the mediation process and the other for those who had taken the matter to the Tribunal's hearing process for a ruling by determination. The questions contained in the questionnaire were aimed at establishing the level of support, or otherwise, for the Queensland Building Tribunal dispute resolution system. To keep the questionnaire simple and gain a maximum response, the questionnaire was designed to be completed in no more than five minutes. This resulted in an instrument structured over two pages in a question and yes/no response answer style. The questionnaires also provided for general commentary if desired and were issued to the sample with a pre-stamped return envelopes. In the event, 168 questionnaires were issued in late June 1993. In all, 63 completed questionnaires were returned - 33 relating to the mediation process and 28 related to the hearings process.

3 Results

The questionnaire and its results are divided into four sections: (1) fairness and impartiality, (2) formality and expediency, (3) credibility and public awareness, and (4) commercial reality. These are presented below.

3.1 Fairness and impartiality

The basic component of any justice system must be that it is seen to be acting in a manner which is fair and impartial in its operation and determination to both parties.

3.1.1 The mediation process

The basic principles of mediation as a process of dispute resolution are such that the mediator should not be able to be seen as anything but impartial, as the mediator's primary function is to get the parties talking, to direct or help them achieve a settlement by themselves, which the mediator will ratify through a statement or mediation agreement. Discussions with a member of the Queensland Master Builder's Association noted

comments raised by some builders that they had felt pressured during the mediation process in a way which they perceived to be more than simply leading.

Overall, 80% of responses (95% of applicants and 70% of respondents) thought the mediation process to be impartial. Similarly, 92% of applicants and 75% of respondents considered the mediation process to be informal. 38% indicated that they were adversely pressured by the mediator to resolve the dispute.

3.1.2 The hearing process

29% of responses believed the process not to be impartial and 40% did not believe the process to be a fair means of resolving disputes.

3.2 Formality and expediency

Action and speed in resolving building disputes are of crucial concern to all parties. Procrastination in finding agreements can cost both parties to a dispute in terms of finance, time and health. Furthermore, behavioural studies suggest that parties are more likely to resolve a dispute on neutral ground and in a comfortable, non suppressive, atmosphere.

In terms of the mediation process, the time involved in getting the mediation started should be quite short as "the Tribunal appoints a mediator who will contact the parties to arrange a mutually convenient time and place for the mediation within 14 days" [3]. This time frame should adequately meet the expectations of the parties.

The average time from application up to hearing was four months. This would seem to compare favourably with the traditional court system, where the general perception is that a matter before the court may, and often will, take several years to be heard and resolved. Also, the formal Tribunal hearing premises are well appointed, they appear to be fresh and do not seem to have any feeling of a stuffy court setting. The two rooms involved do, however, still represent a feeling of authority with a member (judge) set to the front of the room behind a desk separated by a large space from the disputing parties and public seating at the rear.

Although parties may not have legal representation present at mediation or hearing, many disputants obtain advise or assistance in preparing their claims and responses. There have been some differences in opinion over the availability of legal representation, with the Home Building Review Report opining that legal representation should only be as of right in the matter concerning disciplinary procedures against licensed building contractors and subcontractors on the grounds that "most building disputes are not complex and do not involve questions of law ... most are resolved upon findings of fact of a very basic character" [1]. Cotterell, however, holds the opposite view in claiming that many disputes "... involve factual and legal questions" [1]. Whether or not the disputing parties should be entitled to legal representation 'as of right' is an issue yet to be determined. It is likely that applicants would be against legal representation due to the extra costs involved and the possibility of the representation strengthening the oppositing case.

3.2.1 The mediation process

The responses indicate that the Tribunal's mediation is meeting the expectations of customers and builder if not the groups which represent them. As far as expediency is

concerned, 95% of all the responses confirmed that the Tribunal processed disputes to their satisfaction.

3.2.2 The hearing process

38% of responses thought the Tribunal hearing process to be conducted in a formal manner. 30% of responses did not consider the Tribunal hearing to be conducted expeditiously, with the same proportion also not feeling comfortable with the surroundings in which the hearing was conducted. 23% of responses indicated feeling intimidated by the member. As expected, the respondents (100%) were more in favour of 'as of right' legal representation than applicants (12.5%).

3.3 Creditability and public awareness

In following the doctrine of natural justice, which holds that *no man shall be a judge in his own court*, it is not the practice of the Tribunal to appoint industry-based persons such as architects, engineers and builders as mediators. As a result, the majority of the Tribunal's mediators have a legal background. This naturally raises concerns over mediators' ability to quickly grasp the technical issues involved in building disputes. The Tribunal does, however, engage the use of Queensland Building Services inspectors, most of whom have a building trade or technical background, to act as mediators. The building inspectors have had no formal training in the conduct of mediation or social behavioural studies.

This situation brings into question the credibility of the Tribunal. Any institution or organisation's creditability and acceptance rests on the level of competence it demonstrates. One means of measuring the perceived creditability of the Tribunal is by gauging consumers' and builders' perception of the Tribunal's knowledge and understanding of the building industry.

A related issue is that of public awareness. One view is that the Tribunal's services should be advertised extensively so parties may realise that there is a relatively quick and cheap means of resolving disputes available. Another view is that, if the Tribunal were to actively advertise its existence, it might become inundated with frivolous disputes which are presently being resolved easily and congenially by builders and consumers. To date, the Tribunal has adopted a low key approach and consumers and builders are likely to become aware of the Tribunal's existence only when a dispute which cannot be readily resolved by the parties becomes evident.

3.3.1 The mediation process

A large majority of responses (93%) considered an adequate knowledge of the building industry to be important while rather less (74%) thought that the mediator really had such knowledge, with 84% of responses believing the mediation process to have been an appropriate solution to their problems. 48% of responses were aware in advance of the Tribunal's mediation procedure.

3.3.2 The hearing process

64% of responses thought that the Tribunal did have adequate knowledge of the building industry. 77% thought the Tribunal hearing to be an appropriate method and 50% were aware in advance of the Tribunal's hearing procedure.

3.4 Commercial reality

The social trauma which occurs due to a proceeding before a court or tribunal is difficult to gauge as each individual approaches, and in turn is affected by, such circumstances differently. It is a fact, however, that some people will be left with a lasting emotional scar. This issue is of particular interest when considering the resolution of disputes by mediation, which offers an opportunity to settle with a minimum of time, cost and emotional expense.

Actual or expected delays in proceeding to a hearing force applicants and respondents to make decisions and agreements which they may not have made had an immediate determination been available. Such delays can be for a period of 3 months or more and the Tribunal will naturally reflect a feeling of injustice in respect of decisions which are made by parties as a perceived imposition. On the other hand, attempting to avoid delays by pressuring premature agreements is hardly likely to be a satisfactory solution as it is justice that is being sought and not just a speedy conclusion.

Applicants and respondents views were quite different. 31% of applicants against 58% of respondents reached a mediation agreement because of feeling unable to handle proceeding to the hearing process. 31% of applicants against 67% of respondents reached a mediation agreement as a result of a commercial financial decision, ie., to avoid the costs of a hearing.

4 Discussion

One of the major findings reported here is the significant numbers claiming to have been adversely pressured by the mediator to resolve the dispute. This problem seems to originate from a lack of instruction on mediation and it would seem a set of guidelines issued by the Tribunal may help. Such guidelines should not hinder or limit the running of the Tribunal's mediation process and should not prejudice the Tribunal's role of acting independently of the individual parties involved.

That some of the responses thought the Tribunal not to be impartial is of some concern. However, it could be argued that the perception of justice on the part of the losing party will be tainted by the mere fact of the result. One way to attempt to overcome this perception is for the proceedings to be conducted in a clearer and more open manner. Another possible solution is to introduce a duty lawyer system to complement the Tribunal's services with junior lawyers providing an advisory service to both applicants and respondents on a casual basis. Such a system should be both cost effective to the Tribunal and beneficial to those parties using the proceeding through the Tribunal system.

That 23% of responses found the Tribunal to be intimidating is unfortunate but perhaps unavoidable as it is very much a part of all judicial systems to provide an air of authority, which can be intimidating to some people, especially those with no previous experience of court proceedings.

The many responses, particularly from those who had been respondents in disputes, believing 'as of right' legal representation should be available is clearly a question of benefits and costs. Legal representation is not only expensive but does tend to extend the period of the proceedings, and the question of finance needs to be addressed if the parties are to be provided with free legal aid. Legal representation is allowable under the present system providing the member feels it justified, this option being available on a case by

case basis. Alternatively, the duty lawyer system, mentioned above, may suffice in most cases.

The question of the technical knowledge of mediators is potentially very difficult to solve. Clearly the doctrine of natural justice must be regarded and yet, equally clearly, some degree of technical 'know-how' is necessary for building disputes in order that decision makers are sufficiently well informed. The first issue concerns bias and the second concerns reliability. To have the best of both worlds would seem to require at least a technical adviser to the mediator. In view of the survey results, in which approximately three quarters of respondents felt the current situation to be adequate, there seems to be little cause for alarm as yet.

One of the main purposes of mediation is to progress disputes to a conclusion as quickly as possible. That many of the respondents are accepting a premature settlement because of the time, money and emotional risks involved in proceeding onwards, suggests that further improvements are necessary to the present system. One such improvement might be to allow the role of the mediator to be extended to adjudicator where both parties so agree. This could help in cases where there is a deadlock and no other prospects for a solution other than to continue into a lengthy and protracted hearing. Instead of the present practice of calling bluffs, a simple executive decision by the mediator should encourage the parties to act in the pursuit of justice rather than in avoidance of the risks involved in continuing.

5 Conclusions

The Queensland Building Tribunal was established in 1992 with the specific goal of obtaining quick, inexpensive and simple resolutions to domestic building disputes by means of mediation and/or tribunal hearing. This paper describes research aimed at gauging the success or otherwise of the Tribunal in achieving its goal.

The majority of those surveyed thought the mediation process to be sufficiently impartial, expedient, informal and knowledgeable. In contrast, the hearing process, as expected, was perceived to be less expedient and more informal and intimidating. There are significant areas of concern however over the absence of 'as of right' legal representation and the reasons for settlement at the mediation stage. It is suggested that mediators receive some training or at least some guidelines are issued on the mediation process, that "duty lawyers" are made available for consultation with the parties, and that mediators may, with common consent, act as adjudicators when circumstances require.

The results of this survey generally support the Queensland Building Tribunal's mediation process in achieving the timely settlement of building disputes. Subject to the reservations mentioned above, there seems to be no major barrier to the development of equivalent organisations and procedures in other parts of Australia or the world in general.

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7 References

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