

**Submission**

**No 9**

## **INQUIRY INTO THE OPERATIONS OF THE HOME BUILDING SERVICE**

**Organisation:** Champion Homes

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**Telephone:**

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**Subject:**

**Summary**

# HOME BUILDING DISPUTE RESOLUTION SERVICE

## Introduction

- 1.1 *“The building industry is prone to disputation due to the complex nature of the projects and the need to use sub-contractors to complete many building projects ... Many building contracts include dispute resolution provisions and in most states there are dispute resolution services provided and/or mandated under State legislation.”<sup>1</sup>*
- 1.2 Mediation is a *“structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute”.* <sup>2</sup>
- 1.3 The Terms of Reference of the Legislative Council’s Inquiry into the operations of the Home Building Service of the NSW Office of Fair Trading include particular reference to the resolution of complaints, the proposed establishment of a Home Building Advice and Advocacy Centre and any other relevant matters.
- 1.4 I am an accredited mediator with extensive experience in the building industry. I was formerly a part-time referee with the Building Disputes Tribunal and I am the principal of a mediation consultancy known as Just Mediation. I am also employed on a part-time basis as a business manager and dispute resolution adviser by Champion Homes Sales Pty Limited, a leading project home builder.

## Resolution of home building disputes

- 1.5 This submission wishes to address the issue of mediation of complaints and disputes within the residential building and construction industry and to propose the establishment of an effective Home Building Dispute Resolution Service.
- 1.6 The home building industry in NSW has undergone changes in recent years. With the advent of specialist tribunals (culminating in the Consumer Trader and Tenancy Tribunal) to determine construction disputes there has also been a purported and expressed emphasis on mediation and alternative dispute resolution in resolving building disputes.
- 1.7 In its 2004-2005 report the Office of Fair Trading claims that where a complaint is lodged Fair Trading “may then act as an informal negotiator between the two parties in an attempt to reach a mutually acceptable resolution”.<sup>3</sup>

- 1.8 At page 35 of its annual review, the following statistics are provided:
- The Home Building Service’s dispute resolution service was established to provide a quick and cost-free way of resolving disputes between consumers, builders and tradespeople.
  - Of the 6,313 complaints received in the year 1,737 (30%) were resolved through intervention by Fair Trading Centre staff; 2,284 were referred to the Home Building Service where 1,960 were resolved through technical assessment by building inspectors and 2,336 (37%) were either referred to another part of the Office of Fair Trading, the Consumer, Trader and Tenancy Tribunal, another agency or required no further action.
  - “Approximately 20% of matters referred to the Home Building Service are ultimately referred to the Consumer, Trader and Tenancy Tribunal.”

### **The fiction and the reality**

- 1.9 According to the Office of Fair Trading’s website and its literature, when a dispute occurs between a consumer and trader, the consumer is encouraged to contact the Office of Fair Trading and (preferably) put his or her complaint in writing. The Office of Fair Trading “will attempt to negotiate a suitable outcome between you and your contractor”.<sup>4</sup>
- 1.10 If that is unsuccessful, the complainant may be referred to the Home Building Service which is billed as an “upfront intervention service (aimed) to help consumers and traders achieve resolution”. The dispute may be referred to a building inspector or the parties are advised of other avenues of resolution (such as the Consumer Trader and Tenancy Tribunal).
- 1.11 The building inspector's role is to meet the consumer and builder on site; inspect the items in dispute and assist the parties to achieve a suitable outcome.
- 1.12 If the dispute is contractual in nature (eg, differing interpretation of the building contract; disputes as to variations and provisional sums; delays in completing works and so on) the Office of Fair Trading will contact the builder and put the consumer’s version of events to the builder. In the event that the builder disagrees with the consumer’s version then, apparently as a matter of course, the Office of Fair Trading will refer the consumer to the Consumer Trading and Tenancy Tribunal.
- 1.13 Typically, the Office of Fair Trading will advise the consumer that intervention by the Office “has not resulted in a resolution of this dispute and you may wish to pursue this matter through the Consumer, Trader and Tenancy Tribunal”. On occasions, the Office of Fair

Trading does not even contact the builder but merely decides that the dispute should be referred directly to the Tribunal.

- 1.14 The “upfront intervention service” by the Office of Fair Trading and its Home Building Service is a fiction and in this writer’s experience it is usually limited to a few phone calls to the builder which invariably fail to resolve anything. The Office of Fair Trading merely acts as a kind of post box for the Tribunal, passing on disputes without any real attempt at resolution in the sense of mediating the dispute.

### **Examples of failed “intervention”**

- 1.15 The following examples are actual case studies in the last two years.
- 1.16 Client A accepts a tender for the construction of a project home and pays a tender fee expressed to be “non-refundable”. The builder proceeds to prepare plans and undertake site investigations. The client refuses to sign a building contract and seeks a refund of the tender fee. The “intervention” by the Office of Fair Trading consists of a phone call to the builder who unsuccessfully explains the amount of work undertaken by the builder. The client is advised to make a claim to the Consumer, Trader and Tribunal. The matter is settled between the parties at the first directions hearing at the Tribunal after conciliation by a Tribunal conciliator.
- 1.17 Client B signs a building contract for the construction of a project home for a fixed price subject to certain contract price adjustments and variations. A variation is raised for additional piling caused by excessively sandy conditions encountered at the slab pouring stage. The client disputes the variation and “intervention” by the Office of Fair Trading comprises a telephone call to the builder requesting that the variation be withdrawn. In the face of a negative response from the builder, the Office of Fair Trading advises the client to bring a claim in the Tribunal. The parties file statements and eventually settle the matter at the second directions hearing at the Tribunal. Significantly, the client engaged a lawyer conversant in mediation and dispute resolution techniques.
- 1.18 Client C is building a house on a steep block with considerable rock. A provisional sum is provided for rock excavation but a fixed sum is agreed on the removal of spoil. The builder raises a variation for the costs of the rock excavation and rock removal. The client disputes the sum claimed for rock removal, alleging that that rock is part of the spoil from the site, and refuses to pay. The client completes an application to the Tribunal after being informed by the Office of Fair Trading that the matter should be referred directly to the Tribunal.
- 1.19 Client D is building a duplex. The development approval requires that acoustic treatment measures be implemented. The client disputes the builder’s building methods and after correspondence with the builder fails to resolve the dispute the client proceeds to file an application with

the Tribunal bringing up a number of other matters, thereby broadening the ambit of the dispute. The Office of Fair Trading does not even contact the builder although it issues a pro forma letter to the client advising that intervention has not resulted in a resolution of the dispute.

- 1.20 As a result, many disputes – some often of a trivial nature – ultimately find their way into the Tribunal where resolution is often achieved in the presence of Tribunal-appointed conciliators. Unfortunately, by the time the matter has reached the Tribunal the relationship between consumer and trader has broken down irretrievably and additional expense may be incurred in obtaining legal advice and preparing for the hearing.
- 1.21 The word “intervention” in the context of dispute resolution or mediation processes can be defined as a process of entering into a discussion or dispute in order to change its course or to resolve it (*Oxford New Australia Standard Dictionary*) or to intentionally become involved in a difficult situation in order to improve it or prevent it from getting worse (*Cambridge Advanced Learner’s Dictionary*).
- 1.22 The “upfront intervention” by the Office of Fair Trading’s Home Building Service achieves neither outcome in the area of contractual disputes in the home building industry.

### **Proposal for a Home Building Dispute Resolution Service**

- 1.23 Is there a more effective means of early intervention to bring the parties together with a view to a swift and angst-free resolution of the dispute and to restoring the relationship between consumer and trader?
- 1.24 Based on my experience, I submit that the dispute resolution service provided by the Office of Fair Trading is unable properly to intervene and assist in the resolution of many types of construction disputes which do not otherwise require the presence of an investigator to view actual defective work. The anonymity and distance associated with attempting to bring two parties together through separate phone calls relaying to each party the other party’s version of events, does not make for a positive mediated outcome.
- 1.25 Consideration needs to be given to the adoption of new techniques, including on-site assisted mediation or negotiation, to help facilitate discussion and resolution in face-to-face meetings rather than through a phone call.
- 1.26 The standard forms of contract used in the home building industry (eg. Clause 39 in the HIA NSW Residential Building Contract for New Dwellings (fourth edition) contain a provision to the effect that in the

event of dispute the parties must meet to attempt to resolve the dispute.

- 1.27 In my experience such meetings, in the absence of a qualified mediator or facilitator, do not produce a favourable outcome as both parties refuse to move from their entrenched positions. To take an example, a builder passes on a price adjustment because building works have not commenced within the time specified under the original fixed price tender. The consumer disputes the price adjustment by alleging that the delays are the builder's fault. The parties meet as required by the contract and merely restate their own positions and often maintain unreasonable expectations as to the possible outcome. The dispute is not resolved and invariably moves on to the Tribunal.
- 1.28 It is time to introduce and implement more refined on-site dispute resolution techniques that may assist in the early resolution of disputes. So that, for example, the existing Home Building Service be expanded to enable staff and contracted mediators to go on site in order to bring the parties together.
- 1.29 In the USA, for example, they are known as "on site neutrals". The function of these neutral mediators is to intervene in order to help manage the relationship amongst stakeholders and (hopefully) to diminish issues that have the potential to escalate into a dispute. Such schemes operate under the auspices of the American Arbitration Association.<sup>5</sup>
- 1.30 In Victoria, the Building Advice and Conciliation Victoria ("BACV") is described as a "one stop shop for preventing and resolving domestic building disputes" with a team of building specialists (including conciliators) on hand to make it quicker and easier to resolve disputes between builders and their clients.<sup>6</sup> Note the availability of conciliators to address issues other than just building defects.
- 1.31 The concept of "on site mediation" can be explored to determine whether a "flying squad" of trained facilitators/mediators/conciliators can be enlisted to provide a true interventionist approach in resolving many contractual and monetary disputes before they escalate into expensive actions before the Consumer Trader and Tenancy Tribunal.

## **Recommendations**

- 1.32 The Standing Committee is encouraged to investigate and make recommendations as to the viability of devising pragmatic "up front" mediation, assisted negotiation and facilitation services which will provide the means whereby owner vs builder disputes can be resolved expeditiously before parties have hardened their positions making resolution more difficult and expensive in the long run.

- 1.33 The introduction of a truly interventionist approach to dispute resolution within the building industry would have the following benefits:
- Improving the knowledge and awareness of mediation and assisted negotiation as viable techniques in the resolution of building disputes.
  - Reducing acrimony and breakdown in the lines of communication between builder and consumer by bringing the parties together, face-to-face, at an early stage in the dispute.
  - Encouraging a more consensual environment for the resolution of construction disputes.
  - Establishing a mobile, on-site mediation team (“flying squad”) may help promote better understanding within the home building industry as well as provide information for builders as to ways in which to avoid similar disputes re-occurring. As such, the availability of on site mediation would have a beneficial educative value.
  - Reducing the caseload on the Consumer, Trader and Tenancy tribunal.
- 1.34 I am prepared to amplify on the above submissions before the Standing Committee in session should you so wish.

George Vardas

8 November 2006

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<sup>1</sup> Quoted in the Federal Department of Industry, Tourism and Resources’ publication, “Dispute Resolution – Building Industry” [www.industry.gov.au/content/cmscontent.cfm?ObjectID=04A8E22E-A4E6-4B18-9BA145B8E9AD08E7](http://www.industry.gov.au/content/cmscontent.cfm?ObjectID=04A8E22E-A4E6-4B18-9BA145B8E9AD08E7) (accessed 19.10.2006)

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<sup>2</sup> Section 57(1) Consumer, Trader and Tenancy Tribunal Act 2001 (NSW)

<sup>3</sup> NSW Office of Fair Trading “A Year in Review 2004-2005” at page 34 [www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

<sup>4</sup> See, for example, “Building disputes and resolution” (Office of Fair Trading publication FT200 March 2004)

<sup>5</sup> See, for example, the AAA’s “Construction Industry’s Guide to Dispute Avoidance and Resolution (Oct 2004)” at [www.adr.org](http://www.adr.org)

<sup>6</sup> The Information Victoria Newsletter Issue No. 58 (Sept-Oct 2002)