

EDITOR'S COMMENTARY

Has arbitration failed the domestic housing industry?

Are state funded Domestic Building Tribunals going to be able to deliver to builders, proprietors and others the outcomes they desire?

In the lead article in this issue of *The Arbitrator* Judge Davey expresses the view that

"The Uniform Commercial Arbitration Act failed in its objectives in so far as it was intended to facilitate the provision of an expedient and inexpensive method of dispute resolution."

In many instances during the past 10 years arbitration has, in the domestic housing field delivered expedient and a cost effective method of resolving disputes. We tend never to hear of these cases but only those cases which have become protracted and expensive some of which have boiled down at the end of the day to a fight over costs. Some community groups and others would have us believe that all arbitrations end up this way. That some arbitrations have been disasters cannot be denied. Was this the fault of arbitration as a system of dispute resolution or were other factors involved? Clearly the attitude of some parties towards the process and the resolution of their dispute, the failure on the part of some arbitrators to take adequate control over the management of cases, the perceived high fees paid to lawyers which lead their clients to believe that the arbitration processes main objective was to generate high incomes for lawyers have all contributed to dissatisfaction expressed from time to time by critics of arbitration.

Can a Tribunal do it any better? Mediation and conciliation techniques will be pursued with vigour, and rightly so. It should however, be remembered that for these techniques to be successful requires a great deal of good will, trust, and co-operation on the part of the parties. These are not qualities and attitudes which parties to the usual run of home building disputes are noted for. The use of conferencies is a useful tool which Tribunals have in their armoury as to is their ability to implement procedures which may seem appropriate in particular cases.

Having considered all this can disputants reasonably expect better outcomes from Tribunals which have been established in several States? Cost wise, in Victoria anyway, the claimant pays \$100 per day after the first day. This certainly is cheaper than arbitration as far as the parties are concerned. This cost advantage may encourage more parties to pursue their disputes at the Tribunals. If this happens lengthy delays are highly likely to occur which will impact on the Tribunals ability to expedite matters before them. In due course it will be interesting to know what the full cost of dispensing justice through the Tribunals will be and whether or not they meet their objectives of being more cost effective than arbitration.

It is fact that when considering outcomes of litigation, arbitration, Tribunal hearings and other dispute resolution processes not all parties

will be satisfied with the results. It would seem to be reasonable to predict that in due course, the Tribunals will be subject to some criticism by those who expectations have not been met, i.e. the outcome has not been to their satisfaction.

Whilst some compelling arguments have been made to justify the establishment of the various Domestic Building Tribunals the question as to why it was necessary to outlaw arbitration clauses in contracts has not been satisfactorily answered. There is evidence that governments have responded to consumer pressure groups. There seems to be no good commercial or other reasons given to support and justify the restriction. Why should parties to a contract be denied the right to agree to have any future dispute which may arise settled by arbitration should they so desire. At the end of the day when all else fails the judgement of the Tribunal and the Award of the arbitrator must be based on the law. Why shouldn't parties have the right to organise their affairs as they wish in order to achieve a resolution of their dispute: why can't arbitration and the Tribunals compete in the market place of dispute resolution?

Many observers will be watching with interest the operations of the various Tribunals to see how effective they are in expediting the resolution of home building disputes and at what cost. The acceptance of Tribunals by the wider community as a dispute resolution medium will also be observed with interest.

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