



SUBMISSION BY THE
Housing Industry Association

to the
NSW Law Reform Commission
on the
**Dispute Resolution: Frameworks in New South
Wales**

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.



1 Introduction

- 1.1.1 The Housing Industry Association (**HIA**) is the peak body for residential builders in Australia with nearly 13,000 members in NSW. HIA members include builders, contractors, manufacturers, suppliers, building professionals and business partners. Members' businesses range from self-employed independent contractors and home based small businesses, to large publicly listed companies.
- 1.1.2 Given this diversity of membership, HIA is in a unique position to comment on the status and operation of current dispute resolution mechanisms.
- 1.1.3 It is of note that HIA have made a number of submissions in relation to the operation of the dispute resolution framework within the NSW residential construction industry, most notably:
- In November 2011, HIA made submissions in response to the Standing Committee on Law and Justice inquiry into the Consolidation of Tribunals in NSW;
 - In July 2012, HIA made submissions to the Office of the Small Business Commissioner on the Legislative Framework for the NSW Small Business Commissioner; and
 - In September 2013, HIA made submissions in response to the *Civil and Administrative Tribunal Amendment Bill 2013*.
- 1.1.4 HIA note that on 1 March 2013, the Attorney General directed the NSW Law Reform Commission (**NSWLRC**) to conduct a review of statutory provisions in relation to Alternative Dispute Resolution (**ADR**) with the principle aim of improving or updating the legislative provisions dealing with ADR¹.
- 1.1.5 Further to this, in April 2014, the NSWLRC released a consultation paper entitled *Dispute Resolution: Frameworks in New South Wales (Consultation Paper)*. HIA notes the Terms of Reference outlined at paragraph 1.1 of the Consultation Paper.
- 1.1.6 HIA welcomes the opportunity to provide feedback in response to the Consultation Paper and is supportive of mechanisms that would assist the furthering of the just, quick and cheap resolution of the real issues in dispute.
- 1.1.7 HIA submit that there is diversity in the nature of disputation within the construction industry and more broadly across industry sectors and HIA is concerned that the Consultation Paper and Terms of Reference seem to largely ignore this.
- 1.1.8 Within the construction industry disputes arise:
- between a business and a consumer i.e. **Home Building Disputes**; or
 - businesses and with Government i.e. disputes arising from **commercial transactions**.
- 1.1.9 The discussion below seeks to address the use of ADR within the context of these different types of disputes. On this basis HIA would suggest caution be exercised in relation to any attempt to standardise or introduce model ADR provisions.

2 The Residential Construction Industry

- 2.1.1 Home building disputes i.e. a dispute between a homeowner and a builder, often involve the resolution of a combination of both technical matters and contractual issues.
- 2.1.2 Further it is HIA's experience that most building disputes and disagreements arise because of one or more of a combination of the following:
- Quality of work issues;

¹ See para 1.17 of the Consultation Paper



- Unrealistic client expectations (often fuelled by an unfamiliarity with the building and construction processes);
 - a poor understanding of the construction contract by the owner and poor contract administration by the builder;
 - project management issues; and/or
 - a breakdown in communications between the owner and builder.
- 2.1.3 In HIA's view, many disputes escalate because of a failure of either party to talk to each other. At present, some consumers expect the Government to resolve their dispute for them and refuse to recognise their obligation to negotiate in good faith with their builder.
- 2.1.4 Therefore in order to reach an early resolution to these types of disputes the dispute resolution process needs to be easy to understand simple to invoke and operate; it needs to afford natural justice; allow ready identification at the outset of threshold issues, such as whether or not a 'defect' warranting further action exists; and involve procedures that are expeditious and guarantee due process.
- 2.1.5 It is HIA's view that in the event of a dispute or difference, the parties should first be required to utilise non-binding ADR mechanisms such as conciliation, mediation and on-site negotiation between the builder and home owner, facilitated by an independent third party.
- 2.1.6 Both mediations and conciliations can be helpful as a starting point, but are usually highly dependent on the skills and experience of the mediator involved. Conciliation is usually more effective because the conciliator may make suggestions for terms of settlement, give expert advice and may actively encourage the parties to reach an agreement.
- 2.1.7 It is of note that the Consultation Paper discusses the use of a number of ADR terms including 'mediation'².
- 2.1.8 In relation to Home Building disputes, HIA is unaware of any problems with the use and definition of the term 'mediation' within the current legislative framework.
- 2.1.9 Most notably, Part 2.4 of the NCAT Regulations provides
- 'Mediation means a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties in dispute to achieve their own resolution of the dispute'*
- 2.1.10 It is HIA's view that this definition is clear and reflective of the current process for Home Building matters in the Tribunal.
- 2.1.11 HIA submit that the definition proposed at paragraph 3.45 of the Consultation Paper is lengthy and complex. HIA would be concerned with any attempts to replace the current definition within the NCAT Regulations with that outlined within the Consultation Paper.
- 2.1.12 The Consultation Paper also discusses the use of expert determination and, for home building disputes, HIA recommends that further consideration be given to the use of experts to determine these disputes, including the contractual right for parties to refer certain types of technical disputes to binding expert determination in lieu of tribunal/court determination.
- 2.1.13 It is often the quickest and most effective way of resolving disputes in the building industry where the disputes are relatively simple in content or are technical in nature.
- 2.1.14 As noted within the Consultation Paper, disputes that cannot be resolved between the parties can be escalated to the NSW Civil and Administrative Tribunal³.

² See Question 3.3(1)
³ Under the *NSW Civil and Administrative Tribunal Act 2013 (NCAT Act)* and *NSW Civil and Administrative Tribunal Regulations 2013 (NCAT Regulations)*



2.1.15 Of note, NCAT has an express obligation to promote the use of ‘*resolution processes*’⁴ which are defined as

*‘any process (including, for example, alternative dispute resolution) in which parties to proceedings are assisted to resolve or narrow the issues between them in the proceedings’*⁵

2.1.16 In addition under the NCAT Act, prior to proceeding to hearing all parties in Home Building matters are encouraged to participate in mediation. HIA understands that many disputes are resolved at this stage.

2.1.17 Also, for matters over \$30,000 involving issues of defective work an expert conclave can be established.

2.1.18 Generally, when a conclave is established, expert witnesses meet on site to discuss the issues which they have prepared reports on with a view to, as far as possible, clarify the matters in dispute and reach agreement or narrow points of difference.

2.1.19 HIA would emphasize that the use of experts is often central to home building disputes.

2.1.20 HIA submits that given the unique nature of building disputes utilising ADR practitioners who lack sufficient technical knowledge can be detrimental to a case and dictates the need to appoint experts in any dispute over defective work. Parties often shop around for a number of different opinions and there is no restriction on this practice, inflating the cost of litigation and making it impossible for respondents to defend a claim that has been made against them without doing the same.

2.1.21 As such it is HIA’s position that those involved in the resolution of disputes in relation to home building have subject matter expertise that is tightly managed and subject to an enforceable code of conduct.

2.1.22 It is of note that HIA’s submissions in response to the *Civil and Administrative Tribunal Amendment Bill 2013* expressed disappointment that the Bill did not explicitly require that practitioners have specialist knowledge and expertise when dealing with home building matters.

2.1.23 HIA strongly submit that where an ADR practitioner is involved in the resolution of the dispute the practitioner should have subject matter experience. HIA submits that this aids in achieving efficient and fair outcomes.

2.1.24 A matter of particular concern to HIA members has been the inconsistency in decision making, which HIA submits is symptomatic of the lack of technical expertise of Tribunal members. Ensuring that the experts used in ADR have the appropriate expertise will ensure consistent outcomes.

Enforceability of outcomes

2.1.25 HIA notes that the consultation paper discusses the enforceability of agreements arising from ADR processes⁶.

2.1.26 Under the NCAT Act where both parties are able to reach a resolution during mediation the outcome is formally noted, becomes an order of the Tribunal and as such has the same enforceability at a Tribunal decision and is binding on the parties.

2.1.27 HIA would agree with the current approach of NCAT.

3 Disputes arising from Commercial Transactions

3.1.1 It is HIA’s position that ADR between commercial entities should largely be dealt with through contractual mechanisms.

⁴ See Section 37 NCAT Act
⁵ Section 37(2) of the NCAT Act
⁶ See Question 5.8(1)



- 3.1.2 HIA would express concern with any attempts to regulate ADR mechanisms as they would apply in relation to disputes that arise out of commercial transactions.
- 3.1.3 The nature of a commercial relationship, particularly within the construction sector is very distinct from the relationships within the residential construction sector mandating different dispute resolution approaches.
- 3.1.4 Of note, the residential construction sector is one of the most heavily regulated and taxed industries in NSW, by contrast the commercial construction sector is governed largely by negotiated contractual terms and conditions.
- 3.1.5 The nature of a commercial relationship, involving negotiated outcomes, dictates against interference in those relationships via legislative or model ADR provisions.
- 3.1.6 Parties engaged in commercial transaction should be allowed to utilise contractual ADR mechanisms such as expert determination or referral, conciliation and mediation in substitution to formal court processes if the parties contractually agree to do so.
- 3.1.7 HIA notes that the NSW Small Business Commissioner has power to deal with business to business/business to government disputes by way of ADR.
- 3.1.8 Problematically under the *Small Business Commissioner Act 2013* once a complaint is lodged with the Small Business Commissioner ADR is mandatory; if a party refuses to participate a certificate is issued stating that ADR was unsuccessful.
- 3.1.9 These circumstances may lead to negative outcomes and may simply be viewed as another stepping stone in the dispute resolution process rather than a productive process with positive results.

4 Conclusion

- 4.1.1 HIA would suggest that a cautious approach be adopted when considering the utility of developing model provisions in relation to ADR; the nature of the dispute is a crucial consideration when determining the appropriateness of ADR.
- 4.1.2 The home building industry is unique in nature and the approach taken to dispute resolution needs to be industry specific in order to be successfully applied.
- 4.1.3 Further it is HIA's position that the imposition of mandatory ADR processes in commercial relationships is largely undesirable.
- 4.1.4 As such, HIA suggest that if model provisions are developed they should not be overly prescriptive; ADR by its very nature dictates a flexible approach.
- 4.1.5 HIA would submit that any change to the way ADR is currently undertaken in relation to disputes between a homeowner and a builder or interference through mandatory ADR in commercial relationships through model provisions could lead to deterioration in the effectiveness of existing dispute resolution mechanisms, militating against any such steps.