



Dispute Resolution

Policy Background

- Whilst the majority of construction is undertaken without issue or dispute, occasionally different views and disagreements develop between the homeowner and homebuilder. Such disagreements can occur during the course of construction, or in some instances years after the house is completed.
- Ineffective methods for resolving disputes and dealing with consumer complaints not only affect the cash flow and business operations of affected contractors, they impact on the industry at large, may erode consumer confidence and affect its reputation.
- One of the key difficulties in devising an effective policy and model for residential construction is that home owners and residential consumers have little experience in commercial “rules of engagement”. Rightly or wrongly they often become emotionally involved in the dispute and can focus on what they want or expect after the design and specifications are completed and the contract is signed. They measure their expectations in absolute terms – “there are no grey areas” nor opportunity for compromise.
- In resolving disputes between home owners and building contractors it is important to have mechanisms that are effective, low cost and also reflect the consumer protection environment in which the builder operates.

Policy Issues

- Each State and Territory has their own unique laws regulating the domestic building framework.
- HIA has developed an overarching set of national principles to guide policy development. As background to developing these principles, HIA considers that:
 - a) A driving tenet of the principles is to ensure the resolution of disputes occurs in the shortest practical timeframe.
 - b) Complex technical disputes, those involving substantial questions of law and those over a determined monetary threshold, are to be resolved by a specialist judicial body (ie court, tribunal).
 - c) The use of experts is to be tightly managed and subject to an enforceable code of conduct.
 - d) Contractual issues involving the application or administration of the contract can be resolved in the same way as non-complex technical matters.

HIA’s Policy Position on Dispute Resolution

- HIA’s 13 dispute resolution principles are as follows:
 1. The parties need to talk – before the parties can activate any formal dispute resolution mechanism, whether under the contract, under statutory provisions or via a consumer protection agency they should attempt to resolve it themselves.
 2. Parties should still be allowed to utilise contractual ADR mechanisms such as expert determination or referral, conciliation and mediation in substitution to formal court processes. A monetary threshold for either disputes or contracts may need to be considered for those jurisdictions that currently outlaw such clauses.

3. There should be a specialised, independent building jurisdiction (whether that be a tribunal or division of the courts) to deal with domestic building disputes. The tribunal/panel should be presided over by a judge with a list of specialists and experts. Public servants, consumer protection bodies or fair trading agencies should not have the power to determine nor make binding judgments on contractual or workmanship matters.
4. Upon payment of a fee, either party can refer their dispute to the court/tribunal. Referral to mediation/non-binding conciliation should be a first step in the process, where the parties have not already attempted formal ADR. The party initiating the dispute should detail earlier attempts to resolve the dispute. A further fee will be payable if parties wish to take the matter to hearing. Hearing fees should be set keeping in mind the need to discourage the wasting of court or tribunal resources on vexatious claims or petty/minor disputes.
5. The tribunal/court will hold inquisitorial powers rather than merely adjudicate on the evidence presented by the protagonists.
6. Disputes will be initially case managed before being determined under hearing. Expedited hearing processes will apply depending on the value or nature of the dispute. For instance, smaller disputes should be decided via a small claims process with limited rights of appeal. The tribunal/court should also have the power to refer technical disputes to expert determination or contract/variation claims to adjudication.
7. Expert determination and adjudication would be determined under model rules and clauses (to be developed).
8. Detailed particulars of the dispute must be provided at the time of lodgement. Where workmanship is involved, that would be in the form of a simple Scotts Schedule (this is a document that lists the items in dispute (such as allegations) in one column, the other party's version of events, and then provides a third column for the judge to write his or her findings). Pleadings would ordinarily only be necessary for more complicated disputes, such as those involving mixed questions of fact and law.
9. The principles of natural and procedural justice should apply without the strict rules of evidence (so long as the matter proceeds according to the equitable principles of 'equity and good conscience') and there should be appeal rights.
10. Legal representation to argue the case in point will be subject to the discretion of the tribunal/judge. Relevant discretionary factors will include the amount of the dispute, where significant questions of law are involved or where the retention of legal representation will ensure a more efficient conduct of hearing.
11. Where work has been completed, the builder shall have the right to apply to have the disputed amount paid into court to abide the outcome of the dispute.
12. To discourage vexatious litigation and abuses of process, the tribunal should also have discretion to make orders for costs. Relevant discretionary factors will include the issues in dispute, whether legal representatives are involved and the conduct of the parties during the course of proceedings.
13. Parties should have the right to have their domestic building dispute heard by a court, rather than a tribunal, for equitable claims or when the amount in dispute would fall within the monetary jurisdiction of the county or district court (or equivalent intermediate jurisdiction in that state or territory's judicial hierarchy).