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The ADR Bulletin

ADR in the statutory context

Conciliation in residential tenancy disputes

Nicola Doumany

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Tenancy Conciliation — Resolving Disputes within the Act

The Queensland Government recently passed amendments to the *Residential Tenancies Act 1994*. The amendments received bipartisan support and were the result of an extensive review of the Act conducted by the Queensland Residential Tenancies Authority (RTA). The first of the amendments to commence relate to dispute resolution and essentially they replace mediation with conciliation as the first step in resolving residential tenancies disputes under the Act.

The need for change

Formerly the Act contained a two step dispute resolution process. The first step relied on the RTA organising mediation conferences with accredited mediators for parties in dispute. Disputes not resolved through mediation or those classified as urgent under the Act proceeded to the Small Claims Tribunal.

The RTA's use of a generalist and strictly structured model of mediation conferences to deal with a broad range of tenancy disputes received a degree of criticism during the review of the Act. The concerns expressed by clients, community groups and industry included the following:

- that information concerning the Act was not provided to parties as part of the mediation process;
- that it took too long to complete the mediation process;
- and that the model did not encourage the use of active strategies to help parties to resolve disputes such as suggesting options for resolution.

The private rental sector accommodates over 30 per cent of Queensland households. As a form of housing tenure, private rental is assuming increasing significance. Residential tenancy disputes fundamentally impact on the housing and investment choices of tenants and lessors. Tenants and lessors expect a clear and accessible framework of rights and obligations under the legislation and the support of appropriate dispute resolution processes. Fair, lawful and fast outcomes assume particular significance in this context.

New conciliation service

As a result of these factors the RTA has developed a specialist tenancy conciliation service. The amendments formalise this arrangement and enhance the mediation service which the Authority has offered under the Act since 1995.

The RTA has taken into consideration a number of factors in its dispute resolution system design. The National Alternative Dispute Resolution Advisory Council, in their discussion paper on *Issues of Fairness and Justice in Alternative Dispute Resolution* (November 1997) recommend that: 'Each dispute resolution provider is afforded a unique opportunity by ADR to assess and to develop a dispute resolution service which fully accommodates the needs of its users.' The development of the specialist tenancy conciliation service builds on the aspects of the RTA's Dispute Resolution Service which were identified as successful during the review of the Act and addresses those aspects of the service identified as in need of improvement.

The move to conciliation still involves using mediation skills in negotiating outcomes. It reflects the context of dispute resolution, in this case the *Residential Tenancies Act 1994* and is a response to the demands of RTA clients who want to ➢

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➢ make informed and lawful decisions when resolving disputes under the Act. Customer service demands on the RTA have also influenced the development of a more flexible process of dispute resolution.

Conciliation provides parties to a dispute with relevant information on the law and assists them in making informed decisions about options for resolution. The RTA's Dispute Resolution Service now offers a broader range of services to parties in dispute. The developments to the service ensure a flexible approach and a dispute resolution process which is more responsive to the specific issues raised in residential tenancy disputes. It now offers:

- information about the Act and its impact on particular disputes;
- a free telephone shuttle negotiation service;
- conciliation conferences between the parties, either face-to-face or on the telephone.

For some time the RTA has experienced significant success in resolving disputes through telephone discussions with one or more of the parties without the need for a conference. Over one third of disputes are being resolved quickly and efficiently through this process and a significant number of parties find using the telephone an efficient way of negotiating an outcome without the need for a conference. For example, parties who disagree over a claim of $54 from the bond for cleaning the stove, may be reluctant to attend a mediation conference. They may be more likely to simply drop out of the process or let a referee decide (with the result of a relatively small matter tying up the resources of the Small Claims Tribunal). They may not have a continuing relationship and therefore little need for a face to face meeting to sort out their differences. However, they do want information on the impact of the law on their dispute and they are eager to utilise telephone shuttle negotiation in seeking a satisfactory outcome.

The amendments to the Act reflect the change of emphasis from only offering conferences as a forum for dispute resolution. They include:

> Section 232C The functions of a conciliator are-
>
> (a) to encourage the settlement of a tenancy dispute by facilitating, and helping to conduct, negotiations between parties to the dispute; and
>
> (b to promote the open exchange of information relevant to the dispute by the parties; and
>
> (c to provide to the parties information about the operation of the Act relevant to a settlement of the dispute; and
>
> (d to help in the settlement of the dispute in any other appropriate way

The Act does not prescribe the forum for conducting negotiations.

Agreements reached in conciliation must be consistent with the Act and become part of the residential tenancy agreement between the parties. Agreements in this process contain terms which are lawful, measurable and enforceable. While the parties may make 'feel good ' statements as part of a private agreement, these are not recorded as part of the formal agreement reached under the Act. Neither party to a dispute is given unrealistic expectations about the issues which can be enforced through residential tenancy agreements.

Clearly, tenancy conciliators do not play a strictly neutral role. They provide information on the Act, encourage compliance with the law by the parties and play an active role in reality testing possible resolutions.

Involvement of the Small Claims Tribunal

Disputes which cannot be settled through the conciliation process can be lodged with the Small Claims Tribunal for a hearing. The conciliation process under the Act should not be seen as purely an alternative to, or in competition with, the Small Claims Tribunal. Rather, the Act sets out a two step process to deal with those matters which can be resolved quickly through conciliation and minimise clogging of the Tribunal. Conciliation does not necessarily discourage the use of the Tribunal.

An effective conciliation service ensures disputes which are more suited for adjudication receive the Tribunal's attention as quickly as possible and draws on relevant Tribunal decisions in its own discussions with disputants in an effort to generate options for resolution. The Tribunal plays an integral role in the conciliation of disputes and is a major motivating factor for disputants in considering their options for resolution. The Tribunal can also make orders in relation to any alleged breaches of agreements entered into under the Act and can declare that a stated agreement is, or is not, a residential agreement to which the Act applies.

A major issue raised during the review of the Act was jurisdiction for the hearing and determination of residential tenancy matters. Most (65%) of the submissions raised concerns about the current jurisdiction provided through the Small Claims Tribunal. Recent changes to the Small Claims Tribunal Act allow for the development of a specialist tenancy division within the Small Claims Tribunal. Inconsistency of decision making in the Small Claims Tribunal was also an issue raised by community and industry groups during the review of the Act. A lack of written decisions and reliable data for the reference of disputants under the Act has been a particular problem in generating options for resolution during conciliation. Relevant case law is a powerful tool in educating disputants about the requirements of the law.

The Minister for Public Works and Housing announced in Parliament that in addition to the conciliation service, improvements to jurisdiction arrangements for tenancy matters are under negotiation between himself and the Attorney General. A primary focus is to enhance the consistency of decision making and the availability and access to reliable Tribunal data to support a seamless two-step dispute resolution process under the Act. ❖

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