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Designing appropriate ADR

A dispute resolution system in evolution

Ray Rinaudo

The Real Estate Institute of Queensland trades as a corporation to 'support, protect and advance the character, status and interests of the real estate industry generally and particularly the character, status and interests of Licensed Auctioneers, Licensed Real Estate Agents, Registered Valuers, Licensed Branch Managers and Registered Salespersons being members of the Institute' and to 'promote professional goodwill and harmony among members'.

To this end the Institute has a published Code of Ethics to which all members agree to

be bound when becoming a member. This Code dictates the way members will deal with the public and with each other, and is designed to foster a high standard of ethical practice by members so as to maintain their reputation and integrity.

Of course, even with the best will in the world disputes between the public and members, and between fellow members, do occur. Usually these disputes are about entitlement to commission and the vast majority do not involve the public. Examples include whether there was a conjunction

arrangement between the members in dispute and, if so, what was the basis of that agreement; who introduced the buyer to the property, and whether there a valid and enforceable authority in place to sell. The Code of Ethics also deals with such things as inducements, confidentiality, non-portability of information and signs.

Original disputes process

In order to ensure adherence to the Code, the Institute adopted a disputes and complaints process. This process has been subject to much evolution over the last six years.

Originally the Institute set up an Arbitration Tribunal, which consisted of a chair and four other members. This Tribunal would sit and determine cases in a very structured way. The parties were invited to address the Tribunal in turn and were asked questions by the Tribunal members. ➤



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➤ The proceedings were taped. At the end of the parties' submissions, and after all questions were answered and the parties had interrogated each other, the chair would ask the parties to leave the room so the Tribunal could consider its decision.

At this point the Tribunal chair would invite the parties, while they were outside, to discuss the matter with a view to settling their dispute. This, it was claimed, would relieve their Tribunal of its obligation to make a decision and would assist the parties in their future dealings.

Needless to say, very few parties, having become locked into their position during the Tribunal hearing, would at that stage have any inclination to settle. They had just spent two or so hours presenting and arguing their case to the Tribunal, reinforcing their position along the way.

In any event the Institute had already sent them to a mediation, which had obviously failed or they would not now be before the Tribunal. These mediations, which were held some weeks before the Tribunal hearing, had a low success rate and had become no more than a fishing exercise for the parties.

It is not necessary in this short article to address the reasons why the parties believed in their own case. Suffice to say that the reasons are not dissimilar to the usual causes of conflict such as lack of information, misunderstanding of the obligations under the Code of Ethics, poor communication and interpersonal conflict.

After their hearing, the parties had a right of appeal to another tribunal known as the Appeals Tribunal. Only about 8 per cent of cases settled and a substantial number would go on to appeal. This caused parties to become even more entrenched in their own view, leading them to feel as though they had not been heard or believed if their case was unsuccessful. This led many to resign their membership in protest. This was exactly the opposite reaction to what the Institute was trying to achieve.

The system did have a number of advantages, such as being quick and inexpensive. It is also reasonable to say that the majority of members accepted the decision of the Tribunal and went about their business. However, it was a concern that the number of members who were not satisfied caused

significant problems for themselves, the Appeals Tribunal and the Institute. This was a drain on resources and time and it caused feelings of ill will amongst members.

Improvements in the process

In 1996 the Institute took its first steps to improve the process. A permanent chair of the Tribunal was appointed. The qualities the Institute was looking for in the new chair were knowledge of the law (particularly the rules of natural justice and procedural fairness), a thorough knowledge of dispute resolution processes, and consistency of decision-making. The chair would also have the responsibility for publishing decisions in the Institute's journal so that members could be better informed, again with a view to bringing some consistency to the process.

Initially this innovation met with limited success. The chair was hamstrung by the previous arrangement of having a five person Tribunal and a very structured process that was not conducive to assisting the members to try to settle their dispute.

Changes had to be made. First, the taping of the hearing was done away with. Then the Tribunal was reduced from five members to two — the chair and one other member who was a member of the Institute. These changes, although improving the system to some degree, still did not make any significant difference.

It was decided that a new hearing format needed to be introduced. First, the setting was changed so that all the parties sat around a table rather than the Tribunal members at one end and the parties at the other. Next the process was changed from arbitration to a mediation/arbitration model with a much greater emphasis on the mediation part of the hearing. The Tribunal members did not sit together but rather opposite each other. The Real Estate Institute member of the Tribunal would then have the responsibility for the mediation. Members were given special training in mediation. This led to a much greater emphasis on the mediation model, focusing on interest based bargaining.

The parties were required to exchange all documents 14 days before the hearing so as to avoid the previous practice of attending the mediation to obtain as much detail as possible from the other party. The parties ➤



➤ were made aware at the start that if the mediation failed the Tribunal would immediately commence the arbitration part of the hearing and make a decision.

Measuring success and effectiveness

Although a number of these changes appear cosmetic only, they should not be underestimated. Settlement rates jumped to around 50 per cent, which was a significant improvement on the old system.

The last change made so far, and probably the most controversial, is the interventionist approach of the Tribunal. After

the parties have given their opening statements and there has been a thorough exploration of the issues, the Tribunal breaks for a private meeting. In these meetings the Tribunal discloses to the parties its view of the likely outcome. Space does not permit any in-depth examination of this issue here — suffice it to say it is being closely monitored by the Tribunal. All indications so far are that the parties are accepting of it and there do not appear to be any strong concerns about it. Settlement rates are now consistently around 65 to 75 per cent.

If success can be measured in this process

then it would probably be measured in the following ways: fewer disputes, fewer appeals, more matters resolved by mediation, client satisfaction, and fewer members who resign after the hearing and stay resigned. In this context the client is the Institute and the member the agent.

On these criteria the Tribunal has significantly improved its success rate to date. ●

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