IBQC - Good Practice Guidelines for the Development of Construction Dispute Resolution Tribunals and Decision-Making Institutions

INTERNATIONAL BUILDING QUALITY CENTRE

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INTERNATIONAL BUILDING QUALITY CENTRE

PREFACE

Building disputes are often costly and time consuming. This cost and delay can add significantly to the stress associated with a building dispute and can sometimes result in there being insurmountable barriers to procuring an independent resolution of the dispute. Given these circumstances those involved in building disputes can readily feel that justice and fairness is out of their reach.

These challenging circumstances exist in many jurisdictions and can impact all types of building disputes. Parties and the community can be assisted by the availability of a Building Dispute Resolution mechanism which seeks to reduce cost, time, stress and barriers to access. Hence the International Building Quality Centre considered that there was value in publishing a guide to the design and implementation of a Good Practice Building Dispute Resolution mechanism[1].

The design of a Good Practice Building Dispute Resolution mechanism is an important undertaking. Equally important is the resourcing of that mechanism. If such a mechanism is to succeed and bring benefit to the community it is imperative that it is supported by appropriate and sufficient resources.

A Good Practice Building Dispute Resolution mechanism will be influenced by the type of dispute under consideration.

For the purpose of considering such a mechanism, disputes can be considered to be one of three types as follows:

- A dispute of modest value, involving works of modest complexity with parties who are individuals or modest commercial entities;
- A dispute of high value, involving works of a significant value with parties who are sophisticated and substantial entities; and
- A dispute where at least one party with a significant interest in the dispute is not resident in the relevant jurisdiction.

This framework focusses on the first type of dispute.

PRINCIPLE ONE

1. The Dispute Resolution mechanism should be a public forum with legislative backing

1.1. Such a forum will:

- facilitate consistency in the way disputes are managed;

[1] The guide was prepared by Phillip Greenham, Enterprise Fellow Melbourne Law School, FCIArb, Dr Richard Manly QC, Professor Kim Lovegrove MSE, RML and Hon Justice Brian Preston FRSN SC. The guide was reviewed and adopted by the full Working Group, which comprised the authors and Her Honour Frances Kirkham CBE, Stephanie Barwise QC, Prof Robert Whittaker AM, FRSN, FAIB, FAIQS, MAIBS, Mark Colthart LLM (Hons) FCIArb, and Ms Zama Ngcobo.

- allow for the mandatory adoption of practices which will support the other Principles set out in this guide;
- allow greater control over the costs of the process;
- allow greater control over the individuals who will oversee and determine disputes; and
- allow for the finality of the outcome (subject to limited appeal rights in limited circumstances).

1.2. A statutory Tribunal dedicated to these types of disputes (or with a division dedicated to these types of disputes) would satisfy this Principle.

1.3. It is relevant to consider the balancing of an open system and the maintenance of party confidentiality. An open system has many advantages. These include:

- transparency and accountability in relation to the operation of the Tribunal;
- the development and visibility of a jurisprudential framework relevant to the resolution of disputes coming before the Tribunal; and
- guidance to parties in dispute, and their advisors, as how matters coming before the Tribunal might be resolved.

1.4. With a view to achieving this balance, except as the Tribunal otherwise determines, its proceedings should be conducted in public and the reasons for its decisions published.

PRINCIPLE TWO

2. The Dispute Resolution mechanism should be supported with sufficient and appropriate resources

2.1. It is important that the Tribunal is supported by sufficient and appropriate resources. These resources may include:

- sufficient funds to remunerate the presiding Tribunal members and those assisting the Tribunal so that high quality and experienced practitioners are available to the Tribunal;
- administrative staff so as to ensure that the Tribunal administrative processes operate efficiently and reliably and support the timely disposition of disputes; and
- appropriate physical facilities to enable the Tribunal to be accessible and to operate efficiently.

2.2. The unavailability of sufficient and appropriate resources can result in:

- delays in the progress and resolution of disputes;

- pressures on presiding Tribunal members and those assisting the Tribunal such that the quality of administration and decision making is compromised which can in turn undermine confidence in the Tribunal; and
- the appointment of personnel to the Tribunal who do not have the experience and qualities to enable the Tribunal to fulfill its role.

PRINCIPLE THREE

3. The Tribunal members should be of standing which supports credibility and efficiency

3.1. Any dispute resolution process is only as good as the people who administer it. In order for the Good Practice Building Dispute Resolution mechanism to succeed it will be important that the Tribunal members are:

- experienced in building disputes and the resolution of such disputes;
- have the gravitas and standing which instils confidence in the process, the decisions made and increases the prospect of early resolution;
- have the experience and demeanour to keep control of the process and to maximise compliance with the process by the parties;
- have the discipline and experience to take all of the relevant steps within the times contemplated by the rules; and
- are capable of exercising judgement in determining when it is appropriate to depart from the standard rules.

3.2. It is likely that these qualities will most readily be found in a lawyer who has a number of years' experience in dealing with building disputes and who may be interested in an alternative to traditional private practice.

PRINCIPLE FOUR

4. The cost of accessing the system should not be a barrier

4.1. It is important that the cost of accessing a Good Practice Building Dispute Resolution mechanism is not a barrier to the use of that mechanism.

4.2. Cost can be driven by a variety of factors, including:

- the nature of the relevant processes;
- the pool from which the members deciding the dispute are drawn;
- the fees to access the system;
- the entitlement to legal representation; and

- the cost to individuals of preparing their claim.

4.3. Each of these factors are addressed through the implementation of the further Principles set out in this Guide.

PRINCIPLE FIVE

5. The dispute resolution process should be efficient, simple, and relevant

5.1. A dispute resolution process involves a number of stages. These can include:

- the ***pre-issue*** process;
- the ***initiation*** process;
- the ***exchange of information and documents*** process;
- the ***case management*** process; and
- the ***hearing*** process.

5.2. Each of these stages is often complex. This complexity can add to the cost of the dispute resolution process and result in access to the dispute resolution process being difficult for untrained disputants or unsophisticated advisors.

5.3. The rules in relation to four common elements of a dispute resolution process often give rise to this complexity. These are:

- rules relating to the presentation of evidence;
- rules relating to the use and availability of documents;
- rules relating to the use of experts; and
- rules relating to the manner in which a case should be presented.

5.4. It is essential that each of these elements is dealt with in a way which focusses on efficiency and simplicity, without undermining the ability of the parties to progress their claim and understand any claim brought against them.

5.5. In this context, a Good Practice Building Dispute Resolution mechanism will have the following characteristics:

Evidence

- Rules of evidence will not generally apply.
- Evidence will be admitted unless the prejudicial value of the evidence is significantly disproportionate to its probative value.
- The tribunal member will be free to give appropriate weight to evidence to take account of the nature and source of the evidence.

Documents

- Discovery of documents in the style often encountered in common law jurisdictions will not generally be permitted.
- Each party will, at an early stage, present, and provide to the other parties, the documents they seek to rely upon.
- Requests for additional documents will be determined by the tribunal member and will only be granted where the Tribunal member considers the subject document to be relevant.

Case Presentation (Documents)

- Pleadings in the style often encountered in common law jurisdictions will not be permitted.
- Parties will, at an early stage, set out their case in writing. In doing so the parties will:
    - Identify the circumstances which they say support their position;
    - Set out the arguments as to why their case should succeed;
    - Set out the evidence in support of their case;
    - Include a statement from each of the relevant witnesses setting out the evidence of those witnesses;
    - Include the documents they intend to rely upon.
- The written presentation of the case shall not (unless agreed to by the Tribunal) exceed 40 pages (excluding the statements of the witnesses and the documents intended to be relied upon).
- These same guidelines apply to defences to claims and other similar documents.
- Where the Tribunal considers it appropriate the matter will be decided 'on the papers' without any oral presentation by the parties (unless a party demonstrates good reason why this should not be the case).

Case Presentation (In Person)

- If a case is to proceed by way of oral presentation the hearing will be of a fixed duration (determined by the Tribunal) and be on a 'stop clock' basis with each party having equal time.

Flexibility

- The Tribunal shall be at liberty to depart from these guidelines where the justice of the situation requires.

- In considering whether to depart from these guidelines the Tribunal will give significant weight to the objective of facilitating the just, efficient, timely and cost effective resolution of the genuine issues in dispute.

PRINCIPLE SIX

6. Expert evidence should be provided to the Tribunal by independent and accredited experts

6.1. Experts are not advocates for a party. The role of an expert is to give an honest and independent opinion to the relevant Tribunal.

6.2. The obtaining of expert evidence directly by the individual parties can add significantly to the cost of the process, undermine the independence of the experts, and potentially obscure the resolution of the technical issues.

6.3. The Tribunal shall seek to strike a balance between the freedom of the parties to engage their own experts and the benefit of maintaining the independence of experts. With a view to striking this balance the Tribunal may:

- engage the relevant experts itself (at the cost of the parties);
- allow the parties to nominate the experts to be engaged by the Tribunal; or
- allow the parties to engage their own experts.

6.4. Only experts who have agreed to abide by any rules of conduct in relation to experts which the Tribunal may prescribe may be engaged by the parties or appointed by the Tribunal. These rules may include the following:

- the expert must set out the instructions which have been given by the party engaging the expert;
- the expert will certify that the evidence is and will be objective and impartial; and
- the report of the expert is to be prepared and submitted in a prescribed form.

6.5. With a view to ensuring that experts assist the Tribunal in the most efficient and appropriate way, and that the Tribunal derives the greatest benefit from the involvement of experts, the Tribunal may adopt the following rules:

- expert reports are to be provided or exchanged at the earliest appropriate date determined by the Tribunal (with such exchange being simultaneous);
- the experts are to meet in person with the Tribunal and representatives of the parties to exchange views in an open manner and to endeavour to find common ground and a resolution methodology;
- the Tribunal will have a high level of regard to the expert`s findings; and

- the experts will not be subject to cross examination but, with the permission of the Tribunal the parties may be permitted to seek clarification of the analysis and opinion of the expert.

6.6. If the Tribunal allows the parties to engage their own experts the Tribunal may set down rules regarding the engagement of those experts. Such rules may include the following:

- a party may only engage the minimum number of experts necessary to address the relevant issues;
- unless the party obtains the permission of the Tribunal, a party may only engage one expert in respect of each relevant discipline;
- a party must disclose the identity of any experts it has engaged to the Tribunal and the other party as soon as practicable after the engagement of the expert;

6.7. If the Tribunal appoints one or more experts:

- the parties shall bear the cost of the expert in the proportion determined by the Tribunal (which, unless special circumstances apply, should be in equal proportions); and
- the parties will cooperate fully with the expert in terms of permitting them to inspect, evaluate and avail themselves of key documentation and material.

PRINCIPLE SEVEN

7. The appeal process should be limited and protect participants from abuse

7.1. The right of appeal against a decision of the Tribunal can be important in order to correct patently incorrect decisions and to maintain confidence in the process.

7.2. However, it is important that the appeal process is not able to be used by one party against another as a means of delaying resolution or in order to exert inappropriate pressure on a party to settle a matter.

7.3. In order to balance these two considerations, the appeal process might be as follows:

- there should only be one level of appeal, to a conclusive superior tribunal or court;
- an appeal can only be brought with leave from the superior tribunal or court;
- leave might only be granted if:
    - the determination of the appeal will substantially affect the rights of one or more parties; and
    - on the basis of the findings of fact made by the Tribunal, the decision of the Tribunal is obviously wrong; or

- the superior tribunal or court is of the view that the appeal has a real prospect of success.

PRINCIPLE EIGHT

8. The administrative process should be efficient and predictable

8.1. It is important that:

- the Tribunal has in place rules which will support the efficient management of cases before it; and
- the rules are known to and readily understood by the parties.

8.2. The efficient and predictable management of cases can be assisted by having default rules which apply, unless unusual circumstances exist. These default rules can be tiered and timetabled (based on the value of the claim and whether additional parties are to be involved). This will allow a degree of flexibility in the rules having regard to the nature of the claim.

8.3. Default rules for a claim with a value of less than $100,000 could provide for the following:

- the party making a claim must lodge all of the material in support of that claim within 30 days of the lodging of the claim with the Tribunal.
- the parties against whom the claim is brought must set out their defence to the claim and indicate whether they intend to join any additional party with 30 days of receipt of the claim.
- Any claim against an additional party should be brought within 60 days of the receipt of the claim.
- Any application by the claimant to the Tribunal for special directions should be made within 30 days of the making of the claim.
- Any application by the respondent to the Tribunal for special directions should be made within 30 days of receipt of the claim.
- A mediation should be convened within 60 days of the claim (where there is no additional party joined) or within 60 days of the joinder of any additional party.
- The mediation shall not occupy more than 1 day.
- If the mediation is not successful the mediator shall provide a recommendation to the parties as to the basis upon which the matter should be resolved.
- The matter should be determined by the Tribunal within 60 days of the conclusion of the mediation.

8.4. In order for these rules to be administered in a consistent manner relevant to the particular case there should be a Tribunal member dedicated to the case to oversee compliance with and any variation to the rules.

8.5. The Tribunal shall be at liberty to depart from these rules where the justice of the situation requires.

8.6. In considering whether to depart from these rules the Tribunal will give significant weight to the objective of facilitating the just, efficient, timely and cost effective resolution of the genuine issues in dispute.

PRINCIPLE NINE

9. The process should encourage and facilitate early settlement

9.1. It is recognised that the vast majority of disputes are resolved without proceeding to a final hearing. A Good Practice Building Dispute Resolution mechanism should encourage resolution at the earliest appropriate opportunity.

9.2. The early resolution of a matter may be encouraged and support by the following:

- an early and clear statement of the claims and answers by each party;
- whilst keeping a focus on the timely progress of a dispute, allowing the parties sufficient time to understand the position of the other party and to come to terms with the reality of the circumstances;
- a mediation process being compulsory (unless there is good reason why a mediation should not occur); and
- the availability of trained personnel to conduct the mediation.

9.3. The rules set out in paragraph 8.3 are intended to bring forward the time for mediation and to provide other mechanisms and incentives designed to maximise early resolution.

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