Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes: Issues Paper 2013

Consumer Comment: A case study

Margaret Singleton
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Mr. Colin Neave
Chairman,
Commonwealth Consumer Affairs Advisory Council
Consumer Policy Framework Unit
Competition and Consumer Division

Treasury
Langton Crescent
PARKES ACT 2600

Re: Review of the Benchmarks for Industry-based Customer Dispute Resolution Schemes: Issues Paper 2013

Dear Mr. Neave,

Thank you for providing a forum for ordinary consumers to contribute to the discussion and review of the *Benchmarks for Industry-based Customer Dispute Resolution Schemes*: *Issues Paper.*

The Victorian Ombudsman's Report on the governance of the Building Commission tabled in the Victorian Parliament on the 12th December, 2012 insightfully reveals the depth of maladministration and cronyism within the building industry. As ordinary consumers we have endured the trickle-down effect of this corruption and incompetence when trying to resolve our own building dispute. We found dispute procedures and practices put in place by governments to protect citizens are simply not working. Whilst internal, external and judicial complaints handling tools of the kind set out in your *CAAC Issues Paper* (April 2013, p:10) are theoretically available to customers, the Benchmarks principles of accessibility, independence, fairness, accountability, efficiency and effectiveness are openly thwarted by those holding positions of power within building industry resolution schemes. Inherently, this negates proper access to justice principles as outlined in the Australian Government's *Strategic Framework for Access to Justice*. This tawdry state of affairs is what inspired me to contact you and tell our story.

Internal complaints handling procedures: The builder, his inspector and surveyor.

In 2009, we engaged a builder to construct a new home that would accommodate my husband's special disability needs. The contractor we chose was a member of the HIA and held a franchise with a reputable company. Before the Contract was signed he was made very aware that my husband was a stroke victim and that certain home modifications were imperative. For example, level access level access from the garage into the home and out onto the front porch and alfresco, stepless showers and wider doors into the bathroom and toilet. Unfortunately, we were badly let down.When communications deteriorated, we were forced to find formal ways of alerting the builder to what he should already have known. This was difficult because the builder's inspector and surveyor appeared complicit in the lowering of standards.

They were aware of the excessively deep cut to our block that meant the builder had missed the Shire infrastructure directly at the front of the house; the pouring of the garage floor level with the internal part of the house when the unsigned Plans submitted to Council showed a step-down garage, and the consequent defective garage door opening height. None of the deviations by the builder had been presented in writing or submitted as a proper variation in accordance with the Contract, and despite my ongoing protestations, the builder, his inspector and surveyor continued to look the other way. Over time, more defects became evident so help had to be sought elsewhere. Of particular concern was the brickwork and plumbing. Certified correspondence was sent to the Managing Director of the franchise company but failed to yield any response.

External complaints handling procedures: The Building Commission, Building Advice & Conciliation Victoria and Plumbing Industry Commission.

Because it was all becoming so expensive, we began to think about contacting Consumers Affairs Victoria (CAV) who were advertising a joint service with the Building Commission (BC) that would provide a fast track to resolving building disputes. Building Advice & Conciliation Victoria (BACV) assigned us a case number and a formal onsite meeting with relevant parties was arranged. The BC inspector and BACV conciliator were given exact copies of the Contract, Specifications, drawings and unsigned Plans that had been submitted by the builder to various agencies.

Despite having access to clear and reliable evidence showing workmanship that did not comply with Australian Standards; incorrect house siting; money demanded and received for rendering that was part of the works; defective plumbing and structural changes made without proper computations; the inspector and conciliator failed in their duty of care to properly investigate these matters and take appropriate action. It was a massive shirking of responsibility.

After the BACV visit, further issues came to our attention. Of particular concern was the direction of the storm water. In September 2010, we were advised there was an illegal storm water pipe running into the gully at the rear of the property. On the 2nd July, 2009, the builder and his inspector had been served a Legal Point of Discharge (LPD) notice stating the water must be directed to the Shire barrel directly at the front. Because the builder had dug so deep he was unable to comply with the original directive. His solution was to bury the pipe in the gully and hope it would not be noticed. The builder's inspector did not appear concerned. This set the tone for all future encounters.

Once caught, the builder and his plumber decided the remedy was to install a soakage pit in the back yard. Three certified letters were forwarded to the builder and inspector instructing them not to install a pit because the surveyor I had engaged had put in writing that the storm water could easily be taken to the other side of the block and connected into Shire infrastructure. Further urgent correspondence was sent to the builder, his inspector and the surveyor but to no avail.

Desperate for advice, an urgent email was sent to the BACV conciliator requesting that he and his Building Commission inspector return to our property and assess the storm water issue and other outstanding items (mentioned above) that were causing us deep distress. We really wanted to avoid the legal option as we were already $10,000.00 out of pocket.

In his reply email, the conciliator said he had discussed the matter with the 'Dispute Resolution & Reduction Branch' and that it was possible for the BC inspector to return "provided we confine the matter to the storm water". This did not seem fair or just. All outstanding items needed to be properly addressed!

On the 22nd December 2010, we received a letter from a senior BACV conciliator from the Department of Justice saying "the matter was not appropriate to conciliate"! Interestingly, we had been assigned a different case number that conveniently enabled him to only deal with the storm water not the other serious outstanding items. Apparently, the builder had convinced the BACV senior inspector that it was not feasible to connect to another point (meaning the front of the block). Of course this was not true. Our own surveyor's report had said otherwise, and as previously mentioned all parties had been informed.

The senior conciliator never met with me to discuss my concerns or the full content of my email to BACV. He knew about the first LPD issued by the Shire in May 2009, yet makes no mention of it in his letter (22/12/2010). Nor does he mention the fact that the second LPD notice issued November 9, 2010, clearly states that drainage infrastructure already exists at the front of the property, and it is only if the storm water cannot be taken to that point, that the rear LPD option be undertaken. The deliberate omission of such important information only served to protect the interests of the builder and his plumber. Buoyed by this new allegiance, the builder and his friendly inspector quickly applied for (and were granted) a new LPD that justified the installation of a soakage pit in our back yard. No permission was ever sought from us or variation presented.

An urgent call was made to the first BACV conciliator specifying that it was a building inspector we urgently needed not a conciliator biased towards the builder. His advice was for me to "get a lawyer and go to VCAT"! I then realized that all my efforts had been in vain. Despite having credible evidence to support my allegations, the builder, his inspector, the Building Commission and BACV simply closed ranks and deflected my claims.

This was in fact, the crucial moment when the BC inspector and BACV conciliator should have intervened and used their statutory authority to properly address all issues and check the credibility of the builder and his inspector. We could have avoided the expensive, exhaustive journey that followed. This shabby, unethical treatment was also administered by the Plumbing Industry Commission. It was a struggle to make sense of their procedures as well.

In October 2010, a letter had been sent to the Plumbing Industry Commission (PIC) setting out serious issues that needed urgent attention. All relevant documents were attached. A reply came back acknowledging our complaint with a formal reference number. It was assumed the complaint would be fully investigated.

On the 25th October, 2010, I rang PIC and spoke to an employee who said they could not do anything because the house was still under contract. Further, if I wanted any information about how the builder and his plumber were responding, I would have to use their FOI mechanisms and that would cost $23.90. On the 19th November 2010, I forwarded the requested form with the money order and waited for PIC to provide the service for which they had been paid. Nothing ever came from it, not even a receipt! Numerous phone calls over many months failed to elicit any assistance.

On the 7th February 2011, a further registered letter was sent to PIC. Again I requested they investigate our complaint. It seemed they were just not interested in our ongoing distress. One year later (11/02/2012), after complaining again that no Certificate of Compliance had been issued with our Occupancy Certificate in February 2011, PIC suddenly emailed the certificate. To this day, no formal investigation of our complaint has ever been undertaken! We knew it was pointless turning to so-called Home Warranty Insurance for help. The policy actually states that cover will only be provided to the building owner, and successor, "when the Builder is dead, disappeared or insolvent"!

So having exhausted all available avenues of assistance, we were left with no option but to turn to the Victorian Civil and Administrative Tribunal (VCAT). The process of preparing for this encounter took all our savings and left us bewildered. Lawyers instructed us to obtain updated building consultant and architect reports, and arrange for our occupational therapist to undertake a further assessment. Almost eighteen months after being told by BACV to "get a lawyer and go to VCAT", we were finally able to do so. It was hoped that all matters would now be dealt with by an independent adjudicator willing to examine all the facts.

Judicial complaints handling processes: The Victorian Civil and Administrative Tribunal.

What actually transpired at the VCAT mediation meeting can only be described a scandalous! Upon arrival, a copy of a report prepared by the builder's consultant was handed to me. In similar vein to the Building Commission, they only dealt with some of the issues yet deemed our dwelling had been constructed to a "high level finish". Our building consultant and architect reports that canvassed a polar opposite analysis were not taken into account. After twenty minutes we were ushered into separate rooms.

Eventually, an offer of $15,000.00 was floated by the mediator and our attending legal advisor. It was strongly argued that to take the matter to trial (which is what I wanted) would require another $25,000.00 upfront with no guarantee of a better outcome. Effectively, justice was being denied. Under extreme duress, I signed the Terms of Settlement. Adding insult to injury, I was then advised that further legal costs would be

deduced from the settlement amount. The builder did agree to write a cheque for $15,000.00 but after the lawyer deducted an extra $7,164.69 (taking their total to more than $16,000.00), and we allowed for the $5,760.00 that the builder had appropriated from us for rendering piers that were part of the building works, I walked away from VCAT with absolutely nothing! By what fairness or equity measure could this ever be considered a just outcome?

Legal advisors said they had done the best they could to wade through the quagmire but their endeavours were futile. Over the four-year dispute period, payments to lawyers had actually set us back $24,000.00 with another $16,000.00 for building consultants, surveyors, architect and added rent when the builder inappropriately suspended the works. Whist our home is habitable, we have been left with the economic burden of having to clean up a mess that was not of our own doing. Then there is the rectification work that is expected to cost many thousands of dollars. Given we are senior pensioners with no other income stream; this will be a difficult proposition. The builder's life will not be so affected; he simply changed his business logo and now trades under a different name, comfortable in the knowledge that the building industry dispute cartel is out there if needed.

Conclusion

Seeking some form of justice within the current system has been a truly harrowing experience. The enormous pressure placed upon me to sign off at VCAT was extraordinarily destructive because in both a monetary and legalistic sense, it left me without redress and enabled the Building Commission, BACV and PIC to walk away without ever being held accountable. Regrettably, VCAT only serves to legitimate this perverse state of affairs. How is any consumer expected to navigate such an undemocratic, rancid environment?

It is evident from our experience that justice principles and ethical Benchmarks are not operating as a guide and brake against excessive consumer exploitation within building industry dispute resolution schemes. Instead, the whole process is geared to protect industry stakeholders; namely the builders, surveyors, suppliers, corporations and all their professional apologists. It is hoped that this review of the Benchmarks will bring about some critical public debate and fundamental institutional change. The building industry should be compelled to adopt methodologies that ensure consumers have access to reliable, efficient and ethical dispute resolution mechanisms. Too many people are suffering.

Margaret Singleton