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THE CASE FOR IN-HOUSE MEDIATIONS:

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Victorian Civil and Administrative Tribunal (VCAT) is unique in the Justice System in that it supplies from the public purse not only Members to adjudicate but for its Domestic Building, Retail Tenancy, Credit and Real Property Division outside independent Mediators to assist the parties resolve disputes at an early stage of the process.

VCAT uses a mixture of Member/Mediators and outside Mediators. Member Mediators are those who have been appointed as Members and will sit and hear cases in the various divisions and are occasionally used as Mediators, their chief function being to adjudicate. Outside Mediators are from an independent list and are asked to Mediate on a case by case basis.

This Article primarily focuses on the use of Outside Mediators, particularly in the area of Building and Retail Tenancies.

The philosophy of Mediation is largely based on the belief that the parties to a dispute are the best and most appropriate parties to resolve the matters that divide them. Disputes are a result of misunderstandings or a clash between various parties' needs and expectations.

In the area of Building, the clash would usually be between an owner with a vision, a budget and a final reality. Whilst on the Builder's side, it is an interpretation, a way to make a living, juggling the availability of material, workmen, time and experience.

In Retail Tenancy, the potential clash is between one party, who is occupying premises as a means to an end, that is, a profitable business, based on keeping expenses

down, whilst, on the other side, the owner wishes to maximises return on an investment.

The function of Mediation is that of a timely intervention before the dispute escalates to a level where it consumes parties' time, money and health and results in a judgment that, at best, only satisfies one party. Mediation works on the principle that the parties require an opportunity to discuss and actually listen to each other and have their needs acknowledged. The process explores the past, acknowledges the present but is focused on the future.

Whilst in an ideal world Mediation results in a win-win situation; the reality is that Mediation will assist the parties to come to a commercial settlement that both parties can live with, and move past the dispute, with the belief they have been heard and listened too.

The advantages of using a, Mediator from an IN HOUSE list are as follows:-

1. Mediators can be quality controlled. The Tribunal has the ability to set its standard so only qualified and quality Mediators are invited onto the List and given mediations. It is also able to choose Mediators from many and varied courses and life experience.
2. The Tribunal is able to continually assess Mediators' performances and actively update their knowledge and education through in-house courses and training.
3. There are no on-going arguments between the parties as to the cost or who is to be the Mediator. Debates as WHO, HOW WHY and COST can be the cause of ongoing friction. In the case of a Tribunal List Mediator the parties know they are going to Mediation, when and where it is to take place and the cost of the process

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4. The parties are aware of the type of Mediation they are receiving (in most cases it will be based on achieving a result) and can be confident of the quality of the Mediator.
5. Mediations can take place quickly and early in the process so as not to blow costs and relationships out.
6. Parties can expect that the Mediator will be familiar with the type of matters in issue.
7. Mediators have experience in both the subject matter and the process of Mediation. Academic arguments rage about whether Mediation is an "Art" or can be learnt from textbooks; the fact is that the "doing" allows for appropriate skills to be developed honed and polished.
8. Whether the parties come voluntarily or by force of an order, the fact that the parties come together with a skilled experienced mediator who will facilitate positive discussions. How they come to the mediation becomes irrelevant
9. The fact that the Mediations take place consistently enables Tribunals to keep proper statistics and assess feedback. They are able to assess "apples with apples". Whereas if different mediators are constantly used the feedback may be difficult to interpret. Whilst VCAT does not require a Mediators to provide detailed analysis, it does have statistics available as to whether the Mediation reach agreement or not, and why settlements were not reached.
10. Mediators, who see each other regularly are able to, even on an informal basis, meet and discuss their experience and are able to use each other for de-briefing.
11. The Member hearing the case can have confidence in the fact that an experienced Mediator has attempted Mediation and that the parties have been given a fair opportunity to explore settlement opportunities.
12. There is also the potential that the Member could use the service if during the hearing of a case, the Member felt the parties might benefit from further Mediation, either for the whole of the issues or for a particular point.

13. Mediators become familiar with both the legal practitioners advisors and experts involved allowing for a better understanding and running of matters. Thus Mediators can assist in educating the public and practitioners as to what is required and hopefully keep costs down.

14. Mediators are available to the Tribunal at any time and are available to meet urgent demands and to overcome any backlogs. Mediations can also be flexible in both time and place for –

a) On site mediations,

b) Preliminary sessions or

c) Have more than one session required, or

d) Out of hours mediation.

15. Mediators are committed to the Tribunal and to the system and not to any parties who have a say in appointing them. The fact is that Mediators are in business and, just as it may be argued, counsel or experts are coloured by the party who engaged them, Mediators may need to court favour with those who can influence their appointment. Tribunal appointed Mediators are free of such pressures.

16. Parties bring their prejudices and experience to Mediation. Experienced Mediators can use and harness such experience to the advantage in mediation. This is especially so with Mediators who are constantly mediating.

17. Mediators can be matched to the actual dispute, plus if a dispute requires highly technical experience, the Tribunal will appoint a Mediator to match the need.

18. The Mediator is a resource available to the Tribunal to advise as to procedures to be put in place, to enable cases to come before Mediators and Members better prepared and with relevant information.

19. There is also possibility for a tribunal to use the Mediators' skills in more flexible ways and used to test different approaches to resolving disputes. Thus, by using skills of the Mediators, conciliation services, case conferencing, caucusing,

facilitation, partial resolution, procedural matter resolutions, and even Mediation/Arbitration can be tested or tailored to a particular case.

20. The Mediator can also have a role in evaluation requirements if they need to be put in place or can be used to monitor a further Mediation after an event, e.g. completion of works.

21. The Tribunal is able to monitor and to ensure the service is cost effective to both the parties and government

Any analysis however must also look at the negatives. These negatives are often the flip sides of positives. Some of these are as follows: -

1. The cost is to the public purse. The purpose of Tribunals and Courts are to adjudicate. It is up to the parties to settle or negotiate before any such adjudication is necessary. If they or their legal advisers feel Mediation will assist, they will obtain the services of Mediators and will pay for such services. It is not for the Tribunal to do more than encourage.

2. The "user pay" principle requires the parties to vote with their pockets and be committed to the process. They cannot be committed if they are forced to attend Mediation.

3. Similarly the concept that "you get what you paid for" means that " if it is cheap the service is not worth much.

4. The parties should be free to choose who they want. The Parties are in the best position to make an appropriate choice as to the Mediator or process and should not be stuck with an imposed Mediator.

5. As a matter of fact Tribunals take little time or consideration in matching Mediators to a problem. Individual parties are able to do that far better and they know their problem more intently.

6. An inappropriate Mediator to a dispute can mean the matter does not settle. This results in another layer of costs, and, even worse, the issues become exacerbated and the dispute widens. The parties should be free to decide if they wish this level

of cost to be incurred, especially so, when parties, after a failed Mediation must go to a Directions Hearing or a Compulsory Conference or some form of further Procedure.

7. Parties coming to a forced mediation only come to test their case or see the other sides evidence. They are not there genuinely to resolve the issues
8. The Mediator doing the same thing, day in and day after, may become jaded and fall into bad habits.
9. The fact that Mediators are tied to the Court means that they have little interest in actually finding a solution and it is only a job.
10. Familiarity between the users especially Practitioners means that the Mediator or Practitioners leave the parties out of the system.
11. Also any antagonism and mistrust from a previous experience at the Tribunal between the Mediator, parties, experts or practitioners becomes intensified and takes over from resolution of the matter.
12. Statistics are self-serving. So what if the figures show a 70/80% success rate. Just by getting the parties together, threatening them with the cost consequences will bring the same result.
13. The Mediators do not have the required experience. Furthermore as Tribunal pay may not match pay elsewhere the quality and experience of the mediators is inferior to Mediators outside of the Tribunal.
14. A Mediator can pressure settlements just for the statistics. Settlement statistics look good and enable the mediator to appear competent.
15. The resources spent on mediation could be better elsewhere. Say for example in additional Members who could hear a case quickly. By its nature mediation takes time.

Whilst no system is perfect or will satisfy everyone, on balance it seems that there is a strong argument to be made for Tribunals employing outside independent Mediators for a Mediation List

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The Government claims it is committed to Alternate Dispute Processes and therefore it should be committed to funding Mediation. The danger of such a commitment and the continued demand for Mediation, could lead the Government into a ludicrous situation where it does not adequately fund such services, but feels that it must regulate Mediators to ensure standards. Or even go to the expense of setting up Community Centres to be seen as doing something. This seems to be the situation with the Federal Government with its current proposal of setting up Counseling and Mediation Services in The Family Law area and its proposed rules for qualifications of Family Law Mediators. Whilst at the same time over the years it has reduced counseling and mediation services in the Court itself.

Mediation at VCAT has been highly successful in the areas it has been used A major reason for that success has been the fact that the Tribunal has used an "In-House List of Mediators" who have become experienced and have worked well with each other and the process. VCAT should in fact look at its own experiment and examine how the service can be used and improved. It is noted, with interest, that the new Small Business Commissioner in setting up its requirement for mediation has adopted an "In-House List" when referring matters to Mediation before parties can issue. Whilst this pre issue experiment is still in its infancy its success in reducing the number of matters requiring adjudication has been impressive

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