holding redlich lawyers

commercial dispute resolution insight

march 2008

Seminars 2008

victoria

The Owners Corporation Act 2006

when
Wednesday 19 March 2008
8am - 9am

speakers
Lou Farinotti, Partner - Holding Redlich
Howard Rapke, Partner - Holding Redlich
Radhika Kanhai, Senior Associate - Holding Redlich

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Tim Smith, Marketing Assistant - Melbourne
t +61 (0)3 9321 9863

new south wales

Protecting you business when staff leave

when
Thursday 13 March 2008
7:45am - 9am

speakers
Stephen Trew, Partner - Holding Redlich

Further details please contact:
Monique Priestly, Secretary - Sydney
t +61 (0)2 8083 0473

queensland

Trade Practices Training Workshop

when
Wednesday 9 April 2008
9am - 1pm

speakers
Paul Venus, Partner - Holding Redlich
Toby Boys, Senior Associate - Holding Redlich

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The ADR edition

Why did we decide to devote this CDR Insight to ADR? The answer is simple - ADR has enjoyed enormous success and prosperity in Australia (and overseas) in the last 20 or so years and many businesses now put ADR processes, such as mediation, to the top of their list in strategies to resolve and avoid disputes within and outside their organisations. We think that it is important that we assist our clients to understand ADR processes, including how those processes can be best used to resolve existing disputes and how the processes can be incorporated into systems so as to try and reduce the costs of disputes in business.

ADR or EDR?

Historically the word "alternative" in ADR meant dispute resolution processes which were an alternative to litigation. Mediation (which involves a neutral mediator assisting the disputing parties to resolve a dispute) is the most popular form of ADR and developed out of the need to reduce the backlog in court systems around the world. Other ADR processes include expert determination (in which the parties appoint an expert to make a binding decision) and early neutral evaluation or case appraisal (where the parties appoint a neutral expert to give a non-binding opinion about the matter).

But processes like mediation are so much part of the mainstream now, particularly because courts are encouraging and even requiring parties to use mediation before trial, that the word "alternative" may now be a bit misleading. Some have suggested that more appropriate names are "Effective Dispute Resolution" or "Early Dispute Resolution". For the moment, however, ADR still seems to be the most commonly used phrase.

What is mediation and what can you do to make the most of it?

Mediation is, very simply, a negotiation between disputing parties which is facilitated by a neutral independent third party (the mediator). The parties meet usually for a few hours or over a day and attend a series of joint meetings and private meeting which are chaired by the mediator. The role of the mediator is to assist the parties to discuss the issues and reach a binding settlement agreement.

Importantly (and unlike litigation or arbitration), in a mediation the mediator facilitates the parties' discussion and resolution - he or she does not make a decision for the parties if they are unable to agree on a settlement. The mediation is held in private and is confidential, another reason which makes mediation so attractive to organisations who are reluctant to have their disputes come under the spotlight in open court. Mediation is extremely successful at resolving disputes; it is still common that about 75% of matters will settle on or shortly after the day of mediation.

So why is mediation so successful? Some say it is because the parties have an opportunity to listen to and understand each other's positions and perspectives (often for the first time) and that allows the parties an opportunity to find a solution to meet all of their needs. There is no doubt that the addition of a mediator makes a huge difference to the

negotiation process. The mediator brings to the table a level of objectivity and reason which the parties do not have. The mediator attends both joint meetings and private meetings with each party, so he or she has a "bird's eye view" of the negotiation. The mediator can test and challenge the parties about the effectiveness of the positions they take and tactics they adopt. Further still, the mediator encourages the parties to stick at the negotiation when the going gets tough.

Effective preparation

If you have agreed or been ordered to attend mediation, what steps should you take to make the most of the day? Good preparation is important. Parties are often caught out at the mediation by not thinking about a few simple things beforehand. Here is a checklist that you can use to help you prepare for mediation:

- do you know the facts? How did the dispute come about what? What facts don't you know which it might be important to find out to try and help resolve the matter?
- what are you trying to achieve? Make a "wish list" of all the things that you think you want from a resolution. Put this list in order of importance - from the most important (the thing you want most of all to achieve in resolution) to the least important (the thing that you can live without). For example, for some parties money may the most important thing, whereas to others maintaining a good business relationship or staying out of the media spotlight may take precedence over money.
- now make a similar list for the other party - what do you think will be the most important thing to them (it just might be something that is not so high on your list). What do you think will be the least important thing to them. (Making a list of the other party's wishes will help you to consider whether there is something you can give up which is important to the other party, but not so important to you).
- what will happen if you do not settle the dispute? If there is litigation on foot, what will be the cost of the litigation, both in terms of legal costs, any judgment against you and the time spent in dealing with the matter or damage to reputation or business relationships? What will be the impact on other people within the organisation or outside it?

Using ADR in business

It's a fact of life and business that at some point an organisation or its members will find themselves involved in conflict of some nature. Many organisations already use ADR processes such as mediation to resolve disputes as and when those disputes arise. But how many organisations investigate how they can incorporate ADR processes into their systems so as to try and identify and deal with potential disputes before they arise?

Some do; for example, Michael Leathes, the former head of intellectual property at British American Tabacco (a company which is no stranger to litigation!) has said that he expects the law firms who work with him to put what he calls "early dispute resolution" strategies, including mediation, at the forefront of their dispute resolution strategies.

Perhaps you can consider how ADR can be used in your business systems to try and reduce the costs of disputes. Matters that you can consider are the following:

- what disputes have we had or do we have at the moment? Where do they come from? How did they arise? Is there a repeating pattern of disputes in our organisation?
- how were those disputes resolved and at what cost (in terms of money, time and relationships)? Did you use litigation, arbitration, mediation or negotiation, or a combination of processes? How successfully were the matters resolved? What were the outcomes? What impact did the disputes have on the organisation as a whole?
- what processes could be used for resolution of the types of disputes that might arise? Which processes will be most effective? What system could be put in place to use those disputes. Are there any contracts which should include dispute resolution clauses.

Of course, we would be happy to assist your organisation to consider those types of matters and more. Just let us know if you would be interested to talk with us further on that topic.

ADR in the news

Litigation has been in the media spotlight recently as a result of some recent long running and expensive cases. Some commentators have called for rules that require companies involved in these mega-disputes to participate in mediation.

There has been significant backing to the proposition that judges be given greater powers to order big companies into dispute resolution. The aim is to save time and money taking the dispute from the taxpayer funded court room and into private negotiation.

In the recent $200 million litigation involving Channel Seven (C7), the need for greater powers for judges was highlighted. Judge Ronald Sackville, who presided over the litigation, repeatedly suggested the parties take their case to mediation; but he lacked the power to be able to order them to do so.

Following this case, then Federal Attorney-General Phillip Ruddock has also agreed that greater powers for judges allowing them to order dispute resolution are necessary.

Similarly, Victorian Law Reform Commissioner Peter Cashman said that although questions of law should still go to the courts, there was no reason why

taxpayers should have to pay when a dispute could be resolved by alternative dispute resolution (ADR).

Dispute Resolution – enforceable only where there is certainty in terms

Dispute resolution clauses are becoming common features of any commercial contract allowing businesses to resolve disputes by reducing costs and saving time. However, as cases have demonstrated, the clauses must be in certain terms or they will not be enforced by the courts.

In order to ensure that dispute resolution clauses are enforceable a number of things must be covered:

- firstly, the clause should be clear as to the rights and obligations of each party.
- secondly, there should be a set procedure for the dispute resolution detailing what parties should do, and when such a clause would be triggered. In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 it was held that mediation rules were not clear enough and therefore, the agreement between the parties was not sufficiently certain.
- finally, the decision-maker or neutral should be named in the clause. In the case, *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503, Justice Einstein refused to enforce an expert determination clause because the parties had not identified an expert or a process to select an expert. Further in *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996 Justice Einstein stated that a dispute resolution clause should also specify how the decision-maker should be paid and when the process ends.

Please contact us if you would like any further information on enforceability of ADR clauses or if you would like us to review a contract containing an ADR clause.

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