



Insight

Commercial Dispute Resolution

23 June 2010

Alternative Dispute Resolution gathers momentum

The recent push by Commonwealth and State Governments and the courts towards increased and more far reaching Alternative Dispute Resolution (ADR) processes is gaining momentum.

ADR is a general and all encompassing term used to describe any method of resolving disputes other than judicial determination, such as mediations, expert determination, without prejudice communications and meetings, case conferences and early neutral evaluations. Judges of the various courts are taking a more "hands on" approach to ADR with judges themselves taking part in mediations, making determinations in early neutral evaluations, or managing case conferences.

The legislature and the courts have highlighted that long running and expensive court litigation is not only a drain on the resources of the parties involved but also on the taxpayer-funded court system. Recent, high profile "mega-litigation" such as *Seven Network Ltd. v News Ltd.* [2007] FCA 1062 (commonly referred to as C7) has led government and the courts to make greater attempts to push parties into compulsory ADR processes which is seen as a cheaper and more accessible way of resolving disputes. In the C7 case Justice Sackville estimated that the legal costs spent on that case was about \$200 million. This case has since been referred to by the Federal Attorney General, Robert McClelland when addressing concerns relating to access to justice and the costs of litigation in the Federal Court System.¹

In May, Mr McClelland outlined a package of measures which aims to improve the effectiveness and accessibility of the justice system by focusing on ADR methods and processes.

One of these measures includes the proposal to introduce new legislation being, the *Civil Dispute Resolution Bill (Cth)* ("CDR Bill") to the Federal Court system, which would require parties to take genuine steps to resolve their disputes before issuing proceedings.

On 16 June 2010, Mr McClelland introduced the CDR Bill to Parliament. It will require prospective litigants in Commonwealth courts to lodge a statement with the court detailing what steps they have taken to resolve their dispute or, if they haven't, the reasons why.

The statements aim is to provide additional information that the court can consider when making orders and directions under its existing case management and costs powers.

Examples of 'genuine steps' to resolve a legal dispute may include:

- exchanging information between parties to more clearly identify the issues in dispute;
- considering possible resolution through mediation or conciliation;
- sending a notice of dispute outlining the issues and referencing relevant information; or
- agreeing to participate in negotiations when initiating legal proceedings.

The Bill implements recommendations of the National Alternative Dispute Resolution Advisory Council (NADRAC) and aims to complement case management powers introduced in the Federal Court last year to promote the timely, inexpensive and efficient resolution of disputes. The measures contained in the Bill form part of the Rudd Government's *Strategic Framework for Access to Justice*.

1. R McClelland, 'Second reading speech: Access to Justice (Civil Litigation Reforms) Amendment Bill 2009', House of Representatives, *Hansard*, 22 June 2009, p. 6732. See also *Seven Network Ltd. v News Ltd.* [2007] FCA 1062 at [10] per Sackville J



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This push towards ADR methods has also been adopted in the Victorian Supreme and County Courts. In the Supreme Court, the Commercial Court, a specialised division of the Court dealing in commercial matters, has introduced a system of early neutral evaluation. Early neutral evaluation is a court managed process which creates a system of judge managed evaluations of cases, on a without prejudice basis. Parties do have the option of agreeing that the evaluation will be binding on the parties.

Similarly in NSW, the NSW Law Society's Early Neutral Evaluation Program allows disputing parties to obtain a reasoned, non-binding assessment of their case from a neutral third party called an evaluator. The Program is aimed at people whose disputes are at a pre-trial stage and who want to understand the likely results of going to Court. The process is confidential. Evaluators are senior legal practitioners who are currently appointed to the Supreme Court Evaluators' Panel.

The County Court of Victoria published a recent address delivered in June, in which it highlighted that its focus was to ensure low cost, expeditious resolution of commercial disputes by Judges with experience in commercial litigation. The address went on to highlight the ability of the Court to order parties to case conferences and settlement conferences. In this respect case conferences were to be conducted by a Judge in open court and would be an avenue for parties to discuss issues of fact and law which arise. A case conference could then provide the opportunity for the parties to retire to conduct private negotiations, on a without prejudice basis. If the parties agreed the Judge could participate in these without prejudice negotiations in the form of a settlement conference. The Judge who conducts the settlement conference would not hear the trial of the proceeding.

Clearly, there are a large range of ADR processes that parties can take advantage of when faced with a looming dispute, or during court proceedings. One method of commercial parties ensuring that they take advantage of the ADR processes before ending up in court, is by the inclusion of Dispute Resolution Clause in any commercial contracts. The second article is a case study of a dispute which shows how ADR can be used in practice without going through possibly lengthy and costly court proceedings.

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