

NEWSLETTER

Legal Up-Date
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MECHANISMS FOR RESOLVING COMMERCIAL DISPUTES

Several mechanisms are available for resolving commercial disputes. Provision to employ one or more of these can also be incorporated into commercial contracts. Generally the methods are:

Negotiation

The first step in attempting to resolve any dispute should always be informal negotiations – whether by meetings or exchange of correspondence.

Mediation

Mediation provides a more *formal* mechanism: the parties appoint an independent mediator and the procedure is flexible, normally involving joint and separate sessions with the mediator who will often make observations on your case, usefully assisting settlement.

If you settle a dispute informally or by mediation, it will not be binding unless an agreement is signed by both parties.

Expert Determination

Where your dispute involves a highly technical issue you can nominate an expert to determine the rights between you. Procedures are generally informal and the expert is free to conduct his/her own investigation/evidence gathering and to make a decision “on papers only”. The determination of the expert nominated in such situations is usually binding and only subject to appeal on the ground of fraud, partiality or jurisdictional error (an error of such a nature that it takes the determination outside the terms of the contract or is a “manifest” error.)

Arbitration

This procedure is governed by the relevant State’s *Commercial Arbitration Act* and by procedures agreed by the parties. It involves the appointment of an arbitrator or panel of arbitrators to determine your rights and liabilities. It can be similar to court proceedings or as informal as the parties wish. The decision of the arbitrator is binding although there are limited rights of appeal, namely on questions of law or if there is either a manifest error of law or if a determination of error of law will add to certainty of commercial law. Further, the decision of the arbitrator can be set aside if there has been misconduct on the part of the arbitrator or in the conduct of the proceedings.

International Arbitration

If your dispute concerns international transactions you may consider international arbitration as a mechanism for resolving it. This is governed by the arbitration statute in force in the country in which the arbitration takes place or the rules nominated or agreed by the parties. The procedure is generally

no different from ‘domestic’ arbitration and can also be “on papers only” if both parties agree. International arbitration affords neutrality of venue and enforceability of the resulting award under the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958*. There are limited rights of appeal on the grounds of breach of natural justice, excess of jurisdiction or public policy.

Litigation

Litigation should only be used as a “last resort” where the parties are unable to resolve their dispute by any other mechanism because of the high costs involved and unpredictability of outcome to both parties. In formal court litigation, procedure is governed by court rules and generally cannot be varied by the parties. A magistrate or judge determines the right and liabilities of the parties, and the grounds of appeal are wider than for arbitration.

In order to add certainty to formal contractual situations, it is preferable to incorporate an alternative dispute resolution mechanism in the contract. The procedure chosen and the wording of such a clause must be carefully considered.

KEEPING QUIET WON’T KEEP YOU OUT OF TROUBLE

Silence or omitting to advise a party of a salient fact in negotiations has long been held by the Courts to constitute misleading and deceptive conduct in contravention of the Trade Practices Act 1974.

This was again confirmed by an appeal court on 24 September 2004. In this case, the Court dismissed an appeal with costs and upheld the finding that a car salesman, in omitting to advise the year of the model of the car being sold, was engaging in misleading and deceptive conduct.

The purchaser was aware that the vehicle was registered in March 2001 and had been used as a demonstration model, having driven about 1,500 km, but did not ask whether it was the latest model. The salesman did not represent that the vehicle was the current 2001 model. On subsequently realising that the car was a 2000 model, the purchaser commenced proceedings for damages for misleading and deceptive conduct in breach of section 52 of the *Trade Practices Act*.

The appeal centred on whether the conduct was misleading or deceptive when the purchaser did not ask about the year model, and whether it was a reasonable inference for the purchaser to have drawn that he was purchasing a current 2001 model.

The Court found that there was not only a failure to disclose that the vehicle was not the current 2001 model *but* there was also a failure to disclose that it was the 2000 model. The transaction concerned an expensive motor vehicle. The 2001 model had a significantly greater trade-in value than the 2000 model and its depreciated value was also significantly greater than that of a 2000 model.

In the Court's view, the circumstances of the transaction supported the inference that the buyer reasonably believed the vehicle to be the current 2001. The conduct of the salesman in all the circumstances, including that he did not expressly indicate that the vehicle was *not* the current 2001 model, amounted to misleading or deceptive conduct.

This case provides a reminder that even if you have not deliberately made a misleading statement in negotiations, your conduct in **omitting** to mention a factor of importance may constitute misleading and deceptive conduct – and this is even if you were not aware that the factor not mentioned was of importance to the person with whom you are negotiating.

THE FAMILY PROVISIONS TEST CASE

Australia has been less progressive than many other parts of the world (including even parts of the "Third World") in the rights afforded to workers with family responsibilities including the rights of women to receive paid maternity leave.

The Family Provisions Test Case was initiated by industry claims from the ACTU including:

- doubling existing parental leave standards;
- the right to return to work part-time after maternity leave regardless of previous work arrangements;
- prima facie right to change days and times of work to suit family needs; and
- prima facie right to change the work location to suit family convenience

Most of the claims by the ACTU and by employers who sought the right to deliver more flexible access to existing leave entitlements and offer overtime and penalty payments as extra leave, were dismissed by the *Australian Industrial Relations Commission* when it handed down its decision on 8 August 2005.

The Commission decided that an employee entitled to parental leave can request:

1. an extension of period of unpaid parental leave (in the case of non-primary care parent) for up to a maximum of 8 weeks;
2. an extension of the period of parental leave (in the case of the primary carer) to a maximum of 24 months; and
3. return from a period of parental leave on a part-time basis until the child reaches school age.

Further, employers must consider any of the above three requests so long as the request is genuinely based on the employee's parental responsibilities. Employers may only refuse such a request on reasonable grounds including:

- (a) the effect on the workplace or the employer's business;

- (b) costs;
- (c) lack of adequate replacement staff;
- (d) loss of efficiency; and
- (e) impact on customer service.

In determining requests regarding parental leave, employers must positively demonstrate a genuine attempt to accommodate the employee's request and give substantial reasons why they cannot meet the request.

Additionally, the case also provides up to 10 days personal leave (including accrued leave) each year to care for members of the immediate family or household who are sick or require care support or, due to an expected emergency and subject to specified conditions, are requiring support. Casual employees are also given rights to leave, extending up to two days in such circumstances.

Because the decision only applies to the award-regulated workforce, it will have to be implemented in the individual Federal and State awards by the usual "flow-on" mechanism.

Critics of the decision complain that the decision does not address the needs of those who would prefer to be looking after their children full-time when very young or those who wish to request part-time work where they are struggling with the demands of school-aged children or aged parents.

Furthermore, the applicability of the "reasonable grounds" by employers will be difficult. For example: how can a small or medium sized business predict its existence in two years' time, let alone guarantee employees' jobs? How does an employer reconcile the needs of the employee with the disadvantage if the business is one with acute skills shortages, particularly in a rural area? Ultimately, the best an employer can do is to have some written record that all possible attempts have been made to accommodate the employee's request.

Under the new *Family Provisions Test Case*, the court's decision will be allowed to operate for a reasonable period and then be subject to review. In practice, there is a chance that the decision may be thwarted by the Federal Government's planned industrial relations reforms **and** that it will be the last of its kind to be heard before the Commission.

YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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