

Enforcing the modern suite of dispute resolution clauses¹

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"... very frequently, whether it be in wills, settlements or commercial agreements ... the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling. It is then the duty of the court ... to give a reasonable meaning to the language if it can do so without doing complete violence to it."

Lord Upjohn, *Wishaw v Stephens* [1970] AC 508

Enforceability of dispute resolution clauses – the general principles

Nowadays, it is trite law that the construction of dispute resolution clauses should be "approached liberally and not narrowly" and from a starting point that requires "parties to be held to their bargain".² It is also firmly established that dispute resolution clauses, provided that they are sufficiently broad in scope, will encompass "a dispute as to the circumstances of termination of the contract, regardless of whether or not parties regard the contract as any longer being on foot".³ Only in limited circumstances will a party commencing court proceedings in defiance of a clause that mandates another form of dispute resolution procedure be able successfully to defend an application that such proceedings be stayed.

Examples of the limited circumstances in which a stay may be refused were identified by Hammerschlag J in *Dance with Mr D Limited v Dirty Dancing Investments Pty Limited* [2009] NSWSC 332 (**Dirty Dancing**) at [54], namely:

- (a) where refusal of the stay would result in a multiplicity of proceedings;
- (b) where, in the case of dispute resolution provisions that call for expert determination, the dispute is inapt for determination by an expert because it

¹ The information in this paper does not constitute legal advice and may only be used for research purposes.

² Hammerschlag J in *Cessnock City Council v Aviation and Leisure Corporation Pty Limited* [2012] NSWSC 221 at [31]

³ *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Limited* [1999] WASCA 144, the Full Court of the Supreme Court of Western Australia at [40] per Steytler J (with whom Pidgeon and Ipp JJ agreed).

does not involve application of the expert's special knowledge to his or her own observations or the area of dispute is outside of the expert's field of expertise; or

- (c) where the agreed procedures are inadequate for determination of the dispute that has arisen.

The Surprise

On 29 August 2013, Standards Australia published an “alert”⁴ advising that dispute resolution provisions in a number of its standard form contracts should be reviewed in light of the decision of the Victorian Supreme Court in *WTE Co-generation and Visy Energy Pty Limited v RCR Energy Pty Limited & Anor* [2013] VSC 314 (**WTE v RCR**). In that case, Vickery J found that a contractual clause requiring senior executives to meet ‘to attempt to resolve the dispute or to agree on methods of doing so’ amounted to an “agreement to agree”, which is unenforceable at law. His Honour refused to stay the proceedings pending the parties’ compliance with that clause.

The Standards Australia contracts affected by the case are numerous and include:

AS 2124-1992	AS 4902-2000	AS 4912-2000
AS 2160.1-1998	AS 4903-2000	AS 4915-2002
AS 4000-1997	AS 4904-2009	AS 4916-2002
AS 4122-2010	AS 4905-2002	AS 4917-2003
AS 4300-1995	AS 4906-2002	AS 4919-2003
AS 4305-1996	AS 4910-2002	AS 4920-2005
AS 4901-1998	AS/NZS 4911-2003	AS 4921-2003

This paper will consider two issues:

- was the decision in *WTE v RCR* correct?
- are there any other bases upon which the dispute resolution clauses in the Australian Standards suite of contracts may be unenforceable.

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http://www.standards.org.au/AnalyticsReports/130906%20Standards%20Alert%20General%20Condition%20of%20Contract.pdf?utm_campaign=GC_Contracts_Ruling_Sept13_HG&utm_source=GC&utm_content=&utm_medium=email&et_jobid=16374603&sf_id=0032000000lm8PKAAZ

Was *WTE v RCR* correctly decided?

Enforcing dispute resolution clauses

For some time, the orthodox approach of courts has been to hold parties to the terms of dispute resolution clauses to which they have agreed and, in doing so, approach the construction of such clauses “liberally and not narrowly”.

In this sense, a dispute resolution clause is no different from any other clause in a commercial contract. The usual rules of interpretation apply, including the rules that require a court to:

- give the contract a businesslike interpretation paying attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure (see *McCann v Switzerland Insurance Australia Limited* [2000] HCA 65);
- construe the contract as a whole and give effect to it accordingly (see *Chamber Colliery Limited v Twyrould* (1893) [1915] 1 Ch 268; *Westgate Ports Pty Limited v Port of Melbourne Corporation* [2011] VSC 331; and *Avranik Pty Limited v Lloyd* [2013] VSCA 244); and
- only hold a clause void for uncertainty as a last resort, where it is not possible to give it a reasonable meaning (see Lord Denning MR in *Greater London Council v Connolly* [1970] 2 QB 100).

The dispute resolution clause

The clause that generated the controversy in *WTE v RCR* states as follows:

Within 7 days after receiving a notice of dispute, the parties shall confer at least in the presence of the Superintendent. In the event the parties have not resolved the dispute then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation.

The case and the decision

In *WTE v RCR*, one or more disputes arose under the contract, but the nature of the dispute(s) is unclear from the face of the judgment. The defendant, RCR Energy Pty

Limited (**RCR**), sought a stay of proceedings commenced by the plaintiff, WTE Co-Generation (**WTE**), on the basis that WTE had failed to comply with the procedure set out in the dispute resolution clause prior to commencing litigation.

This issue was determined as a preliminary matter. WTE argued that the clause was void for want of certainty. The Court agreed, relevantly stating:

*[41] To my mind, subcl 42.2 of the relevant Contract, which provided that “In the event the parties have not resolved the dispute then [within a further 7 days] a senior executive representing each of the parties must **meet to attempt to resolve the dispute or to agree on methods of doing so,**” is unenforceable. [Emphasis added]*

[42] The process established by the clause is uncertain. Once the operation of subcl 42.2 is triggered, the parties are required to do one of two things, either to meet together to resolve the dispute, or to agree on methods of doing so. No process is prescribed to determine which option is to be pursued.

[43] Indeed, subcl 42.2 may indeed be complied with by the parties to the Contract without a meeting “to attempt to resolve the dispute” if instead, they meet to “agree on methods of doing so”.

[44] Further, no method of resolving the dispute is prescribed, and, as expressly contemplated by the subclause, the method of resolving the dispute is to depend on the parties further agreement as to the method to be employed.

[45] Thus further agreement is needed.”

It is apparent from this reasoning that his Honour has construed the clause as in fact requiring the parties at the meeting contemplated between the senior executives to either resolve the dispute or agree a method for doing so.

His Honour’s conclusion that the clause was void for uncertainty rests entirely on the premise that agreement on a method of resolving the dispute was mandatory in the event that the dispute itself could not be resolved at the meeting.

This is because, if it were the case that the parties were only obliged to attempt to agree on a method for resolving the dispute, then there is no reason why, following the decision of the New South Wales Court of Appeal in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 at [74], (of which his Honour otherwise approved) the court, absent other discretionary considerations, would not hold the parties

to their bargain and require them to participate in the meeting as a pre-condition to commencing litigation.

It follows that his Honour construed the clause as meaning:

‘the parties must meet to:

- (a) attempt to resolve the dispute; or
- (b) agree on methods of doing so.’

However, respectfully, such an interpretation is problematic for two reasons:

1. it leads to the conclusion that the clause is void for uncertainty, whereas there is an alternative available interpretation that means it is not; and
2. it fails to give any or sufficient meaning to the final paragraph of the clause, which states:

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute may be referred to litigation.

These are discussed in turn below.

Alternative interpretation

An interpretation of the clause as meaning (emphasis added):

‘the parties must meet to **attempt to**:

- (a) resolve the dispute; or
- (b) agree on methods of doing so’,

gives effect to the clause as a whole because it means that, absent resolution of the dispute at the senior executives’ meeting, the parties would only be required to attempt to agree on methods for resolving the dispute. Such a requirement is not an ‘agreement to agree’ and would not be void for uncertainty (see *United Group Rail Services Limited v Rail Corporation New South Wales*, referenced above).

It is respectfully submitted that this alternative construction was available and should in fact have been adopted by the Court consistently with the principle that a construction that is reasonably available and avoids invalidity on the grounds of uncertainty should be preferred over one that does not (*Greater London Council v Connolly*, referenced above).

Relevance of the right to refer to litigation

Separately, the final paragraph of the clause may, on one view, be inconsistent with an interpretation of the clause that requires the parties at the senior executives' conference, failing resolution of the dispute, to agree on methods of resolving it, because such requirement would either mean that:

- the final paragraph of the clause is redundant, since the parties have agreed on an alternative method of resolving the dispute (and this would be contrary to the application of proper principles for the construction of commercial contracts that require clauses to be construed as a whole and given effect to accordingly – see *Chamber Colliery Limited v Twyrould*, referenced above); or
- the application of the final paragraph would necessitate the agreed method of resolving the dispute to be undertaken and completed within the 14 or so remaining days between the senior executives' conference and the expiry of 28 days from the date on which the dispute notice was served – which does not appear to be a businesslike and commercial interpretation of the meaning of the clause and could be unworkable (see *McCann v Switzerland Insurance Australia Limited*, referenced above) particularly if, for example, the agreed method of resolving the dispute was referral to arbitration in the absence of any express obligation of the parties to extend the time period.

Application to the Australian Standards form

The wording of the relevant clause in the Australian Standards suite of contracts differs from the wording of the clause in *WTE v RCR* and also varies between the various contract suite series.

In AS 4300-1995 and AS 4303-2000, the unmodified form of the clause states:

Within 14 days of service of a notice of dispute, the parties shall confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.

In AS 4305-1996, the unmodified form of the clause states:

Within 14 days of the giving of a notice of dispute, the parties shall together confer with the Superintendent at least once to attempt to resolve the dispute

or to agree on resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

If the dispute has not been resolved within 28 days of the giving of a notice of dispute, that dispute shall be and is hereby referred to arbitration.

These versions of the clause are similar to the clause in *WTE v RCR* and, it is submitted, ought to be enforceable for the reasons set out above.

It is true that an issue may arise regarding the application of the deemed referral to arbitration in circumstances where the parties have, at their conference, agreed to resolve the dispute by other means, but have not done so within 28 days of the giving of the notice of dispute (see the discussion of this issue above). Presumably any agreement reached in conference would supplant the referral, but this is unclear. Nevertheless, this is not a matter that impinges upon the enforceability of the obligation to confer (as opposed to agree), nor is it identified as being relevant to the conclusions reached in *WTE v RCR*.

The unmodified form of the clause in AS 4000-1997, AS 4122-2000, AS 4901-1998, AS 4902-2000, AS 4903-2000, AS 4905-2002 and AS 4906-2002 is cast in somewhat different terms. In these contracts, the clause states:

Within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.

It is submitted that, properly construed, this form of clause is also valid and enforceable.

If the word “to” in the phrase “the parties shall confer at least once **to** resolve the dispute or **to** agree on methods of doing so” is construed as denoting the ‘result or consequence’ of the conference (cf. the eighth meaning ascribed by the Macquarie Dictionary to the word ‘to’), then the clause may be seen as requiring agreement and be invalid.

However, once again, an alternative interpretation is available, namely, one in which the word “to” is construed as denoting the ‘aim, purpose or intention’ of the conference (cf. the sixth meaning ascribed by the Macquarie Dictionary to the word ‘to’) and not a mandatory outcome. Such an interpretation would not lead one to conclude that the clause required agreement as to methods of resolving the dispute if resolution itself could not be achieved, and should be preferred over the interpretation that leads to a conclusion of invalidity (*Greater London Council v Connolly*, referenced above).

Conclusions

It is unclear whether the decision in *WTE v RCR* would be followed by other superior courts and whether the foreshadowed review of its suite of contracts by Standards Australia is actually warranted based upon that decision. The drafting of these clauses is a far cry from that which was the subject of Lord Upjohn's lament.

Nevertheless, perhaps one way of avoiding doubt as to whether a clause could be challenged on the basis of *WTE v RCR* would be to clearly spell out the obligation of the parties only to confer in good faith to attempt to resolve a dispute or to attempt to agree on methods of doing so, failing which a clearly prescribed dispute resolution procedure (such as litigation, arbitration or expert determination) applies.

It is noted that the exposure draft of AS11000:15 (intended in due course to replace AS 2124-1992 and AS 4000-1997) includes a range of optional dispute resolution clauses which are prefaced with the following:

Within 10 business days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute, if appropriate, by mediation. At every such conference each party shall be represented by a person having authority to agree to such resolution. The parties may invite the Superintendent to attend the conference. All aspects of every such conference except the fact of occurrence, shall be privileged.

If the dispute has not been resolved within 20 business days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.

It is suggested that the efficacy of the clause could be improved by asserting the words "to attempt" after the words "confer at least once" in order to address the concerns raised in *WTE v RCR*. It is also suggested that the reference to the Superintendent is needless.

Other issues affecting validity

Enforcing dispute resolution clauses involving the participation of a superintendent or architect

The decision of Vickery J in *WTE Co-generation* was based squarely upon the "inherent uncertainty" of the operation of a clause that prescribed no "method of resolving the dispute", leaving that to further agreement between the parties. This, according to his Honour, offended the basic requirement of a valid and enforceable dispute resolution clause, namely the setting out of a "process or model to be employed ... in a manner that does not leave this to further agreement".

But other dispute resolution clauses may be considered dubious for entirely different reasons. For example, dispute resolution clauses that, despite employing a detailed

process or model, nevertheless require the participation of a person or entity of who, at the time a dispute may arise, has a questionable status under the contract.

Standards Australia contracts AS 2124-1992 and AS 4300-1995 each require that the appointed superintendent give a written decision as a first step of the dispute resolution process. A similar provision, but requiring the involvement of an architect, is contained in a number of the JCC editions.

Provided that the dispute arises prior to the time at which a contract is terminated or discharged by performance, such a clause may be enforceable. However, where a dispute arises after termination (including a dispute as to the circumstances of termination) or discharge, some authorities suggest that enforceability problems may arise.

Two cases involving a form of contract based upon AS 2124 unequivocally affirm the continued application of the dispute resolution provisions of that contract despite:

- in the first case, its termination; and
- in the second, its discharge by performance after the issue of a final certificate.

The standard dispute resolution provisions of that contract require the Superintendent to give a written decision on the dispute together with reasons as a first step. A similar provision is contained in AS 4300-1995 and one requiring the involvement of an Architect appointed under the contract, is contained in a number of the JCC editions. Despite the comparative antiquity of these forms, a number of contracts based upon them remain in circulation, along with other bespoke contracts that involve entities performing superintendency type roles as part of the dispute resolution process.

In the first case, *Eastern Metropolitan Regional Council v Four Seasons Construction Pty Limited* [1999] WASCA 144 (**Four Seasons**), the Full Court of the Supreme Court of Western Australia at [40] per Steytler J (with whom Pidgeon and Ipp JJ agreed) considered that a dispute resolution clause that purported to apply to any dispute arising 'out of or in connection with the Contract' was:

... of the widest import and ... encompass[ed] a dispute as to the circumstances of termination of the contract, regardless of whether or not the parties regard the contract as any longer being on foot.

In the second case, *Western Australian Land Authority v Simto Pty Limited* [2001] WASC 136 (**Simto**), Sanderson M was required to determine whether a dispute resolution provision in a building contract continued to apply notwithstanding that the parties' obligations under the contract had been fully performed two years prior and a final certificate certifying (subject to a number of identified exceptions) that the works had been

completed in accordance with the contract had been issued by the Superintendent. Relying upon the reasoning of Steytler J in *Four Seasons*, his Honour found that the dispute resolution provision continued to bind the parties.

However, the judgments in these cases (and presumably the argument at trial) focussed upon the "liberal construction" rubric associated with the interpretation of dispute resolution clauses generally and perhaps paid little or no heed to the practical application of the clauses in question. Superior courts have separately considered the status of superintendents at varying stages of the life of a contract. On closer examination, the conclusions reached in these cases appear to be fundamentally at odds with those reached in *Four Seasons* and *Simto*.

When does the Superintendent's role under a Contract cease?

These latter decisions considered the effect of:

- termination of a contract; and
- the issue of a final certificate,

on the status of the superintendent under the contract.

In *FPM Constructions Pty Limited & Anor v The Council of the City of Blue Mountains* [2005] NSWCA 340 (*FPM*) a majority of the New South Wales Court of Appeal discussed the extent to which the powers of a superintendent survive the termination of a contract (in that case, a contract based upon AS 4300-1995). Basten JA, with whom Beazley JA agreed relevantly stated (at [185]):

...Absent some clear expression of intention that the superintendent have powers which survive termination, an inference to that effect should not be drawn. That is because clause 23, which confers powers on the superintendent, is in terms an obligation imposed on the principal. It is the principal's duty to ensure that 'there is a superintendent' and that the superintendent acts in the manner prescribed. There is nothing in clause 23 itself which suggests that the contractual obligation thus imposed on the principal continues to operate after the termination of the contract pursuant to clause 44.4. Nor, in my view, can questions of "obvious good sense" prevail over the clear intention of the specific clauses identified above.

His Honour went on (at [190]) to find that a similar conclusion should be drawn in respect of clause 47 of the contract, which governs dispute resolution.

Even where a contract has not been terminated but a final certificate has issued, it appears generally accepted that a superintendent no longer has any further role in respect of the contract – as recognised in the Victorian decision of *Southern Region Pty*

Limited v The Minister for Police and Emergency Services for and on behalf of the State of Victoria [2001] VSC 436 (**Southern Region**) at [44] per Byrne J:

The issue of the Final Certificate gives finality not only to the parties but also to the Superintendent. The Superintendent has no power to correct any error in it and no power to recall it or review it. Once it is issued the Superintendent is "to all intents and purposes functus officio": the role of the superintendent is then ended.

The same conclusion was reached by the Victorian Court of Appeal in *Ian Delbridge Pty Limited v Warrandyte High School Council* [1991] 2 VR 545 (**Delbridge**) at 550 per Murphy J, in relation to a different form of contract, which provided for an architect to exercise a similar certification role.

Both scenarios appear to fall squarely within the third category of exception to the presumption in favour of the enforceability of dispute resolution clauses noted by Hammerschlag J in *Dirty Dancing* - namely, 'the agreed procedures are inadequate for determination of the dispute that has arisen'. Indeed, if the *FPM*, *Southern Region* and *Delbridge* cases were correctly decided, the "agreed procedures" in their respective scenarios would require nothing short of the resurrection of a superintendent or architect who was otherwise "functus officio", for the limited purpose of making an interim determination. In their conventional form, such contracts do not appear to confer such restorative powers upon a principal. If such analysis is correct, it is unclear how the decisions reached in *Four Seasons* and *Simto* can stand.

Conclusions

Most of the current editions of the standard forms of contract have moved away from relying upon the participation of superintendents or other appointees in dispute resolution clauses. Indeed, where it has become *de rigueur* for principals to amend standard forms to remove any obligation of the superintendent to act independently or fairly, the participation of such an entity in dispute resolution determinations can be seen as something of an elaborate fiction.

In keeping with these developments, and so as to overcome the issues of validity raised by *FPM*, it is suggested that it would be appropriate now to remove the superintendent entirely from participation in all dispute resolution clauses – leaving the process as one completely between principal and contractor or, include an alternative dispute resolution clause that will apply only in circumstances in which the contract has been terminated or discharged by performance.

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