UPDATE ON ALTERNATIVE DISPUTE RESOLUTION FOR COMMERCIAL CONSTRUCTION DISPUTES IN VICTORIA[1]

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Introduction

1. This paper provides an update on the availability of some alternative dispute resolution (**ADR**) processes for the resolution of commercial construction disputes in Victoria.

2. The two types of ADR addressed in this paper are arbitration and early neutral evaluation (**ENE**). Whilst the paper has a focus on the resolution of construction disputes, the ADR processes referred to in this Paper are equally relevant to general commercial disputes.

3. In recent times, perhaps due to motivations involving efficient and cost-effective access to justice, there appears to be an openness to supporting the available alternative processes for resolving construction disputes by the County and Supreme Courts of Victoria. In respect of the County Court, this is reflected in the release of the Commercial Division Omnibus Practice Note PNCO 2-2022 on 1 August 2022 (**Omnibus Practice Note**). This Practice Note sets out the details for the referral of proceedings to ENE which is a relatively new ADR mechanism in the Building Cases List in the County Court. The Omnibus Practice Note also deals with the operation of the recently launched Specialist Arbitration List. The Technology Engineering and Construction (**TEC**) List of the Supreme Court of Victoria encourages a progressive and innovative approach to resolving construction disputes efficiently and cost effectively by supporting the use of ENE in appropriate cases.[2]

4. Specifically, this Paper will outline the:

[1] Paper presented in part as a panel speaker at the Victorian Bar Commercial Bar Conference: *The Long Legal Paddock: Reconnecting Town and Country* in Albury on 18 November 2022.
[2] Presentation by Her Honour Justice Stynes, Judge in Charge of the TEC List, at the Building Dispute Practitioners' Society Discussion Group on 22 June 2022.

a) increased availability of arbitration in Victoria through the launch of the specialist Arbitration List in the County Court; and

b) the process of ENE, with a particular focus on the County Court model as outlined in the Omnibus Practice Note.

5. In so doing, the Paper is intended as a practical reference to encourage both barristers and solicitors to consider:

a) the suitability of arbitration, especially for lower claim disputes in the County Court; and

b) the appropriateness of ENE as an ADR process to resolve a dispute or part of a dispute.

Arbitration

6. Arbitration is a private dispute resolution process whereby parties agree to refer their dispute to an arbitrator. The arbitrator delivers an Award which is a binding decision enforceable in a Court.[3]

7. Arbitration is traditionally accepted as a form of dispute resolution suited to construction disputes. But many civil and commercial disputes are suited to and capable of being resolved by arbitration.

8. Arbitration is an excellent alternative to the often costly and time-consuming processes of commercial litigation. Arbitration is private and confidential and gives precedence to party autonomy. Parties are able choose an arbitrator with the requisite skills and subject matter expertise to deliver the Award. Depending on the complexity of the issues and the quantum in dispute, parties may opt for a documents only Arbitration, which avoids the need for a hearing.

The new County Court specialist Arbitration List

9. In early 2021, the Commercial Division of the County Court launched its specialist Arbitration List for proceedings conducted under the *Commercial Arbitration Act* 2011 (**CAA**).

[3] Section 35 Commercial Arbitration Act 2011 (**CAA**).

10. The details are now contained in the Omnibus Practice Note[4] as well as the County Court Commercial Division referral to arbitration information sheet.

11. There are two ways parties may initiate arbitration and move into the County Court's Arbitration List:[5]

    a) the agreement under which the dispute arises involves an 'arbitration agreement'[6]; or

    b) the parties agree for the matter to be referred to arbitration.

12. Section 8 of the CAA provides that where an action is brought in the Court in a matter which is the subject of an 'arbitration agreement', the Court must refer the parties to arbitration in certain circumstances.

13. Even if the parties do not have an existing 'arbitration agreement', the parties may agree to resolve their dispute by arbitration. If so, any County Court proceedings on foot may be referred to arbitration by agreement under s 66 of the *Civil Procedure Act* (the **CPA**).[7] Specifically, s 66(1) of the CPA provides that 'a court may make an order referring a civil proceeding, or part of a civil proceeding', to 'appropriate dispute resolution'. The CPA defines 'appropriate dispute resolution' as a process attended, or participated in by a party for the purpose of negotiating a settlement of the civil proceeding or resolving or narrowing the issues in dispute, and sets out a list of examples.[8] Under the CPA, 'appropriate dispute resolution' includes 'arbitration'.[9]

14. The County Court identifies the following relevant factors which may make some cases suitable for arbitration:[10]

    a) **the dispute needs to be resolved quickly**. Arbitration may be quicker than litigation. This is particularly if the chosen arbitration scheme can deliver an Award for a fixed fee in a fixed time frame.

[4] From page 82.
[5] Omnibus Practice Note para. 488.
[6] s 7(1) of the CAA provides a definition 'arbitration agreement'.
[7] Omnibus Practice Note paras. 13 and 486 to 505.
[8] Ibid.
[9] s 3(h) of the CPA.
[10] County Court Commercial Division referral to arbitration information sheet, para 4.2.

b) **confidentiality may be a concern**. Arbitration proceedings are not open to the public to watch, and any documents not already filed with the Court will not be accessible to the public. The Award will not be published online.

c) **flexibility would assist**. The flexible nature of arbitration makes it an attractive option. The flexibility afforded by arbitration may attract parties located in regional or remote areas, that have other commitments or demands and parties that prefer to choose their own hearing schedule.

d) **the amount claimed is small**. Arbitration may be a more cost-effective option as compared to litigation. If the amount claimed is small, the issue of costs is an important factor to consider to ensure that legal costs do not exceed the claim amount.

15. Whilst the referral to arbitration requires the parties' agreement, the Omnibus Practice Note provides that the Court may encourage the parties to consider arbitration where the 'dispute needs to be resolved quickly' or the 'amount claimed is small'.[11]

16. The County Court has identified the following three arbitration schemes that parties may choose, among others available in the market, particularly for lower value disputes:

    a) Arbitration Victoria;

    b) The Resolution Institute; and

    c) The Victorian Commercial Arbitration Scheme (**VCAS**).

17. Each of the schemes offer parties a choice of arbitrators, a set of arbitration rules, capped fees for arbitrators and expedited timeframes.

18. The VCAS was launched in October 2020 by the Victorian Bar. The overriding objective of the scheme was to 'resolve civil disputes fairly, simply, expeditiously and cost-effectively'.[12] The scheme was a response to the increasing demand for quick and cost-effective ways to resolve civil and

[11] Omnibus Practice Note paras. 491 and 492.
[12] See paragraph 1.12 of The Victorian Commercial Arbitration Scheme User Guide 01 January 2022 (**VCAS User Guide**).

commercial disputes.[13] For more information, the VCAS website[14] contains resources including the VCAS Rules and the VCAS User Guide.

19. Arbitration Victoria[15] and the Resolution Institute[16] have their own websites with further information.

Early Neutral Evaluation

20. This part of the paper is intended to assist legal practitioners when considering whether an ENE is a suitable way to resolve a construction dispute.

21. Despite ENE being acknowledged in Victoria as an 'alternative dispute resolution process' under the CPA, it has had little uptake. There are various factors to explain this but given some of the distinct features it offers as compared to other forms of ADR, and the recent developments in the County Court, practitioners in Victoria should have a greater awareness and understanding of the process.

22. ENE is a relatively new ADR mechanism in the Building Cases List in the County Court and the Court is encouraging practitioners to develop an understanding of the ENE process available. Details as to the County Court process of ENE is dealt with in the Omnibus Practice Note.[17]

23. ENE is also supported as an innovative way to resolve construction disputes in the Supreme Court of Victoria TEC List. The Judge in charge of the Supreme Court TEC List, Justice Stynes has spoken publicly about the need for flexible approaches to case management to facilitate the just, timely and cost-effective resolution of disputes. Her Honour has been trying to implement more creative measures to bring parties to negotiated settlements as early as possible in the TEC List, including the use of single joint experts, early expert conclaves and case management conferences. Her Honour supports the use of more flexible and creative methods for dispute resolution, one of which is ENE.[18] Although

[13] See paragraph 1.1 of the VCAS User Guide.
[14] https://vcas.net.au/
[15] www.arbitrationvictoria.com
[16] https://www.resolution.institute/resolving-disputes/county-court-of-victoria-arbitration-scheme
[17] From page 41.
[18] See note 2, above.

ENE has not yet been utilised in recent times in Supreme Court proceedings, it will be facilitated by the Court where it is considered appropriate.

24. ENE is a determinative model of ADR. Broadly defined, ENE is a process by which parties obtain a non-binding reasoned evaluation of the merits of their case from an experienced neutral third party.[19]

25. The parties present factual and legal submissions and the evaluator gives a non-binding evaluation of the matter, including a likely outcome if the parties proceed to trial. This may include a percentage likelihood of liability or range of damages. The evaluation is provided on a confidential and 'without prejudice' basis and does not require the evaluator to determine the facts of the dispute.[20] The aim is to resolve the dispute at an early stage before significant costs are incurred. The provision of an opinion as to the likely outcome, is a key difference when comparing ENE to other forms of ADR, particularly mediation. Once the evaluation has been provided, parties are encouraged to resolve the dispute or narrow the issues in dispute.

26. ENE is particularly suited to matters involving technical legal issues such as contractual or statutory interpretation and where parties may have limited resources to run a full trial or seek an outcome urgently. It may also be suitable where the costs involved in running a relatively complex matter to trial are disproportionate to the amount in dispute. It may also be a process to recommend to a difficult client that is not accepting legal advice as to the strengths and weaknesses of their case.[21] ENE can be ordered for all or part of a proceeding.[22] It is not particularly suited to cases where credit is seriously in issue or there is an extensive dispute on the facts, as ENE does not allow for in-depth analysis of evidence.

27. The model and key features of the ENE will differ between jurisdictions. For example, who is appointed the evaluator, whether parties are compelled to

[19] The Laws of Australia para. 13.1.370.
[20] https://disputescentre.com.au/early-neutral-evaluation/
[21] 'Early Neutral Evaluation: What, why, when and how?' slide pack and seminar on 'Early Neutral Evaluation' presented by His Honour Judge Woodward, Judge in charge of the Building Cases List, hosted by the Commercial Bar Association and Law Institute of Victoria and delivered 1 September 2020 (**Seminar, His Honour Judge Woodward**).
[22] Omnibus Practice Note, para. 231.

participate in an ENE and the cost consequences (if any) of not accepting the evaluation.

CPA – order by a Court to conduct ENE

28. The CPA recognises ENE as an 'appropriate dispute resolution' process and a form of 'judicial resolution conference' (**JRC**).[23] The definition of 'appropriate dispute resolution' is set out in paragraph 13 above. A 'judicial resolution conference' by definition, is presided over by a judge, or a judicial registrar for the purpose of negotiating a settlement of a dispute.[24]

29. In the US however, the evaluator is commonly a practicing attorney and in the Magistrates' Court, a Magistrate. There are advantages of the model where the evaluator is a judicial officer as the evaluation carries significant weight. This is because the judicial officer is likely to have more standing and authority than a legal practitioner and were it not for the involvement in the ENE, could have been the judge hearing the case at the trial.[25]

30. A Court may make an order referring a civil proceeding, or part of a civil proceeding, to 'appropriate dispute resolution'.[26] An ENE may be ordered without consent of the parties.[27] But, this does not seem to be the model in the County Court. In comparison, the ENE model adopted by the Magistrates' Court in 2010[28] was an 'involuntary' process. Speaking publicly about the Magistrates' Court ENE model, the then Chief Magistrate Peter Lauristen attributed the limited uptake of ENE in other jurisdictions to the 'voluntary' nature of the process.[29] If ENE is offered, it is likely the parties will decline and opt for mediation, the entrenched form of ADR that parties know and with which they are familiar. Mediation is often the default option without the practitioners

[23] Section 3, definitions of 'appropriate dispute resolution' and 'Judicial resolution conference'.
[24] Ibid.
[25] Paula Gerber and Brennan J Ong, Best Practice in Construction Disputes, Avoidance, Management and Resolution, Lexis Nexis Butterworths Australia 2013, para 13.33 and 13.34.
[26] CPA, s 66(1).
[27] Ibid, s 66(2); Compare arbitration, reference to special referee, expert determination and any other type of ADR which results directly, or indirectly in a binding outcome.
[28] Introduced as a Pilot Program in 2010 and known as a permanent feature of the range of ADR processes from 1 July 2012. See Early Neutral Evaluation Pilot Programme, Magistrates' Court Practice Note 4 of 2010.
[29] Early Neutral Evaluation: A useful addition to the ADR smorgasbord? Public lecture presented by the Australian Centre for Justice Innovation, Peter Lauritsen, the then Chief Magistrate of Victoria with Paula Gerber, Associate Professor at Monash Law School: https://vimeo.com/109089060.

and parties perhaps making an informed decision about other forms of ADR that are more appropriate to the nature of the dispute and parties.[30]

31. The ENE is conducted 'without prejudice'. Specifically, if a Court orders that a that a JRC be conducted in relation to a civil proceeding, no evidence shall be admitted of anything said or done by a person in the course of the conduct of the JRC unless the Court otherwise orders, having regard to the interests of justice and fairness.[31] Despite the confidential nature of an ENE, the outcome of an ENE may be relevant on the question of costs and this is dealt with below in paragraphs 38 and 39.

32. The appropriate time to conduct an ENE will largely depend on the issues in the case. The earlier the ENE is listed is likely to mean less costs are incurred. But this will need to be balanced with ensuring appropriate preparation in terms of any discovery, expert evidence and the preparation of any witness statements or outlines.

County Court model

33. Replaceable orders applicable to ENEs are found in the Omnibus Practice Note.[32] If ordered, an ENE Book of Documents is prepared containing a brief agreed statement (phrased as questions) of the factual and legal issues in dispute, a chronology identifying agreed and disputed facts and documents; the relevant pleadings; and the key documents (including any expert reports) that the parties expect to rely on.[33]

34. By the time of the hearing, it is assumed that the judicial officer has read all the documents.[34] At the hearing, the practitioners identify the key issues and outline the evidence witnesses are expected to give at the trial. Procedurally, an ENE proceeding is less formal than a trial. It involves a presentation of submissions on behalf of each party, limited agreed documents and evidence and no cross examination. It is an interactive and inclusive procedure.[35] The

[30] Ibid, per Paula Gerber, Associate Professor at Monash Law School.
[31] CPA, s 67.
[32] See para 235.
[33] Omnibus Practice Note, para. 235.
[34] Ibid, Replaceable Orders H.4A(8)(a).
[35] Note 21 above, His Honour Judge Woodward.

judicial officer may ask question and test submissions of the legal practitioners and invite parties to answer questions.[36]

35. The rules of evidence do not apply.[37]

36. ENE hearing should be attended by the parties or a representative of a corporate party with full authority to make decisions as to the conduct of the proceeding or to settle it.[38] Given the aim is to resolve the dispute, it is important that the parties have been present to observe the process and hear the judicial officer's questions, comments and evaluation.

37. In the County Court, the parties can expect brief written reasons within a week but possibly by the end of the day.[39] Depending on the case, it may be a binary evaluation as to which party is likely to succeed or, an analysis more akin to advice on liability and evidence.[40]

38. The non-binding nature means that one or more parties can decide not to abide by the evaluation. If so, despite the confidential and 'without prejudice' basis of the ENE, if a party fails to improve on the outcome of the ENE at trial the evaluation can be ordered to have cost consequences.[41] Alternatively, the evaluation can be used by the parties to frame a Calderbank offer or offer of compromise.

39. The Omnibus Practice Note provides the following Replaceable Orders:[42]

    a) A party who is dissatisfied with the evaluation may elect to proceed to trial by serving a Rejection Notice within 14 days of the date of delivery of the evaluation.

    b) If no Rejection Notice is given, the evaluation will bind the parties and will operate as a judgment and order of the Court.

[36] Omnibus Practice Note, Replaceable Orders H.4A(8)(b).
[37] Ibid, Replaceable Orders H.4A(8)(d).
[38] Ibid, Replaceable Orders H.4A(7)(a).
[39] Note 21 above, His Honour Judge Woodward.
[40] Ibid.
[41] Omnibus Practice Note, para 234.
[42] Replaceable Orders H.4A(11)-(14).

c) If a Rejection Notice is given, the evaluation has no further effect and the proceeding is decided by the Court as if it had never been referred for ENE.

d) Unless otherwise ordered, having regard to the interests of justice and fairness, if the Court's judgment at trial is not more favourable overall to the party that gave the Rejection Notice than the evaluation, then r 26.08 will apply as if the judicial officer's evaluation was an offer of compromise made to the party that gave the Rejection Notice.

40. In the absence of these orders being made, after the ENE, the parties ordinarily try to resolve the dispute and must inform the Court whether it has settled within 14 days.

Advantages of an ENE

41. There are advantages of an ENE over other types of non-binding alternative dispute resolution. Some of these are explained in the English High Court decision of *Seals v Williams* [2015] EWHC 1829 (Ch):

> [A] judge will evaluate the respective parties' cases in a direct way and may well provide an authoritative (albeit provisional) view of the legal issues at the heart of the case and an experienced evaluation of the strength of the evidence available to deploy in addressing those legal issues. The process is particularly useful where the parties have very differing views of the prospect of success and perhaps an inadequate understanding of the risks of litigation itself (at [3])
>
> [T]he expression of provisional views – with a view to assisting the parties – reduces the areas of dispute and the general scope of the argument, and is an inherent part of the judicial function both in civil litigation and in criminal proceeding (at [6])

42. There is other commentary, based on the experience in the US that where parties have adopted highly disparate views of the value of a case, an evaluation by neutral third party may offer greater assistance than resolving the case through mediation.[43]

[43] K Engro and L Lenihan, 'Understanding Early Neutral Evaluation in the Western District of Pennsylvania' (2008) 10(3) Lawyers Journal 3, page 3.

43. The ENE process has the benefit of the formality of a Court setting before a Judge which affords parties their 'day in Court'.[44] In this way, the ENE may satisfy the need for parties who place a significant value in being heard by a person in authority whose role is to pass judgment rather than a mediator who they may feel simply wants to get the case settled. For some parties:

> "the passing and pronouncement of judgment may be necessary to clear a psychological block, to experience vindication and erase guilt or second guessing, or to begin weaning themselves from unrealistic hopes or avaricious expectations. For such clients, ENE may contribute more than mediation to clearing a path forward.[45]

44. As with other forms of ADR, there are costs savings of a trial if the dispute is resolved at the ENE. If the ENE does not resolve the entire dispute, it may assist to narrow the issues in dispute and provides the parties with an opportunity to assess the case.[46]

45. Before engaging in an ENE these benefits need to be considered and balanced against the risk and costs involved in running an ENE, but one party not accepting the outcome.

Conclusion

46. ENE and Arbitration are alternative approaches to resolving disputes by trial in a Court. They both have benefits and may be appropriate depending on the parties and the case involved.

47. Given the developments in the County Court and the innovative approach to resolving disputes in the TEC list of the Supreme Court, practitioners are encouraged to be open to consider whether ENE may be appropriate on a case-by case basis. In respect of proceedings in the County Court, the new arbitration List is a development which can provide a cost effective and timely resolution, particularly in cases where the costs of litigation are significant as compared to the quantum in dispute.

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[44] W Brazil, 'Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?' (2007) Dispute Resolution Magazine 10, 14 and 15.
[45] Ibid, page 15.
[46] Note 21 above, His Honour Judge Woodward.

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