

Access to Justice Arrangements

**SUBMISSION by the OFFICE OF THE AUSTRALIAN SMALL BUSINESS
COMMISSIONER**

NOVEMBER 2013

We are writing to provide some observations on small business access to justice. Although our focus is on commercial disputes in a small business context, these observations may also have relevance to other types of dispute.

Small business disputes are about relationships

At their core, small business disputes are about business relationships. An effective outcome in a small business dispute is generally not about finding fault and returning parties to a position that they would otherwise have been in, but restoring business relationships. If you focus on financial recompense in small business disputes then you miss the main game – the opportunity to have the parties continue to deal commercially with each other.

This means that alternative dispute resolution which operates with speed, at low cost, informally and collaboratively will generally be of greater benefit to small business – principally because it facilitates parties continuing their commercial relationships. Also, the potential cost of legal proceedings will in many small business disputes outweigh the amount in dispute. Drawn out legal proceedings with the possibility of appeal will generally also mean that the parties do not deal with each other commercially while the action proceeds and the breaking of this business relationship is likely to persist beyond.

Small business disputes can be difficult to resolve

Small business disputes do not generally arise in the ordinary course of operating a small business. They arise periodically and in unusual circumstances. Accordingly, small business operators may not identify an emerging dispute until a late stage and they will not necessarily have developed the skills to resolve the dispute.

For these reasons, we support the approach adopted in the Issues Paper that stresses the importance of education and information, and the linking of disputes with their underlying causes. Through education and by adopting good business practices, small businesses can operate in ways that avoid disputes arising. A good example of this sort of approach is given in the Issues Paper – the inability of a business to budget may give rise to debt issues and disputes. By receiving education around how to budget and using good budgetary management, a business will remove the fuel for disputes to arise in this area.

We also note that the Victorian Small Business Commissioner (the VSBC) has produced a constructive, educative study, entitled *Forming and Maintaining Winning Business Relationships*. The report identifies key behaviours to assist forming and maintaining successful business relationships, and emphasises pre-agreed dispute resolution processes as an important behaviour. The report can be accessed on the VSBC's website.

Disputes hit small businesses hard

The cost of a dispute for small business is not merely the financial cost of the lost business and the cost of pursuing resolution (such as legal costs), but also the opportunity cost and emotional stress involved. The opportunity cost includes what the small businessperson would otherwise have achieved for the business using their time and effort. For small business, resolving a dispute takes someone out of the business. Added to this cost is the emotional stress that disputes have on small business operators.

The emotional impact of disputes on small business operators should not be underestimated since operators tend to be fully invested in their business and a business dispute can often be perceived by the small business operator as a personal attack on their own integrity. Even when this is not the case, a small business dispute has the capacity to require significant time and financial resources of the operator which has its own emotional impact.

The closeness between the identity of the operator and the business also means that relatively small disputes have the capacity to bring down an entire business. When disputes are viewed with a degree of separation, a businessperson can treat a dispute like they would any other business issue and manage it as a business cost. However, when a dispute becomes a personal issue, good business sense may evaporate and parties can be locked into requiring a “complete win with vindication”. This means that rational decision-making based around costs and benefits is lost. We have examples of small business disputes that should not overwhelm the businesses, but when taken personally the undue investment of resources in the disputes can grind the businesses to their end.

Alternative dispute resolution

Alternative dispute resolution (particularly mediation) can be of significant benefit in small business disputes because it helps preserve business relationships by:

- Being used as a tool for early intervention;
- Focusing the parties on what is commercially important (not every legal issue) and not needing to follow legal approaches;
- Control remaining with the parties to the dispute;
- Allowing for creative outcomes that are commercially realistic/pragmatic (not being about finding fault and “winning”); and
- Being confidential and not setting a precedent. For example, this can be of benefit in franchising and landlord issues. A franchisor can settle a dispute with a franchisee and not set a precedent in dealing with all other franchisees. Similarly, a landlord who wishes to settle a dispute with a tenant does not expose themselves to similar claims by other tenants

The success rate of mediation of small business disputes can also be extremely high. Mediation conducted or organised by the State Small Business Commissioners consistently exceeds 80%. It also can be more effective than other approaches, like test case funding, since it can apply in any dispute and not merely to issues that are gauged to have sufficient “legal merit”.

Small businesses can help themselves by getting support

There is much within the control of small businesses to avoid disputes. They can:

- 1) Dispute-proof their business by adopting professional business practices (for example, by ensuring clarity in contracting and invoicing);
- 2) Identify likely disputes early (for example, by maintaining regular and clear channels of communications with customers);
- 3) Know what to do when a dispute arises – and when to let go (for example, through education and familiarity with resources that can assist when disputes arise); and
- 4) Identify the financial cost of disputes as a business cost that can be managed in a way similar to other business costs.

With disputes, prevention is better than cure. Dispute proofing a business is one of the most effective means of combating disputes and the beauty of this is that it is within the power of the business operator. The Commissioner often illustrates this idea through the example of seeking legal advice on a real property lease agreement. When small businesses consult their lawyer, their approach is often to get a “yes” or “no” and get out of there quickly to avoid additional legal charges. However, entering into a lease is an important decision for a business and it will have continuing implications whilst the business operates out of the premises. A practical approach to help to dispute proof a business in a situation like this is to have the lawyer highlight in different colours what the lessor must do and what the small business must do. Having this sort of approach to the lease document provides clarity of the obligations and allows small businesspeople to return to the document in the future and more easily find their way about.

Dispute resolution portal

Our Office is working with the states and territories to create a “dispute resolution portal”. This online portal will consolidate dispute resolution information, resources and services available for small businesses across Australia. The single portal will provide an easy tailored access to the most appropriate low cost services available to resolve disputes, general information on dispute resolution processes and strategies for avoiding and managing disputes. This will assist businesses in avoiding disputes and knowing how to get support if one arises.

Conclusion

Although a potential answer to the question of access to justice is to make access speedier, simpler and cheaper, it is of even greater benefit for small businesses to get education, adopt good business practices and develop approaches to avoid disputes arising. When a dispute does arise, businesses then may have the ability to recognise the importance of business relationships, treat the dispute like any other business issue, seek advice and look for speedy resolution through mediation or other means.

It is also worth noting that, although the focus of this submission is on business-to-business commercial disputes, government often act in a business-like manner (for example, when procuring goods and services). When acting as a business, governments can use the opportunity to display leadership and act as a model business. In particular, governments can seek to resolve disputes early and use best practice in doing so.