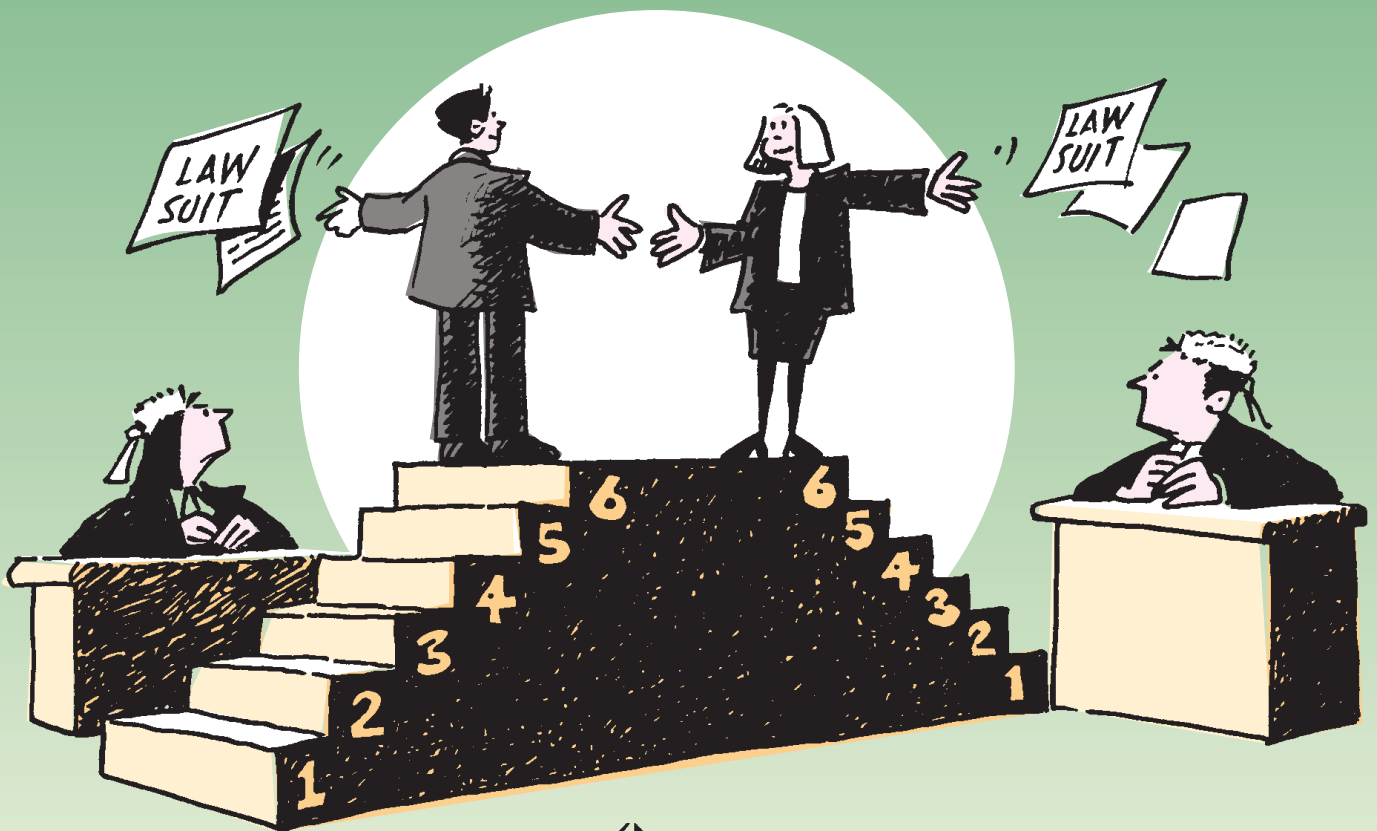




Resolving Small Business Disputes

SIX STEPS TO
SUCCESSFUL DISPUTE RESOLUTION



Department of
Employment,
Workplace Relations
and Small Business

OFFICE OF SMALL BUSINESS

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SUCCESSFUL DISPUTE RESOLUTION

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RESOLVING SMALL BUSINESS DISPUTES

Good Business Management Includes Good Dispute Management

Problems arise every day between businesses, their customers, suppliers, partners and employees. Most of these are dealt with quickly and efficiently through common sense. A small percentage, however, escalate into a dispute. Disputes that remain unresolved may start affecting the profitability and productivity of the business.

This booklet aims to help small business resolve their disputes as quickly and as cheaply as possible, and to implement good business practice with respect to disputes that may arise.

Traditional Dispute Resolution for Small Business

Although small businesses often have legal recourse in disputes, their access to justice can be constrained by the cost of going to court, the long time and delays before their case is heard, the disparity in the quality of representation and their need to preserve business relationships. In many cases, neither party achieves a satisfactory result from a Court judgement.

The Benefits of Alternative Dispute Resolution

The thrust of the booklet is to encourage and help small business to use 'Alternative Dispute Resolution' (ADR) instead of litigation, where it is appropriate. In most cases ADR can offer small businesses a low-cost, quick and flexible system for resolving disputes. ADR is a viable alternative to litigation, typically achieving a success rate of around 80%, without costly and time-consuming legal action. For example, some studies show that using ADR in a dispute can cost as little as five percent of the cost of going to court.

ADR processes seek to produce a negotiated settlement between the parties in a manner that encourages common-sense, practical solutions and preserves business relationships. A neutral party (usually a mediator) helps the parties find a settlement that both can agree to, within a fully confidential process.

ADR provides the parties in a dispute with total control over the outcome, removing the uncertainty that comes with a Court case and judgement. Where an agreed settlement is not achieved, the parties retain their full rights to proceed with legal action.

This booklet should help you to resolve your dispute through six simple steps.

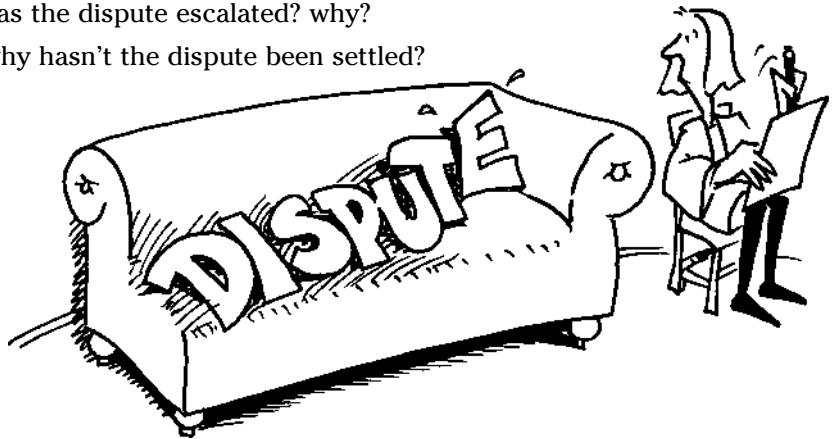
understand your dispute

Good business management involves good dispute management. A good understanding of your dispute will enable you to take control of the dispute and make an informed decision about the most appropriate way to resolve your dispute.

The steps set out below will enable you to better understand and resolve your dispute. 'Dispute Characterisation' (page 4) and 'Case Studies' (page 22) provide typical dispute scenarios and may also be of some use in understanding your dispute. These scenarios illustrate the type of disputes that are typically well suited to Alternative Dispute Resolution (ADR).

WHY DID THE DISPUTE ARISE?

- list the sequence of events leading up to the dispute
- document the facts
- has the dispute escalated? why?
- why hasn't the dispute been settled?



WHAT ARE THE REAL ISSUES?

- document the most important issues you need to resolve, in order of priority
- think about the issues from the perspective of the other party

WHAT DO YOU WANT TO ACHIEVE?

- document what you would like from the other side in terms of a 'preferred outcome'
- think in terms of your 'needs' rather than your legal rights
- consider the impact of your preferred outcome on all parties – is this reasonable?
- consider your preferred outcome in terms of impact on profitability, productivity, future business and personal relationships, time and resources
- will the preferred outcome resolve the dispute in the long-term?

REALITY TEST

- play devil's advocate – are you being realistic about the strength of your position?
- is your preferred outcome a reasonable proposition?
- discuss the dispute with a trusted adviser – do they agree with your position?
- are you allowing anger or disappointment to cloud your perspective?

You should now have a clearer understanding of your dispute and what you want to achieve in terms of dispute resolution. The following pages provide an overview of the dispute resolution methods that are available to you and provide a summary of disputes that typically arise in small business making reference to case studies.

What types of disputes commonly arise in Small Business?

In every small business, disputes will arise as part of your business relationships with suppliers, landlords, partners, or customers. The types of disputes vary by industry, however they generally fall into a number of broad categories.

• FINANCIAL

The fundamental cause of business disputes is poor profitability. The reasons for a decline in profit can be market driven or resulting from the actions of one of the parties, either way it often results in disputes over the ability and/or willingness to pay accounts.

*Refer to case studies pp 25 and 27– **Banking and Government.***

• BREACHES OF SPECIFIC TERMS OF THE CONTRACT

Contracts can vary from a simple supply agreement to a more restrictive business format franchise, however, they all place obligations on the parties to meet performance standards. Disputes may range from serious (eg. breach of termination provisions) to every day disputes (eg. involving the provision of goods and services).

*Refer to case study p 29 – **Franchising.***

• PRODUCTS

Goods or services are traded between suppliers and customers. Throughout the process disputes can arise regarding the quality, price, range, delivery, packaging, and customer service.

*Refer to case study p 31 – **Supply Contracts.***

• LEASES

The relationship between landlord and tenant is often difficult and can result in disputes across a range of issues including rental, lease term, relocations, redevelopment, quality and maintenance, renewals, annual increases, fit-outs, and terminations.

*Refer to case study p 23 – **Retail Tenancy.***

• MARKET PLACE

Rapid changes in market conditions, including the introduction of new products and technologies, place great pressure on small business to cope. As competition increases sales and margins can decrease, having a negative impact on the business relationships of small operators and providing a fertile breeding ground for disputes.

• RELATIONSHIPS

Although there are often business factors influencing the breakdown in a business relationship, a breakdown may result from a fundamental disagreement over the growth or direction of the business which will need to be resolved for the business to operate effectively.

*Refer to case study p 33 – **Partnerships.***

• DECEPTIVE AND MISLEADING CONDUCT

These disputes usually arise when a recently acquired business fails to meet the expectations of the purchaser/operator. Disputes typically focus on the disclosure and offer statements at the time of purchase.

• UNCONSCIONABLE CONDUCT

Involves the abuse of power in a commercial relationship by the dominant party who deliberately takes advantage of the weaker party to gain a commercial advantage.

• WORKPLACE RELATIONS

This covers the whole range of issues including such areas as unfair dismissal.

*Refer to case study p 37 – **Workplace Relations.***

• INTELLECTUAL PROPERTY

Breaches of intellectual property and copyright.

There are many ways to approach dispute resolution. The great majority of problems encountered by small business are resolved through simple discussion and common sense between the parties and do not escalate into a dispute.

In virtually all instances, small businesses should at first attempt to resolve their disputes through direct discussion and negotiation.

However, disputes will occur where there is a lack of communication, where there are unrealistic expectations or where there is a grievance that cannot be resolved through direct discussion.

When a dispute occurs, each party has a choice about the dispute resolution method that they would like to pursue. Unfortunately, litigation is usually the norm and dispute resolution is often approached as a matter between lawyers and the Courts. There are, however, a variety of other approaches available which may save time and money and preserve business relationships.

Dispute resolution options for small business range from negotiation-based methods, where the parties have full control over the outcome (generally known as 'alternative dispute resolution' - ADR), to adversarial methods where the parties have less control over the outcome (such as arbitration and litigation). Where a negotiated settlement is reached through ADR, the terms of the settlement, once agreed and signed by the parties, are legally binding and can be enforced if necessary.

The chart below sets out some of the advantages and disadvantages of different approaches to dispute resolution.

ADVANTAGES & DISADVANTAGES OF DISPUTE RESOLUTION METHODS

ADVANTAGES

METHOD

DISADVANTAGES

- Parties Control Outcome
- Time - Efficient
- Cost - Efficient
- Confidential
- Maintains Business Relationships
- Non-Adversarial, Informal Process



Alternative Dispute Resolution (ADR)



- Does Not Establish Legal Precedent
- Not Open To Public Scrutiny
- Not Appropriate For Fraud Or Criminal Behaviour

- Appropriate For Fraud Or Criminal Matters
- Can Establish A Legal Precedent
- Appropriate Where One Party Has No Intention Of Compliance



Adversarial Approaches

- litigation
- arbitration



- Parties Have Limited Control Over The Outcome
- High Cost & Lengthy Process
- May Destroy Business Relationships

A more detailed definition of dispute resolution methods follow.



AN EXPLANATION OF ALTERNATIVE DISPUTE RESOLUTION METHODS

ASSISTED NEGOTIATION

The parties engage a professional negotiator or 'go-between' to assist them reach a desired result. It is usually informal and the negotiator can either be appointed by one party or both. In the latter situation he/she is a joint negotiator. This method is often helpful in smaller disputes where parties are still talking to one another and need help to break an impasse, and where they have identified all the issues to be negotiated.

MEDIATION

Mediation is a process where an independent person is used to assist the parties in dispute to find a mutually acceptable solution. The mediator will systematically work through the issues, help identify alternatives, and facilitate final agreement. The process is non-adversarial and focuses on the parties' resolving the dispute themselves using the skills of a mediator. The key principle of mediation is that the parties work together to arrive at an agreement that suits both. This is in contrast to litigation and arbitration where a judge or arbitrator imposes a decision which may be disappointing for one or both parties.

A mediator is appointed by the parties to help establish effective communication and by doing so find a solution which satisfies both their needs and interests. The informal process is speedy and cost effective and caters for on-going business relationships.

INTER-MEDIATION

Similar to Mediation in concept but more sophisticated. The neutral third party closely interacts with the parties in dispute to assess all relevant material, identify key issues, and most importantly, helps to design a process that will lead to resolution of the dispute.

The process involves separate meetings with the parties to conduct extensive reality testing, and analysis of parties' legal, commercial and financial positions. The process utilises creative thinking techniques and is suitable for more complex, large or sensitive matters.

FACILITATION

The parties appoint a neutral facilitator to manage the dispute resolution process, identify issues and apply specialist techniques to achieve the desired outcome. The facilitator assists by preparing an agenda, chairing meetings, distributing relevant information between the parties and steering them to reach agreed objectives. The process is less formal and more flexible than Mediation. It has wide application and is often used where there are several parties or groups involved with differing points of view, such as creditors or multi-party claimants, joint venture negotiations, and environmental and planning disputes.

EXPERT DETERMINATION/RECOMMENDATION

The parties agree to an independent expert to provide a report on specific aspects of a dispute by examining relevant documentation and material. The expert is usually commissioned to report on technical matters such as standards, compliance, quality specifications, quantification of loss or similar issues. The expert may be asked to provide a recommendation or a determination on the matter depending on the circumstances.

PARTNERING

Often used for long term contracts or in the building/construction industries and in joint venture type projects. A Partnering agreement or charter is based on the parties' need to act in good faith and with fair dealing with one another. The Partnering process focuses on the definition of mutual objectives, improved communication, the identification of likely problems and development of formal problem solving and dispute resolution strategies. It is useful, for example, where there is a need to complete a technical or building project with a minimum of disruption and cost and within a tight time frame.

AN EXPLANATION OF ADVERSARIAL DISPUTE RESOLUTION METHODS

LITIGATION

Litigation is an adversarial legal process conducted in a Court of law, in accordance with strict procedures, where the parties present legal arguments and evidence to support their claims before a judge. The judge applies the relevant law to the evidence, resulting in a judgement in favour of one of the parties involved.

ARBITRATION

Arbitration is an adversarial process, agreed by the parties in dispute, in which each party presents legal arguments and evidence, in accordance with formal procedures, to a mutually agreed arbitrator. The arbitrator makes a determination in favour of one of the parties. This determination is usually legally binding.

The next page, Step 3, will assist you to determine which dispute resolution method is most appropriate for your dispute.

3

select a dispute resolution method

This section is designed to help you select the *most appropriate* dispute resolution method for your dispute. Please work through the steps methodically and if additional information is required, contact one of the Alternative Dispute Resolution providers listed on pages 11-17.

With regard to your dispute:

Would you rather negotiate a settlement than go to Court?

YES

CONTINUE

NO

SELECT
LITIGATION

Is any aspect of the dispute about a potentially 'criminal'* matter, as opposed to a 'civil' matter? (*criminal matters can usually be defined as those that may warrant police involvement).

YES

SEEK LEGAL
ADVICE PRIOR TO
CONTINUING

NO

CONTINUE

Do you need a binding legal interpretation of a fundamental contract clause?

YES

SELECT LITIGATION
OR ARBITRATION

NO

CONTINUE

Do you have a contract that requires arbitration to resolve any dispute that arises?

YES

SELECT ARBITRATION

NO

CONTINUE

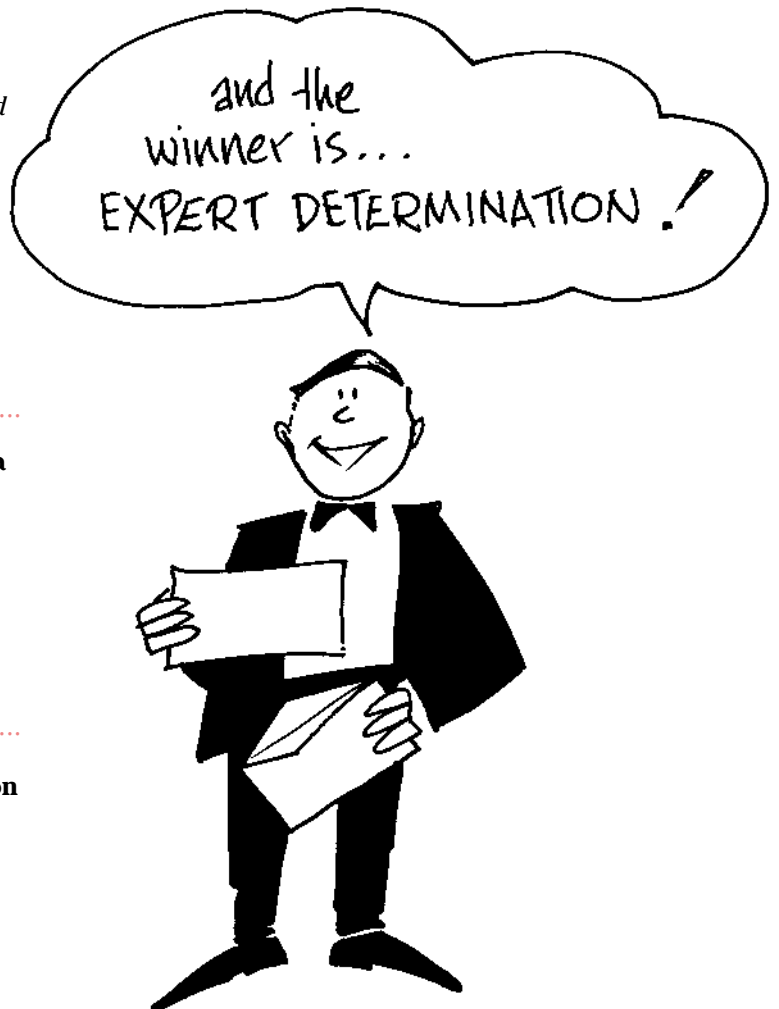
Are you seeking to establish a legal precedent?

YES

SELECT LITIGATION

NO

CONTINUE



Is there a risk that a Court decision will not provide you with your <i>preferred outcome</i> ?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
Is it important to maintain an ongoing business relationship?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
Would it benefit your business to have the matter settled quickly?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
Is the cost of settling the dispute an important factor?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
Publicity about the dispute or its outcome should be avoided.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
The dispute lends itself to a realistic, commercial settlement rather than a Court's legalistic decision.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
A full appreciation of my needs, interests, concerns and expectations, rather than legal rights, is most important.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
A mediator may help defuse emotion or hostility which otherwise may hinder a settlement and could improve communication between the parties.	<input type="checkbox"/> YES	<input type="checkbox"/> NO
Will direct negotiations or continued inaction deepen into litigation, increase hostility and inflexible positioning by either party?	<input type="checkbox"/> YES	<input type="checkbox"/> NO

IF YOU HAVE SELECTED 'YES' FOR ANY QUESTION THEN GO TO THE ADR OPTIONS BELOW

ALTERNATIVE DISPUTE RESOLUTION (ADR) OPTIONS

If you have progressed this far through the checklist it should by now be apparent that an alternative dispute resolution (ADR) approach would be beneficial for the resolution of your dispute.

There are a large number of ADR methods which may be appropriate depending upon the particular circumstances of your dispute, including mediation, assisted negotiation, inter-mediation, facilitation, expert determination and partnering.

The information below will assist you to select the most appropriate ADR method for your dispute.

SELECT ASSISTED NEGOTIATION	If ongoing negotiations are deadlocked or <i>bogged-down</i> over sticking-points, which a joint negotiator/mediator may help resolve.
SELECT MEDIATION	If you are willing to work with the other party, with the assistance of a mediator, to identify issues, develop options, and try to reach an agreement.
SELECT INTER-MEDIATION	If the dispute is relatively large, complex or sensitive and would benefit from independent analysis, reality testing, a fresh perspective and creative input.
SELECT FACILITATION	If there are many parties or groups involved and many issues in the dispute. If there is a need for assistance or independence in the exchange of information, agenda setting, communication processes or the chairing of meetings.
SELECT EXPERT DETERMINATION OR RECOMMENDATION	If the dispute involves technical issues, such as standards, compliance, quality specifications, quantification of loss or similar issues and would benefit from independent expert advice, determination or recommendation.
SELECT PARTNERING	If a long-term working relationship and/or mutual goals are at risk. If there is a major project that must be completed within a tight timeframe and with minimum disruption. If it is important to maintain trust and effective communication in the working relationship.

If you find yourself in a dispute that is threatening to damage your business you should seek independent advice. Most small businesses in legal disputes consult a solicitor. The box below offers you some questions to ask your solicitor about ADR.

QUESTIONS FOR YOUR SOLICITOR

1. I've read the Small Business Information booklet on Alternative Dispute Resolution and I believe my dispute can be resolved by one of the ADR options referred to; what option do you think is the most suitable for my dispute?
2. If your solicitor disagrees that ADR is suitable then ask, "Please give me your reasons why none of the ADR options referred to in the booklet are suitable".
3. If your solicitor advises you that Court proceedings (litigation) is the best option for resolving your dispute, then ask:
 - a. What are your reasons for supporting litigation?
 - b. What are your estimated legal fees and disbursements and barrister's fees?
 - c. How long will it take to get my dispute heard by the Court and in which Court?
 - d. Will my case involve a lot of preparation work which could take up a lot of my business time and resources?
 - e. Are you confident I'll win my dispute if it goes to Court. Are my chances better than around 70%?
 - f. If I lose the case, how much will it cost me - my legal fees and the other party's costs and what impact could it have on my business?
4. If you were in my shoes and wanted to get on with developing a business, what would you do with the dispute - try ADR first and if it doesn't work then litigate, or go straight to litigation?

Note: It is recommended that if your solicitor advises you that litigation is best for resolving your dispute, that you should ask for a letter of advice from your solicitor setting out his/her supporting reasons, your likely costs, your chances of success and when the matter is likely to come before the Court.

Please also note that the Dispute Resolution Advisers set out on pages 11-17 will be able to provide you with independent advice on your dispute resolution options.

If you are still unsure of the most appropriate dispute resolution method for your dispute, or if you would like to obtain additional information on any of these options, the 'ADR providers' listed on pages 11-17 will be able to provide advice.

Section 4 also provides information on assistance that is available from industry associations.

4

access an alternative dispute resolution provider

Small businesses have traditionally been reliant on their solicitor or accountant for advice on dispute resolution, however, there are many other sources of professional dispute resolution advice that small business may access.

Contact details for dispute resolution advisers and providers are set out under the following categories:

Industry Associations

Some Industry Associations provide assistance or advice to their members who may be in dispute. Details of these services are provided.

Specific Advisers/Providers

These are Government or Industry funded agencies that provide dispute resolution advice or services in specific circumstances or for specific industries only.

Alternative Dispute Resolution Providers

There are a range of other alternative dispute resolution providers whose business it is to help resolve disputes through non-legalistic processes. These providers can advise or assist small business in many aspects of dispute resolution.

Industry Associations

Some industry associations provide assistance to their members when disputes arise. The following associations provide information on their ADR services to members. Other associations also offer advice and/or assistance to members.

ACT AND REGION CHAMBER OF COMMERCE & INDUSTRY

- general advice and assistance for small business
- provides dispute resolution services

Tel 02 6282 2199

Fax 02 6282 2436

www.actchamber.com.au

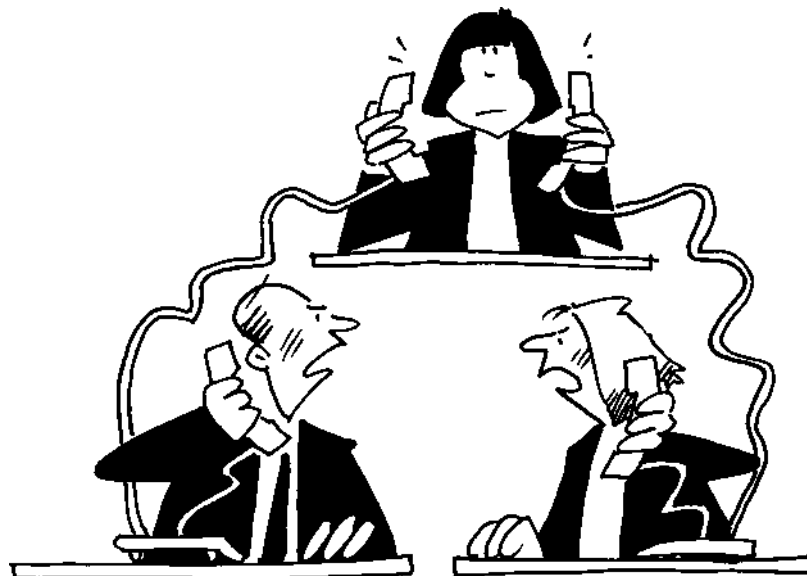
ASIA PACIFIC SMART CARD FORUM

- the Forum has established a Code of Conduct for the Smart Card Industry
- this Code provides for the mediation of disputes that arise within the industry
- Secretariat services for the Forum are provided by the Australian Electrical and Electronic Manufacturers' Association (same phone number)

Tel 02 6247 4655

Fax 02 6247 9840

www.smartcardforum.asn.au



<p>AUSTRALIAN ASSOCIATION OF PERMANENT BUILDING SOCIETIES</p> <ul style="list-style-type: none"> • will refer people with problems to appropriate person in the society 	<p>Tel 02 6281 1588 Fax 02 6285 1674 email rvenga@aapbs.com.au</p>
<hr/>	
<p>AUSTRALIAN BUSINESS LTD</p> <ul style="list-style-type: none"> • provide specialist advice, assistance and representation for business in workplace issues, including unfair dismissal; under-payment claims; industrial disputes; OH&S; EEO; employment contracts and enterprise bargaining • mediation and facilitation services are provided 	<p>Tel 13 26 96 Fax 02 9923 1166 email grozied@abol.net</p>
<hr/>	
<p>AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY</p> <ul style="list-style-type: none"> • general advice and assistance for small business 	<p>Tel 02 6273 2311 Fax 02 6273 3286 www.acci.asn.au</p>
<hr/>	
<p>AUSTRALIAN COMMUNICATIONS INDUSTRY FORUM</p> <ul style="list-style-type: none"> • provide dispute resolution assistance to members • has published a brochure on organisations providing ADR services 	<p>Tel 02 9959 9111 Fax 02 9954 6136 www.acif.org.au</p>
<hr/>	
<p>AUSTRALIAN COUNCIL OF PROFESSIONS LTD</p> <ul style="list-style-type: none"> • has participated with the ACCC in the production of dispute avoidance and resolution benchmarks • the ACP promotes the use of mediation to its constituent bodies 	<p>Tel 02 6281 2790 Fax 02 6281 5742 www.austprofessions.com.au</p>
<hr/>	
<p>AUSTRALIAN HOTELS ASSOCIATION</p> <ul style="list-style-type: none"> • can provide an explanation of laws and relevant awards to members • can facilitate negotiations between parties • provide for referral of matters to the Australian Industrial Relations Commission for resolution 	<p>Tel 02 6273 4007 Fax 02 6273 4007 www.aha.org.au</p>
<hr/>	
<p>AUSTRALIAN INDUSTRY GROUP</p> <ul style="list-style-type: none"> • resolves small business disputes through conciliation/arbitration 	<p>Tel 02 9466 5566 Fax 02 9466 5599 www.aigroup.asn.au</p>
<hr/>	
<p>AUSTRALIAN INFORMATION INDUSTRY ASSOCIATION</p> <ul style="list-style-type: none"> • supports ADR • dispute resolution services available 	<p>Tel 02 6281 9444 Fax 02 6285 1408 www.aiia.com.au</p>
<hr/>	
<p>AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS</p> <ul style="list-style-type: none"> • advocates and supports the use of alternative dispute resolution • alternative dispute resolution service for members available 	<p>Tel 02 8234 3333 Fax 02 8234 3366 www.companydirectors.com.au</p>
<hr/>	
<p>AUSTRALIAN MEDICAL ASSOCIATION</p> <ul style="list-style-type: none"> • provides support, workplace advocacy, professional matters, contract disputes 	<p>Tel 02 6270 5400 Fax 02 6270 5499 www.ama.com.au</p>
<hr/>	
<p>AUSTRALIAN NEWSAGENTS FEDERATION</p> <ul style="list-style-type: none"> • provide an advocacy services for individual newsagents via state associations • lobbying activities for the industry conducted through the Newsagency Council • some disputes referred to the Australian Retailers Association 	<p>Tel 02 9460 2999 Fax 02 9954 1766 www.australiannewsagents.com.au</p>
<hr/>	
<p>AUSTRALIAN PETROLEUM & DISTRIBUTORS ASSOCIATION</p> <ul style="list-style-type: none"> • offer advice/advocacy 	<p>Tel 03 9473 6460 Fax 03 9473 4463 www.apada.com.au</p>

<p>AUSTRALIAN PROPERTY INSTITUTE</p> <ul style="list-style-type: none"> mediation may be used to resolve complaints and disputes involving members, but no specific assistance is provided 	<p>Tel 02 6282 2411 Fax 02 6285 2194 www.propertyinstitute.com.au</p>
<p>AUSTRALIAN RETAILERS ASSOCIATION</p> <ul style="list-style-type: none"> advice and assistance to members 	<p>Tel 02 9290 3766 Fax 02 9262 1464 www.ara.com.au</p>
<p>BOATING INDUSTRY ASSOCIATION OF AUSTRALIA</p> <ul style="list-style-type: none"> free access to legal advice for members in some states 	<p>Tel 08 9271 8067 Fax 08 9271 9057 email biawa@iinet.net.au</p>
<p>BUILDING AND CONSTRUCTION COUNCIL OF NSW</p> <ul style="list-style-type: none"> assistance to members on labour and building material prices where cost adjustment disputes arise problem solving assistance provided 	<p>Tel 02 9282 6446 Fax 02 9282 6448</p>
<p>CPA AUSTRALIA</p> <ul style="list-style-type: none"> provide a contact and referral service for members in dispute (most commonly disputes regarding fees, transfer of clients, quality of service) 	<p>Tel 08 8232 3188 Fax 08 8232 3194 www.cpaonline.com.au</p>
<p>CREDIT UNION SERVICES CORPORATION (AUSTRALIA) LTD</p> <ul style="list-style-type: none"> provides dispute resolution services between credit unions, and between credit union and customers 	<p>Tel 02 9333 7777 Fax 02 9333 7767 www.cu.net.au</p>
<p>DIVE INDUSTRY VICTORIA ASSOCIATION INC.</p> <ul style="list-style-type: none"> provides dispute resolution advice to members 	<p>Tel 03 9544 9002 Fax 03 9545 9433 www.diva.asn.au</p>
<p>ELECTRICAL AND WATER OMBUDSMAN (VICTORIA)</p> <ul style="list-style-type: none"> ombudsman scheme to resolve various disputes between consumers and electricity suppliers in Victoria 	<p>Tel 1800 500 509 Fax 1800 500 549 www.eiov.com.au</p>
<p>ELECTRICITY ASSOCIATION OF NEW SOUTH WALES</p> <ul style="list-style-type: none"> ADR procedures for resolving certain disputes between service providers and others in NSW 	<p>Tel 02 9267 7088 Fax 02 9261 2451 www.eansw.asn.au</p>
<p>FINANCIAL INDUSTRY COMPLAINTS SERVICE</p> <ul style="list-style-type: none"> provides three stage ADR process for resolution of disputes with financial planners 	<p>Tel 1800 670 040 Fax 03 9621 2291 www.fics.asn.au</p>
<p>FRANCHISE COUNCIL OF AUSTRALIA LTD</p> <ul style="list-style-type: none"> members include both franchisees and franchisors members subject to a mandatory dispute resolution process able to provide a range of dispute resolution services for members including facilitation of the mediation process 	<p>Tel 03 5973 4140 Fax 03 5975 2502 www.franchise.org.au</p>
<p>HOTEL MOTEL & ACCOMMODATION ASSOCIATION OF NSW</p> <ul style="list-style-type: none"> provides general advice to small business will provide advocacy service to the commission for a fee 	<p>Tel 1800 659 923 Fax 02 9439 8483 www.hmaa.com.au</p>
<p>INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA</p> <ul style="list-style-type: none"> provides a referral service to mediators and arbitrators for disputes involving chartered accountants and clients 	<p>Tel 1800 674 330 Fax 02 9262 4841 www.icaa.org.au</p>

INSTITUTION OF ENGINEERS AUSTRALIA <ul style="list-style-type: none"> • do provide support and maintain a list of arbitrators and mediators to handle contract disputes • can provide arbitrators, mediators/conciliators and expert determiners to parties in formal dispute 	Tel 02 6270 6555 Fax 02 6273 1488 www.ieaust.org.au
<hr style="border-top: 1px dashed #ccc;"/>	
INSOLVENCY PRACTITIONERS ASSOCIATION OF AUSTRALIA <ul style="list-style-type: none"> • advocate and support the use of ADR in insolvency disputes, including disputes with financiers, preferences, quality of goods, arising from voluntary administration, fees, etc 	Tel 02 9290 5700 Fax 02 9290 2820 www.ipaa.com.au
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MORTGAGE INDUSTRY ASSOCIATION OF AUSTRALIA <ul style="list-style-type: none"> • provides a dispute resolution service for members and consumers • if required will refer matters for expert determination • has incorporated an ombudsman who will assist in matters not successfully mediated 	Tel 02 9411 7406 Fax 02 9419 7561 www.miaa.com.au
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MOTOR TRADES ASSOCIATION OF AUSTRALIA <ul style="list-style-type: none"> • provides dispute resolution advice to members • provides assistance in negotiations with suppliers, and mediation • assists in oil industry disputes • may assist in funding under certain circumstances 	Tel 02 6273 4333 Fax 02 6273 2738 www.mtaa.com.au
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MOTOR TRADES ASSOCIATION/ACC STATE ORGANISATIONS <i>located in all states and territories</i>	National Office Tel 02 6273 4333 Fax 02 6273 2738 www.mtaa.com.au
<ul style="list-style-type: none"> • provides dispute resolution advice to members • advise members on workplace disputes, unfair dismissals etc. • will represent members at tribunal hearings 	
<hr style="border-top: 1px dashed #ccc;"/>	
NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION <ul style="list-style-type: none"> • assistance to members direct advice, advocacy, and referral to mediation and arbitration 	Tel 03 9645 5566 Fax 03 9645 5577 www.neca.asn.au
<hr style="border-top: 1px dashed #ccc;"/>	
NATIONAL FARMERS FEDERATION <ul style="list-style-type: none"> • provide assistance to members in dispute, from counselling through to advocacy and representation 	Tel 02 6273 3855 Fax 02 6273 2331 www.nff.org.au
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NATIONAL INSTITUTE OF ACCOUNTANTS <ul style="list-style-type: none"> • general guidance and advice provided to members involved in a dispute 	Tel 03 8665 3100 Fax 03 8665 3130 www.nia.org.au
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NSW ROAD TRANSPORT ASSOCIATION <ul style="list-style-type: none"> • provides dispute resolution advice to members • particular knowledge of workplace disputes, unfair dismissal, etc. • will represent members in conciliation and tribunal proceedings 	Tel 02 9267 8222 Fax 02 9267 8388 www.nswrta.com.au
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PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA <ul style="list-style-type: none"> • provides dispute resolution assistance 	Tel 02 9248 7300 Fax 02 9299 0087 www.printnet.com.au
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PROPERTY COUNCIL OF AUSTRALIA <ul style="list-style-type: none"> • advises members on all issues relating to commercial property 	Tel 02 6248 6902 Fax 02 6248 8210 www.propertyoz.com.au

ROYAL AUSTRALIAN INSTITUTE OF ARCHITECTS	Tel 02 6273 1548
<ul style="list-style-type: none"> • provide a dispute resolution service for members 	Fax 02 6273 1953
	www.raia.com.au
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SERVICE STATION ASSOCIATION	Tel 02 9808 4188
<ul style="list-style-type: none"> • assistance to members preparing claims • negotiating with oil companies • advocacy in conciliation procedures 	Fax 02 9808 3670
<hr/>	
SHOPPING CENTRE COUNCIL OF AUSTRALIA	Tel 02 9336 6902
<ul style="list-style-type: none"> • provides general assistance and advice for dispute regarding shopping centre owners and retail leases 	Fax 02 9336 6976
	www.propertyoz.com.au
<hr/>	
TOURISM COUNCIL OF AUSTRALIA	Tel 02 9358 6055
<ul style="list-style-type: none"> • the Tourism Code of Conduct provides for the mediation of complaints and disputes relating to the industry 	www.tourism.org.au
<hr/>	
URBAN DEVELOPMENT INSTITUTE OF AUSTRALIA	Tel 02 9868 3677
<ul style="list-style-type: none"> • advice on policy and processes • advocacy, advice and assistance • access to professional services • lobbying 	Fax 02 9868 7117
	www.udia.com.au
<hr/>	
VICTORIAN EMPLOYERS CHAMBERS OF COMMERCE & INDUSTRY	Tel 03 8662 5333
<ul style="list-style-type: none"> • provide advice and referral when required to a specialist whom VECCI has a strategic alliance • cover sexual harassment, unfair dismissal, copyright, retail tenancy 	Fax 03 8662 5462
	www.vecci.org.au
<hr/>	

Specific Advisers/Providers

The table below sets out details of agencies that provide advice for small business or ADR services in specific instances. Most of these are State Government Departments or agencies which administer a statutory dispute resolution scheme (eg retail tenancy disputes), although some are industry funded (such as the Banking Industry Ombudsman) and others supported by governments (such as Business Enterprise Centres).

Refer to the 'Alternative Dispute Resolution Providers' section below for a list of those providers who are able to provide the full range of ADR services across all small business industries.

Organisation	Tel Contact	Scope of Services
Federal/National Organisations		
Australian Banking Industry Ombudsman	1800 337 444	Disputes with banks
Arts Law Centre of Australia – mediation service	02 9356 2566	Arts industry disputes
Office of the Mediation Adviser www.mediationadviser.com.au	1800 150 667	Mediation service for franchise disputes
Retail Grocery Industry Ombudsman www.rgio.dewrsb.gov.au	02 6121 7302	Mediation service for vertical supply disputes in retail grocery industry
Australian Capital Territory		
ACT Tenancy Tribunal	02 6217 4259	Retail and commercial tenancy disputes

New South Wales		
Department of State & Regional Development	02 9338 6600	General advice to small business
Retail Tenancy Unit	02 9223 0466	Retail tenancy disputes
Community Justice Centres	02 9228 7455	Community based disputes involving small business
Business Enterprise Centres	02 9413 3230	General advice to small business
NSW Ombudsman	02 9286 1042	Complaints/disputes with government agencies
Energy and Water Ombudsman NSW www.ewon.com.au	(Sydney) 02 8218 5200 (Outside Sydney) 1800 246 545	Electricity and water disputes
Victoria		
Small Business Victoria	03 9651 9888	General advice to small business
Victorian Civil & Administration Tribunal	03 9628 9960	Retail tenancy disputes
Business Enterprise Centres	03 9564 0106	General advice to small business
Dispute Settlement Centre	(VIC only) 1800 658 528 (Other States) 03 9603 8370	Advice on dispute resolution
Tasmania		
Department of State Development	03 6336 2501	General assistance and advice to small business
Business Enterprise Centres	1300 654 499	General assistance and advice to small business
Consumer Affairs & Fair Trading	1300 654 499	Retail tenancy from 1 July 1998
South Australia		
The Business Centre	08 8233 4600	General advice to small business
Office of the Small Business Advocate	08 8221 6120	Small business disputes with governments
Business Enterprise Centres	13 18 91 (Direct) 08 8226 2804	General advice to small business
Office of Consumer Affairs	08 8204 9777	Retail and commercial tenancy
Western Australia		
Small Business Development Corporation	08 9220 0222	Retail and commercial tenancy, general advice
Business Enterprise Centres	08 9220 0222	General advice to small business
Northern Territory		
Department of Industry & Business	08 8999 5303	Assistance to small business
Business Enterprise Centres	08 8922 9529	General advice to small business
Queensland		
Department of State Development	07 3224 2076	General advice and assistance to small business
Retail Shop Leases Registry	1800 807 051	Retail tenancy

Alternative Dispute Resolution Providers

Set out below are details of peak ADR providers. These organisations manage panels of dispute resolution specialists and most can provide services including:

- advice to small business regarding the appropriateness of alternative dispute resolution (ADR) for any particular set of circumstances
- selection of an appropriate ADR method (eg whether mediation, facilitation, expert determination, etc would be most appropriate)
- contact the other party in a dispute to explain ADR to them and obtain their consent to participate in ADR
- advise on an appropriate mediator/facilitator/expert
- organise all aspects of the 'mediation' including times, neutral venue, mediation agreement, etc.

Most of these organisations have quality control criteria to ensure that only high quality mediators are used.

There are also many other independent mediators in each State and Territory that may provide these services, and who would be contactable through the Yellow Pages.

Alternative Dispute Resolution Branch – Queensland	Tel 07 3239 6278 Fax 07 3239 6284 www.justice.qld.gov.au
Australian Commercial Disputes Centre	Tel 02 9267 1000 Fax 02 9267 3125 www.acdcltd.com.au
Conflict Management Australasia	Tel 03 9614 0333 Fax 03 9614 0555 www.cmacentre.com.au
Dispute Settlement Centre of Victoria	Tel 03 9603 8370 1800 658 528 Fax 03 9603 8355 www.justice.vic.gov.au/disputes
The Law Society of NSW	Tel 02 9926 0333 Fax 02 9231 5809 www.lawsociety.com.au
LEADR (Lawyers Engaged in ADR)	Tel 02 9233 2255 Fax 02 9232 3024 www.leadr.com.au
Mediate Today	Tel 02 9223 2255 1800 500 035 Fax 02 9223 6058 www.mediate.com.au
The Accord Group	Tel 02 9264 9506 Fax 02 9264 8268 www.accordgroup.com.au
The Conflict Resolution Centre	Tel 02 6257 5611 Fax 02 6295 5992 email conflict@dynamite.com.au

A number of other organisations have been established to manage panels of mediators and they can put you in contact with an appropriate mediator. These organisations generally do not provide the scope of ADR services listed above.

Association of Lawyer Arbitrators and Mediators	Tel 02 9223 4010 02 9235 0187 Fax 02 9223 4032
Institute of Arbitrators & Mediators	www.iama.org.au
	Tel 02 9223 8566 New South Wales Fax 02 9252 2911
	Tel 03 9607 6908 Victoria Fax 03 9602 2833
	Tel 07 3220 2122 Queensland Fax 07 3220 2133
	Tel 07 4771 6977 North Queensland
	Tel 08 9316 9971 Western Australia Fax 08 9316 9974
	Tel 08 8363 5922 South Australia Fax 08 8363 1877
	Tel 02 6260 4431 Australian Capital Territory Fax 02 6282 7191
	Tel 08 8981 2288 Northern Territory Fax 08 8981 3042
	Tel 03 6224 9911 Tasmania Fax 03 6224 9966

5 preparing for alternative dispute resolution

At this stage you have chosen to seek resolution of your dispute through ADR and you now need to prepare for the resolution process.

Good preparation will maximise the opportunity for a successful resolution to your dispute. Working through the following steps will ensure that you are properly prepared.

PRESENTATION AND ASSISTANCE

Consider whether there are other people who should attend the dispute resolution process with you.

If there is a joint owner or business partner who will need to be party to the agreement, then it is very important that they attend or, alternatively, that they provide you with the authority to make a decision on their behalf.

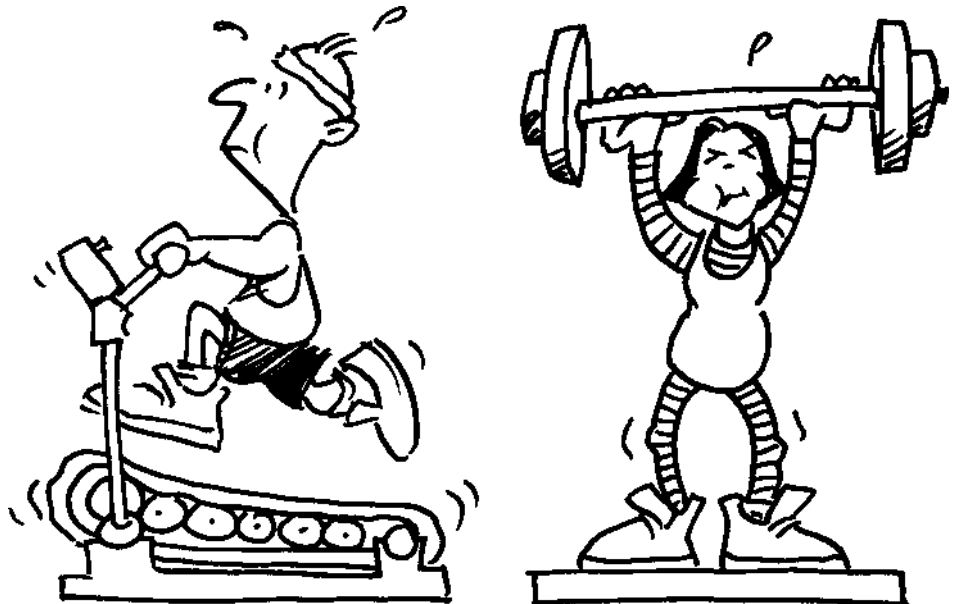
Consider whether you need assistance in the dispute resolution process. Depending upon the nature of the dispute it may be appropriate to bring a friend or family member, solicitor or barrister, accountant, interpreter or a professional negotiator.

If you are emotionally involved in the dispute, you may benefit from the assistance of a professional negotiator. If you need advice about this, contact one of the dispute resolution providers listed on pages 15-17.

PREVIEW THE DISPUTE

Write down your understanding of the problem and list all the related issues in order of importance.

Prepare the information and data required to justify your claim, and bring it to the mediation.



CONSIDER POTENTIAL OUTCOMES – BEST CASE

Identify a range of options which may resolve the problem – be as expansive as possible. Focus on addressing your real needs and concerns rather than your legal rights.

Be clear about your preferred outcome.

Identify those matters that are most important to resolve and those that are less important.

CONSIDER POTENTIAL OUTCOMES – WORST CASE

Consider the alternatives to reaching an agreement at the mediation:

- what will be the cost (legal fees, time)?
- what will be the impact on your business?
- what is the risk of losing a Court case and what implications will this have?
- what is the potential impact on your family and/or business associates if this dispute is not settled? (obtain their input).

IS THERE COMMON GROUND?

Are there aspects of your commercial relationship which provide common ground. For example, will it be mutually beneficial to ensure an ongoing business relationship?

List any potential areas of common ground.

DEVELOP A NEGOTIATING STRATEGY

Try to understand the dispute from the other side's perspective and be as objective as possible. Identify a range of options which the other party may see as acceptable to them and consider how you may present these in negotiation.

Make sure that you understand the strengths and weaknesses of your case.

Can you identify trade-offs that may be acceptable? This may involve identifying non-financial benefits or discounting a monetary settlement in return for ongoing business, early payment or other benefit. It is beneficial to identify in advance any issues where you are able to make a concession or compromise. This may prompt the other side to also make concessions.

Think about your approach to the mediation – good negotiators usually present a combination of calmness and assertiveness. An aggressive attitude may undermine your ability to reach an agreement and escalate the dispute.

How will you present your side of the dispute in a way that is clear and comprehensive? (prepare some notes to assist you).

If you think that there may be a personality clash or an awkward situation in the mediation, consider how you will deal with this.

REALITY TEST

Reconsider whether you have contributed to the problem or its escalation. If so, does this change what is required to resolve the dispute?

Will your real concerns be resolved by your preferred outcome? If not, reconsider your preferred outcome.

Discuss the dispute with a trusted adviser and ask them for their honest opinion about your position and preferred outcome.

Most importantly, consider carefully your 'bottom line', having regard to:

- the most important issues that need resolution
- the strengths and weaknesses of your position
- the potential implications if a negotiated settlement is not achieved.

Consider your bottom line in terms of 'what can you live with'.

**What ever you do, keep an open mind to new ideas and suggestions.
This is your best opportunity to settle the dispute without going to Court.**

The following information will help ensure that you fully understand the dispute resolution process and are aware of what to expect. The typical dispute resolution process set out below is based on mediation, however, other ADR methods would usually follow a similar path.

A typical dispute resolution process

APPOINTMENT OF A MEDIATOR/ VENUE SELECTION

Most mediations are organised through a dispute resolution provider (refer to step 4 pages 15-17). An important role for the provider is to ensure that the mediator in any particular dispute is independent of all parties and does not have a conflict of interest in the matter.

The dispute resolution provider will usually send both parties a list of potential mediators for their consideration. Any party to a mediation has the right to veto the appointment of a mediator, however, this should be done at the earliest possible time.

The dispute resolution provider will also arrange all aspects of the mediation, including co-ordinating a mutually convenient time for the mediation and organising a 'neutral' venue.

MEDIATION AGREEMENT

The dispute resolution provider will provide the parties with a 'mediation agreement' for signature prior to the mediation. This agreement sets out details relating to the conduct of the mediation, such as payment for mediators' services, confidentiality provisions, enforceability issues and termination of the mediation. These matters are discussed in greater detail below.

CONFIDENTIALITY

In most cases, the parties to a mediation will be asked to sign a confidentiality agreement. This ensures that all information provided at the mediation, including settlement offers that may be made, cannot be revealed in other proceedings.

The purpose of this confidentiality provision is to ensure that the parties in a mediation are able to discuss the dispute openly and frankly, and seek settlement, without the risk of prejudicing further legal action that may occur if the mediation fails. Confidentiality is also important for the resolution of disputes where adverse publicity may undermine the chances of a settlement.



ROLE OF THE MEDIATOR

The role of the mediator is to manage the mediation process and to assist the parties to find a settlement that they can both agree to. The mediator does not provide legal or any other advice to either party and will not make a judgement on any issue that arises during the mediation.

OPENING STATEMENTS

At the commencement of the mediation both parties will be asked to make a short statement providing their perspective to the dispute, including:

- how the dispute started
- how the dispute has affected them and their business
- what their main concerns are
- what they see as the main issues
- their needs that will need to be satisfied in any settlement.

Each person is usually required to speak for themselves when making opening statements. The only person who may interrupt is the mediator, who may want to clarify some points. The other party cannot interrupt.

ISSUES IDENTIFICATION

The mediator will summarise each party's key points and identify the key issues in dispute. Both parties can provide additional information at this stage, with the aim being a full compilation of all relevant issues.

Once issues have been comprehensively identified and summarised, the mediator will usually encourage discussion about the issues so that any early opportunity for resolution can be identified.

PRIVATE SESSIONS (CAUCUS)

In most disputes, the mediator will meet with each party separately and privately. This provides an opportunity for more frank discussion about the dispute and exploration of opportunities to resolve the dispute. The mediator may discuss with you matters that were raised in the opening statements and establish whether these change the situation or your expectations in any way.

You will be able to confidentially discuss any matter with the mediator in this private session. The mediator is bound to maintain the confidentiality of anything said in private session unless you provide authority for him/her to transmit information to the other party.

In some cases you may ask that the mediator convey a settlement offer to the other party. The mediator would, however, usually be reluctant to do this until all issues are explored.

TERMINATION OF THE MEDIATION

You have the right to terminate the mediation at any time, for example, if you think the mediator is biased or the other party does not seem to be acting in good faith. If you wish to terminate the mediation for any reason, it is recommended that you first discuss your concerns with the mediator in private.

Mediation has a very high success rate (80%+), however, if it becomes apparent that the parties are not going to reach a settlement the mediator will normally recommend that the mediation be terminated.

ACHIEVING RESOLUTION

A joint session of the parties chaired by the mediator is usually held to finalise settlement terms. If necessary, further private sessions may be held to fine-tune difficult issues or break deadlocks.

In some instances there may be agreement between the parties on some issues but not on others. In these instances there may be an opportunity for the mediation to be adjourned so that further advice can be obtained. Where there is a technical issue in dispute, the parties may agree to commission an independent expert to provide a recommendation.

A mediation settlement may also take the form of an action plan which sets out dates for the making of payments or the completion of various activities (such as the preparation of legal documents, new lease agreements, supply contracts and the like).

The terms of settlement of the dispute are not determined by the mediator but by the parties themselves. These terms are written down and signed by each party. If there is a considerable amount at stake, ask for time to seek the advice of a lawyer on the proposed agreement before signing.

ENFORCEABILITY

The signed settlement agreement can be enforced through the courts in the event that a party fails to abide by any of the terms of the agreed settlement.

DISPUTE RESOLUTION **CASE STUDIES**

- Retail Tenancy
- Banking
- Government
- Franchising Industry
- Supply Contracts
- Partnerships
- Building Industry
- Workplace Relations
- Trade Practices
- Consumers

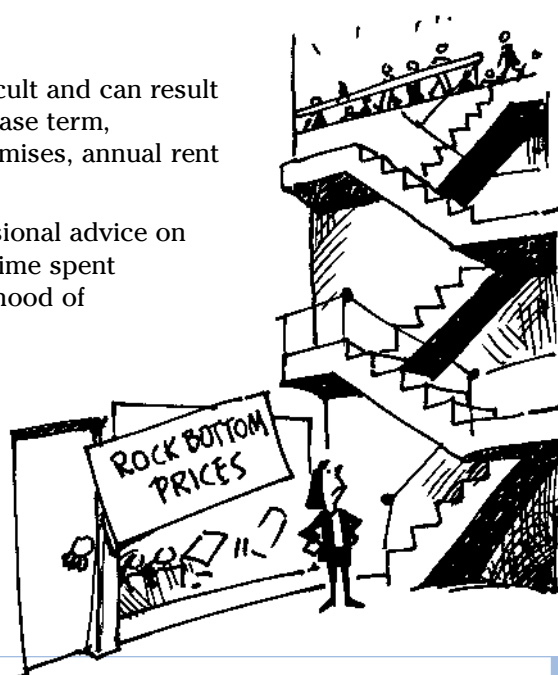


RETAIL TENANCY DISPUTES

The relationship between landlord and tenant is often difficult and can result in disputes across a wide range of issues, including rent, lease term, relocation, redevelopment, quality and maintenance of premises, annual rent reviews, fit-outs, and terminations.

It is imperative before signing a lease that you seek professional advice on both the commercial and legal aspects of the agreement. Time spent making a sound decision will significantly reduce the likelihood of major conflict during the term of the lease.

Retail tenancy in most states is governed by specific legislation, and assistance is available through your state government department. *Refer schedule on page 24.*



Case Study Retail Tenancy

Background

John and Mary Jones were the owners of “Glitz Gifts”, a gift shop located in a metropolitan shopping centre. The Centre had recently undergone a major redevelopment and under the terms of the lease the gift shop was relocated to a lower floor.

The Dispute

Twelve months after the relocation the shop had not achieved its prior year’s sales and was unable to pay the rent which had increased by 30%. John and Mary had written to Centre Management on three occasions and made numerous personal requests to review the impact of the relocation on their business. However, no one was prepared to listen. John and Mary needed assistance to break through the communication barrier with Centre Management.

The Facts

The lease did allow for compulsory relocation to a “reasonably suitable alternative premises”.

The new shop had an increased area but reduced frontage and visibility.

The rent increased by 30% on relocation.

The annual rental increase of 6% was now due.

The Process

John and Mary were a married couple in their mid to late fifties and were experienced retailers with a proven track record in this Centre and prior business. Since notification of the proposed relocation 18 months earlier they had strongly objected, however under the terms of the lease they relocated. The Retail Tenancy Unit was contacted and as prescribed under the State legislation a commercial mediator was appointed to help the parties resolve the matter.

At the first joint mediation session John and Mary stated their belief that the new premises were inferior and that the sales results over 12 months now proved their assessment of the location. The increased rent was not achievable and the commitments made by the leasing manager had not been honoured.

The Centre Manager, Simon Smith, believed that performance would improve over time, with a more positive attitude by the tenants. Neither party was prepared to concede their positions.

The mediator started the resolution process by gaining an acknowledgment from both parties that they were keen to find a mutually acceptable outcome and that maintaining a good business relationship was important. This provided the basis for private discussions with the parties.

In private the mediator reviewed Centre Management’s role in the relocation and identified the risks and costs of not resolving the matter by mediation. Simon conceded the matter was poorly handled and was now prepared to sign a new lease agreement. The mediator asked Simon to prepare an offer of settlement for the joint session.

John and Mary acknowledged that business was improving but the rent was too high, in particular the proposed annual increase of 6%. They also conceded that it would be impractical to relocate back to their original premises.

The parties reconvened in joint session where Simon made an offer of settlement. Although not acceptable John and Mary were pleasantly surprised at the turnaround. The parties were then requested to justify their position on the financial figures provided. Both parties moved ground and the gap narrowed. Both parties had developed a better understanding of the other's needs and concerns and the mediator was able to further develop this level of understanding into a final agreement.

The Mediated Outcome

A new lease was signed with the rent reduced by 30%.

The lease provided for an annual rent increase tied to the C.P.I. instead of the 6%.

Lessons to be Learnt

Centre Management should implement the "Dispute Avoidance" benchmarks in the Australian Competition and Consumer Commission booklet "Benchmarks for dispute avoidance and resolution", October 1997.

	MAIN LEGISLATION	KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
NSW	Retail Leases Act 1994 Retail Leases Ammendment Act 1998	Must try to mediate a dispute before going to Commercial Tribunal unless Tribunal is satisfied that mediation will not be successful. Mediation of unconscionable conduct & other retail claim matters.	Registrar of Retail Tenancy Disputes 02 9223 0466 or 1800 063 333 (outside Sydney)
VIC	Retail Tenancies Reform Act 1998	Dispute to be referred to conciliation or arbitration before going to the tribunal or a court.	Victorian Business Line 13 22 15 or 1800 136 034
QLD	Retail Shop Leases Act 1994	Tenant or Landlord may apply to the Retail Shop Lease Registry for mediation of their dispute.	Retail Shop Lease Registry 1800 807 051
SA	Retail & Commercial Leases Act 1995	Tenant or Landlord may apply to the Office of Consumer & Business Affairs for mediation. Act covers lease terms, security bond, unlawful threats, exclusion clauses, warranties, etc.	Office of Consumer & Business Affairs (Tenancies Branch) 08 8204 9777
WA	Commercial Tenancy (Retail Shops) Agreements Act 1985	Tenant or Landlord may apply to the Registrar of the Commercial Tribunal for mediation. If this fails can proceed to commercial tribunal.	Registrar of the Commercial Tribunal 08 9425 2773
TAS	Tenancies Code of Practice Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998	Tenant or Landlord may refer dispute to Retail Tenancies Monitoring Committee for conciliation (mediation). Code covers lease negotiation, rent reviews, termination, unconscionable conduct, etc. (minor ammendments to Code in 1999 regulations).	Office of Consumer Affairs & Fair Trading 1300 654 499 03 6233 3360
ACT	Retail Tenancy Tribunal Act 1994 Commercial & Retail Leases Code	Tenant or Landlord may apply to the Registrar for mediation. If this fails can proceed to Tenancy Tribunal. Code covers Landlord, Tenant rights & obligations, rent reviews, termination, renewals, subleases, etc. Code to be repealed 1 July 2002 & replaced.	Registrar of the Tenancy Tribunal 02 6217 4314
NT	Tenancy Act 1979 (Retail Tenancy Legislation proposed 2001)	Limited to tenancy repossession notice requirement – mediation NOT COVERED.	Office of Consumer Affairs & Fair Trading 08 8999 1999
FED	Trade Practices Act 1974 (National)	Prohibits misleading conduct, false representations & unconscionable conduct & certain anti-competitive conduct. Damages & other remedies available. No specific provisions covering retail tenancy.	ACCC office in each state/territory Head office Canberra 02 6243 1111

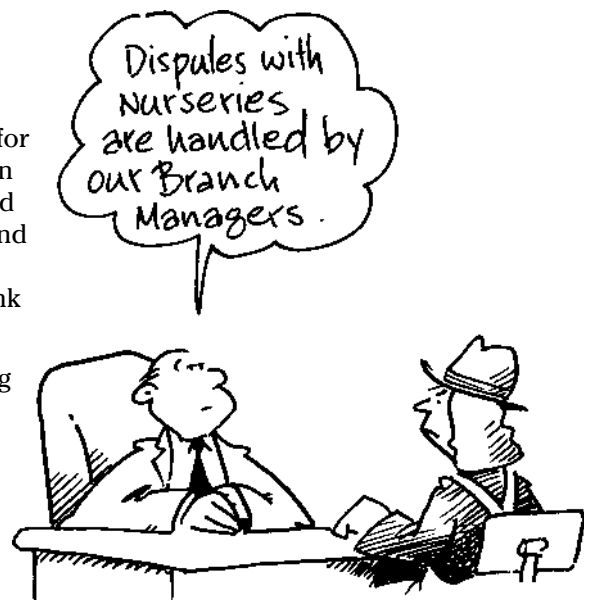
NOTE In addition to the above, the terms and conditions of a retail tenancy lease may provide for some form of dispute resolution procedure. Check the relevant provisions of the lease and follow the procedure.

BANKING DISPUTES

Small business is heavily dependent on the banking industry for financial services and it is inevitable that disputes will arise. In recent years the rapid advances in electronic technologies and deregulation have altered the relationship between banking and business, although problems still arise when the customer believes the lending of money constitutes advice from the bank that the project or investment is viable.

The three key areas for disputes are complaints about banking practice, errors in transactions and calculations, and poor service resulting in financial damages.

The Australian Banking Industry Ombudsman Scheme operates across the country and helps resolve complaints between banks and their customers and is available for individuals and small business.



Case Study **Banking**

Background

Mario and Helen owned and operated a family Nursery business. Following a profitable year they decided to purchase a fast food shop in the area. The nursery had arrangements with a Bank and they were able to obtain an investment loan secured against the business. Over a period of 10 years Mario and Helen required several additional injections of funds for capital equipment and renovations and ended up with two overdrafts and three loans.

The Dispute

The family had not provided the Bank with financial details for the past 12 months and loan repayments were irregular. The Bank applied penalty interest rates which further exacerbated the debt problem resulting in a demand for recovery under the mortgage security.

Neither party had tried to hold a meeting to resolve the matter, preferring to communicate in writing. There was considerable emotion involved in the dispute and a risk that Mario and Helen would lose everything.

The Facts

The debt had doubled over the 10 years without a full review of the indebtedness.

The documentation for the additional loans was not completed correctly.

The communication and processes used to notify changes in interest rates were poor.

The Process

As Mario and Helen had been customers for over 15 years the Bank requested the matter be settled by mediation. The mediation was not prescribed by legislation and was based on the Bank's judgement that mediation made business sense. The Australian Banking Industry Ombudsman (A.B.I.O.) was not considered as Mario and Helen were an incorporated company and not eligible under the terms of reference at that time. The Ombudsman's role has now been extended to cover all small businesses.

Although agreeing to the mediation, Mario and Helen were not prepared to attend and sent an agent with full authority to settle the matter. Although not a preferred arrangement, the mediation proceeded.

After two attempts to mediate the dispute the parties were deadlocked and all attempts to break the deadlock had failed. The mediator approached Mario and was able to convince him to attend a mediation in person.

The first joint session enabled the Bank Manager to hear first hand how poor business practices on both sides had led to a doubling of the debt over 10 years. The mediator was able to identify the common goals and establish effective communication. This was the first time either party had

spoken directly to each other for 18 months. It surprised the mediator how quickly the parties were able to eliminate the side issues and focus on the solutions.

The mediator assisted the parties to recognise their contribution to the current crisis, and was able to manage their expectations about the likely outcome. Effective communication had been achieved and this enabled fresh options to be identified and the gap narrowed. The Bank Manager made the first major concession by offering to waive the penalty interest, and from there both parties were prepared to contribute to a final resolution. The process had generated considerable goodwill and trust between the parties, which was certainly not present before the mediation.

Mediated Outcome

The penalty interest rates were waived.

All loans were consolidated into one with a capped credit limit.

Agreement was reached to sell the fast food business with the net recovery to be offset against the loan.

Lessons to be Learnt

Professional business practices on both sides would have identified the financial “early warning signals” in time to remedy the situation.

Effective communication is essential to good business relationships.

	MAIN LEGISLATION	CODES OF CONDUCT	KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED		Australian Banking Industry Ombudsman Scheme	Resolve banking services disputes between members, banks & their customers. Power to make an award up to \$150,000.	Australian Banking Ombudsman 1800 337 444
FED		Code of Banking Practice * presently under review	Disclosure of information, banking standards & interest dispute resolution procedures for non-commercial type transactions with Banks.	Reserve Bank of Australia 02 9551 8111
FED		Electronic Funds Transfer Code of Conduct	Procedures for resolving Electronic Funds Transfer, credit & debit cards complaints with Banks & other issuers – where errors made by card issuers. Allocation of liability, correction to account.	Australian Competition & Consumer Commission (ACCC) 02 6243 1111
FED		Australian Bankers' Association Code of Practice for Farmers Small Business Charter	Regulates conduct between Banks & farmers regarding farm loans, equipment finance etc. Disputes to be mediated where Bank & farmer cannot agree on a financial plan of action. Covers disputes between Banks & small business.	Australian Bankers' Association 02 8298 0417
FED	Trade Practices Act 1974 (Operates nationally)		Prohibits certain anti-competitive conduct, misleading conduct, false representations, unconscionable conduct. Damages & other remedies.	ACCC 02 6243 1111
FED	Banking Act 1959**		Licensing & regulation of Banks, protection of depositors, capital adequacy requirements, prudential supervision of Banks.	Reserve Bank of Australia 02 9551 8111
FED	Cheques & Payment Orders		Cheques duties & liabilities of Banks, negligence & defences on paying cheques, forged & dishonoured cheques. Damages.	Reserve Bank of Australia 02 9551 8111
FED	Privacy Act 1988 Privacy Act 2000 (Operative 21 December 2001)		Collection & dissemination of credit information by credit providers. Privacy principles. Collection & use of customers personal information.	Federal Privacy Commissioner 02 9284 9610
FED	Financial Services Reform Bill 2001		Uniform regulation of financial products, service providers & markets	Australian Securities & Investment Commission (refer state offices)

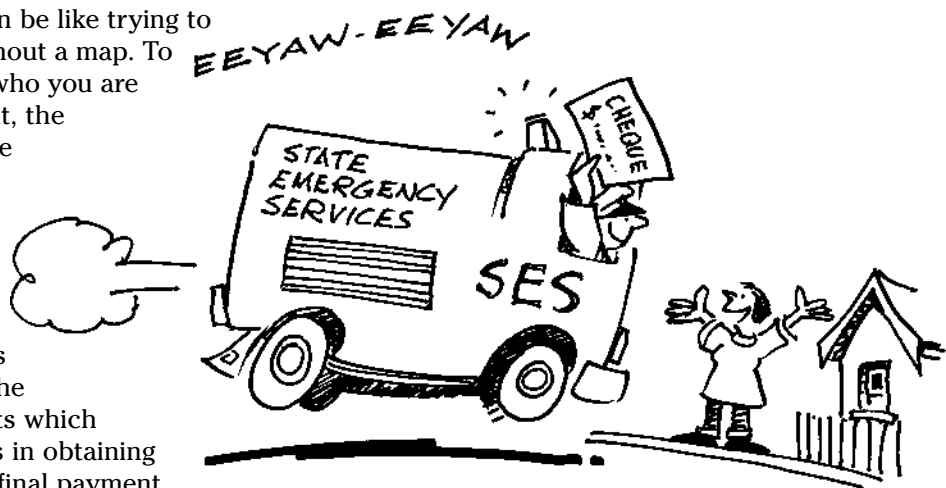
* Banking is primarily governed by Federal Law. However, State and Territory Fair Trading Acts may have some application, depending on the facts. Consumer Credit Acts of States and Territories only regulate consumer loans and leases. A Small Business Charter which will cover dispute between Banks and their small business customers.

** The banking industry is supervised by the Australian Prudential Regulation Authority, as well as the Reserve Bank of Australia.

DISPUTES WITH GOVERNMENTS

Dealing with government can be like trying to find your way in a maze without a map. To succeed you need to know who you are dealing with, the department, the policies, procedures, and the relevant authorities which govern your contract.

Disputes with government arise for all the same reasons as private enterprise, however, there is the added complication of the size and diversity of interests which can increase the time delays in obtaining approvals for a project and final payment.



Case Study Government Dispute

Background

The State Emergency Service, together with the Police and Fire Brigade, provide immediate response to disasters. Depending on the type of incident there may be several state services working together to address the problem. Their primary concern is to protect the citizens from injury or death and secondly, to protect property. Emergency services respond quickly and have a wide range of powers to use local infrastructure to assist in getting the job done.

During one such disaster the Emergency Services used several premises owned by George Brown for boarding their staff and housing equipment. The Emergency Services agreed to pay for the use of the facilities, and the cost of repairs to several walls damaged by their employees.

The Dispute

Three State Emergency Services were involved. Invoices were prepared and forwarded for payment, however, after four months George had not been paid and he was unable to find out who in government was responsible.

George had taken the names of the officers in charge but not the units they belonged to or where they were based.

The Facts

The accommodation and damages claims were genuine.
The three government services were legally responsible.

The Process

The state department for small business made a visit to the area to survey the impact of the disaster on the business community and George made representations regarding the outstanding invoice. The client manager, Barry Rush, realised the impact of non payment for a small business and agreed to act as an advocate.

George did not know how to go about finding who was responsible for processing his invoices. Having worked with the government for many years Barry realised his first task was to receive full details of the situation leading to the agreement with the three Emergency Services, including dates, contact names, services used, repair bills, etc.

Barry contacted the three Emergency Services and was able to find the person responsible for approving this expenditure by starting with the head office of each department. This was not easy and required persistence to identify those responsible. The original invoices were located, however no action had been taken because they were outside the norm and no one knew how to handle them.

The Facilitated Outcome

The invoices were paid in full.

Lessons to be Learnt

When dealing with bureaucracies, try to keep records of the names of all people and government departments you deal with. Seek advice from the departments on how they handle accounts.

Find out about the department's or agency's complaint handling procedures and where to/how to complain or lodge a dispute. If you can't get a satisfactory response then complain to the Ombudsman.

	MAIN LEGISLATION	CODES OF CONDUCT	KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Ombudsman Act 1976		Ombudsman's independent review of administrative action of government departments, agencies, statutory authorities. Ability to Mediate disputes.	Commonwealth Ombudsman 02 6276 0111
NSW	Ombudsman Act 1974	Public Sector Mediation Guidelines 1997	Similar to Federal Ombudsman legislation, but also covers police, local government & certain commercial activities & tendering. Government policy to use ADR, especially mediation, whenever possible in disputes with third parties per Mediation Guidelines 1997.	State Ombudsman 02 9286 1042
VIC	Ombudsman Act 1973		Similar to NSW Ombudsman legislation.	State Ombudsman 03 9613 6222
QLD	Parliamentary Commissioner Act 1974		Similar to NSW Ombudsman legislation.	Parliamentary Commissioner for Administration Investigation 07 3005 7000
SA	Ombudsman Act 1972		Similar to NSW Ombudsman legislation.	State Ombudsman 08 8226 8699
WA	Parliamentary Commissioner Act 1971		Similar to NSW Ombudsman legislation.	State Ombudsman 08 9220 7555
TAS	Ombudsman Act 1978		Similar to NSW Ombudsman legislation.	State Ombudsman 03 6233 6217
ACT	Ombudsman Act 1989		Similar to NSW Ombudsman legislation.	Commonwealth Ombudsman 02 6276 0111
NT	Ombudsman (Northern Territory) Act 1980		Similar to NSW Ombudsman legislation.	State Ombudsman 08 8999 1818

NOTE (1) There are Administrative Appeals Tribunals in the Commonwealth, Victoria and the ACT and an Administrative Decisions Tribunal is being established in NSW to review, on their merits, certain decisions by governments' administrative authorities and officials. They can exercise the powers of the original decision-maker and make a wide variety of orders.

FRANCHISING INDUSTRY DISPUTES

Franchise contracts vary from simple product to more complicated business format franchises. They all place obligations on the parties to meet performance standards. More than any other business area, franchising relies on positive business relationships and effective communication as the failure of either party to meet their obligations may result in financial loss for the other party.

Many disputes arise when the performance of the business fails to meet the expectations of the franchisee, as presented in the disclosure documentation. Other disputes can relate to disputed trading areas, maintaining operating standards, uncompetitive product pricing, royalty payments, assignments, and terminations.



Case Study *Franchising Industry*

Background

Frank Wiley was the owner of 'Blast' a franchise for household cleaning services based in Melbourne. Following the success in Melbourne Frank decided to try the concept in the Sydney market. Wayne and Sue purchased one of the franchise outlets in Sydney.

The Dispute

After two years Wayne and Sue were unable to pay their franchise royalty. Attempts by both parties to find a solution by direct negotiation failed and Wayne and Sue requested the matter be mediated on advice from their solicitor. Frank Wiley agreed to the mediation in an effort to prevent costly litigation.

The Facts

The franchise agreement was 10 years plus a further 10 years from the date of purchase.

Initial cost included goodwill and capital for equipment and start up costs.

A retail lease was in place, with 12 months and a three-year option remaining.

The Process

The mediator requested a private meeting with both parties as emotions were running high. Wayne and Sue were a young married couple who had borrowed from their family to buy the franchise and the possible failure of the business was creating significant stress. They believed Frank Wiley had not supported the Sydney network and had not honoured commitments made at the time of purchase causing the business to fail.

Frank admitted in private his concern about the Sydney market. However, he also believed Wayne and Sue were poor performers thus compounding the problem.

The joint mediation session (held at neutral premises) enabled the parties to table all relevant documentation including current financial data. The major outcome revolved around the realisation that the market in Sydney could not support the current number of franchisees. Although many potential solutions were explored, including new business opportunities and various cost cutting initiatives, no agreement could be reached.

Private sessions were then held between the mediator and each party in confidence. Wayne and Sue declared their preferred option was to sell the business to the franchisor as soon as possible, but they required a reasonable price to cover their existing debts and would like some compensation. They acknowledged that their lack of experience had contributed to the problems and were realistic about the costs and risks of pursuing litigation.

Frank also believed that buying the franchise and combining it with the adjacent operator would be the best outcome. His concerns related to the purchase price and the ability of the adjacent

franchisee to finance the additional franchise. Frank was also concerned about the impact on Blast's goodwill in the market if the business was allowed to deteriorate further.

Having achieved a common objective, being the "sale of the business", the mediator was able to assist the parties to negotiate an acceptable price. Although this option was not foreseen prior to the mediation both parties were pleased with the outcome.

The Mediated Outcome

Frank agreed to buy the franchise, including stock and equipment, and take over the existing retail lease. The price was discounted, however, it allowed Wayne and Sue to exit the business and repay the family loan.

Lessons to be Learnt

Detailed disclosure by the franchise company is essential prior to purchase.

Seek professional advice to evaluate any new business venture.

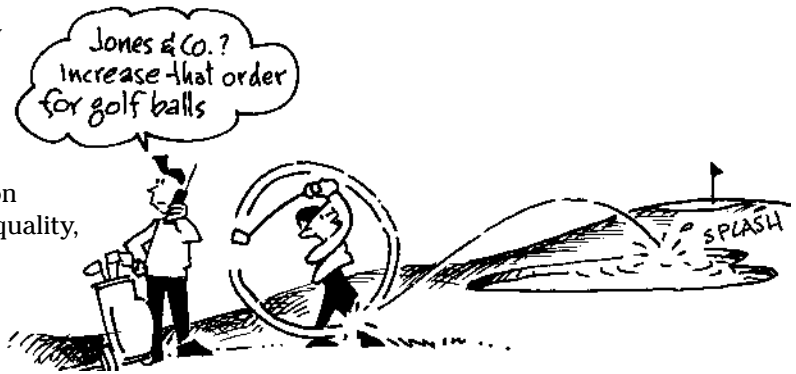
Critically assess your skills and experience to manage a new business venture.

MAIN LEGISLATION		CODES OF CONDUCT	KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Trade Practices (Industry Codes – Franchising) Regulations 1998	Franchising Code of Conduct	Part four covers resolving franchise disputes. Code is mandatory for franchise agreement entered into since 1 July 1998 & provides for mediation & appointment of mediation adviser.	Office of the Mediation Adviser 1800 150 667
FED	Petroleum Industry Retail Marketing Franchise Act 1980	Franchising Code of Conduct	Governs relations between Petroleum companies & retail site operators/franchisees. Parties accepting the Code required to submit their dispute to ADR before commencing legal proceedings.	Department of Industry, Science & Resources 02 6213 6000
FED	Trade Practices Act 1974 (Operates nationally)		Provides remedies for misleading & deceptive conduct & unconscionable conduct. The Franchising Code is prescribed under the Act.	Australian Competition & Consumer Commission 02 6243 1111
NSW	Fair Trading Act 1987		Prohibits misleading conduct & false representations.	Department of Fair Trading 13 32 20
QLD	Fair Trading Act 1989		Similar provisions to NSW.	Office of Fair Trading 07 3246 1500
SA	Fair Trading Act 1987		Similar provisions to NSW.	Office of Consumer & Business Affairs 08 8204 9777
WA	Fair Trading Act 1987		Similar provisions to NSW.	Ministry of Fair Trading 08 9282 0777
TAS	Fair Trading Act 1990		Similar provisions to NSW.	Office of Consumer Affairs & Fair Trading 03 6233 4567
ACT	Fair Trading Act 1992		Similar provisions to NSW.	Office of Fair Trading 02 6207 0400
NT	Consumer Affairs and Fair Trading Act 1990		Similar provisions to NSW.	Office of Consumer Affairs & Fair Trading 08 8999 1999

NOTE (1) The provisions of the Franchise Agreement should be checked to see if they provide for ADR procedures, if so follow them.

SUPPLY CONTRACT DISPUTES

The most common contract signed by any small business is a contract to supply or receive goods or services. Supply contracts can suffer from problems relating to breaches in performance. Supply disputes are commonly focussed on matters such as price, delivery of goods, quality, and customer service standards.



Case Study Supply Contracts

Background

Mike Jones was a small manufacturer of quality products for the local sports/leisure market. Mike's company had been in operation for two years. Fun Equipment Pty Ltd operated in the same market selling a wide range of products and accessories. Fun Equipment held around 15% market share and marketed nationally using both television and high impact point of sale promotions.

Fun Equipment approached Mike to develop a product based on his existing designs but modified to Fun Equipment's trade mark brand to complement their range. An order of 100,000 units was confirmed as the initial purchase. The development took three months and costs were incurred in manufacturing moulds and set up costs.

The Dispute

Prior to commencing manufacture an amended order was received for only 5,000 units. Mike attempted to discuss the matter with the Managing Director, but his calls remained unanswered. Mike Jones was a member of the local Business Enterprise Centre and sought assistance from the small business adviser.

The Facts

Fun Equipment had placed a written order for 100,000 units.

Fun Equipment had formally advised an amended order for only 5,000 units.

The Process

Mike Jones was referred by the Business Enterprise Centre to a commercial mediator. The mediator contacted Jeff Rhodes, Managing Director of Fun Equipment, who although reluctant to acknowledge there was a problem did finally agree to mediation.

During the mediation Mike stated his willingness to extend the time for completion of the order to 12 months but believed the original order should stand. Jeff Rhodes believed it was Fun Equipment's legal right to vary the order and if this was not acceptable he would cancel the complete order. The parties were not prepared to change their positions.

The mediator met with the parties privately and was able to identify that Mike's main concern related to the uncertainty of the business relationship for the future, and not the initial order. Mike's concerns were:

Had Fun Equipment found another manufacturer?

Why were his calls not returned?

What will be the financial implications if the contract does not proceed?

A smaller order over a longer period would in fact be easier to manage and be of less risk to the business.

Jeff Rhodes advised the mediator in confidence that one of the major shareholders had been bought out by the remaining partners and the requirement for additional funding had created financial problems for the company. They were still keen to proceed with the new product but funding was the issue.

Jeff agreed to table the problem in the joint session (as matters discussed in mediation are confidential) and the parties worked with the mediator to find a solution. The mediator's ability to identify the real issues and establish effective communication were the keys to a successful outcome.

The Mediated Outcome

Fun Equipment paid Mike Jones \$4,000 for the cost of moulds and materials.

The parties agreed to enter into a 3 year supply agreement.

The initial order was reduced to 2,000 units per month for 6 months, 5,000 units for the following 6 months.

Lessons to be Learnt

Avoiding communication does not make a problem go away. In fact, a lack of communication will usually escalate a problem.

Solutions between business partners are usually achievable with effective communication.

If you have a supply dispute just find out about the other company's dispute resolution procedures. For example a staff member may be responsible for handling disputes.

	MAIN LEGISLATION	KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Trade Practices Act 1974 (Operates nationally) Trade Practices Amendment (Fair Trading) Act 1998	Prohibits certain exclusive dealing, price fixing, misuse of market power, misleading, false or unconscionable conduct, product standards compliance. Defective product remedies. Implied conditions in sales to consumers. Damages for breach & other remedies. S51AC unconscionable conduct criteria for transactions with small business.	Australian Competition & Consumer Commission 02 6243 1111
NSW	Sale of Goods Act 1923 Fair Trading Act 1987 Contracts Review Act 1990	Implied conditions of fitness, merchantability, description title for goods; remedies for unpaid sellers & buyers of goods, unfair practices prohibited. Damages for breach. Contracts with consumers can be reopened if "unjust" (Contracts Review Act). Damages & other remedies available.	Department of Fair Trading 13 32 20
VIC	Goods Act 1958 Fair Trading Act 1985 Goods (Sales & Leases) Act 1981	Implied conditions of fitness, merchantability, description title for goods; remedies for unpaid sellers & buyers of goods, certain unfair practices prohibited. Damages for breach. Non excludable conditions in sales to consumers.	Consumer & Business Affairs 03 9627 6111
QLD	Sale of Goods Act 1896 Fair Trading Act 1989	Implied conditions of fitness, merchantability, title of goods; remedies for unpaid sellers & buyers of goods, certain unfair practices prohibited. Damages & other remedies available.	Office of Fair Trading 07 3246 1500
SA	Sale of Goods Act 1895, Fair Trading Act 1987, Consumer Transactions Act 1972	Similar provisions to VIC.	Office of Consumer & Business Affairs 08 8204 9777
WA	Sale of Goods Act 1895 Fair Trading Act 1987	Similar provisions to QLD.	Ministry of Fair Trading 08 9282 0777
TAS	Sale of Goods Act 1896 Fair Trading Act 1990	Similar provisions to QLD.	Office of Consumer Affairs & Fair Trading 03 6233 4567
ACT	Sale of Goods Act 1954 Fair Trading Act 1992	Similar provisions to QLD.	Office of Fair Trading 02 6207 0400
NT	Sale of Goods Act 1972 Consumer Affairs & Fair Trading Act 1990	Similar provisions to QLD.	Office of Consumer Affairs & Fair Trading 08 8999 1999

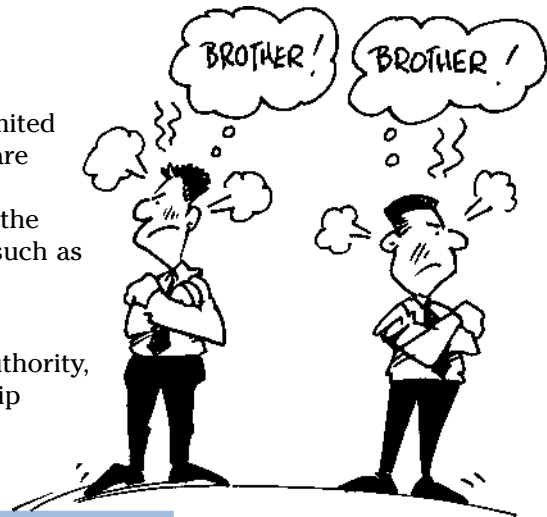
NOTE (1) None of the Acts provide for ADR. However this does not preclude ADR if other party agrees.

(2) Various Federal, State and Territory anti-discrimination Acts prevent discrimination based on sex, marital status, religion, disability, age in refusing to supply goods or services to a person or the terms on which they are to be provided, subject to certain exceptions.

PARTNERSHIPS DISPUTES

Partnerships are an effective way to conduct businesses involving a small number of people where the need for limited liability is not considered necessary. Many partnerships are family businesses, as the cost of set up and on-going reporting is low, and the informal, flexible structure suits the parties. Partnerships are also common for professionals such as Accountants, Doctors, and Lawyers.

Disputes between partners are common and can relate to breaches of the partnership agreement, acting without authority, future direction of the business, capitalisation, relationship issues, and division of assets on termination.



Case Study Partnership/Family

Background

The partnership involved two brothers, John and Jim Martin, and their respective families. The business commenced as a retail clothing shop with John and Jim entering the partnership while their children were young. The business proved to be successful and over the years a further two shops were opened. There were five children now actively involved, three from one family and two from the other.

The Dispute

Plans to open a further store had been vetoed by Jim's family which brought to the surface a range of underlying issues, involving work practices and remuneration, which had been unresolved for several years resulting in a breakdown in communication.

The Facts

The business was a 50/50 partnership between the two brothers.
The assets included two owned properties and one retail lease.
The three retail shops were located within a 10 kilometre radius.
The stores were profitable.

The Process

John and Jim had attempted to resolve the dispute through direct negotiation over several months, however both families had different needs and it became clear that the business could not be managed under the circumstances. The families' accountant realised the impact the dispute was having on the business and suggested mediation. Both families agreed.

After a preliminary conference with John and Jim, the mediator recommended that they meet separately with the mediator to help them identify all the issues, their concerns and the needs of the two families. Both families believed they were contributing more to the successful operation of the business and were not receiving the appropriate remuneration. The rivalry between the children was intense and effective communication was minimal.

The mediator arranged a joint meeting to discuss the issues and look at what options were available. During this session both families were able to speak freely about their concerns in an environment controlled by the mediator. All the cards were put on the table and although sensitive issues were discussed, for the first time in several years the families were communicating.

The preferred options were: divide the asset between the families; one family purchase the entire business; or sell the business and split the returns. John and Jim agreed to an independent valuation to assist in making the final decision.

Both families were keen to continue in the business, however, the valuation exceeded initial expectations. The economies of owning three stores increased the value of the business as a whole

and therefore both families agreed not to split the business. Funding the acquisition for either family was a problem, and some time was spent looking at the various financial options available. The role of the mediator throughout this process was to assist the parties to review their options, to keep the communication lines open, and to continue to build trust between the families.

The whole process took several months and required a number of meetings. The major time delays revolved around the preparation of the valuation and investigating the various funding options.

The Mediated Outcome

The business was sold to John's family with 50% paid up front and the balance over two years. A key outcome of the mediation process was the restoration of the relationship between the families including the children.

Lessons to be Learnt

Unresolved issues or problems will surface at some stage – it is better to address the problem when it occurs. They do not get better with age.

Mediation is an effective means of dealing with partnership disputes, especially where family or personal relationship issues are involved.

MAIN LEGISLATION		KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Trade Practices Act 1974 (Operates nationally)	Prohibits misleading & deceptive conduct, false representation & unconscionable conduct. Only applies to corporations & unincorporated businesses which trade on an interstate basis.	Australian Competition & Consumer Commission 02 6243 1111
NSW	Partnership Act 1892*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Department of Fair Trading 13 32 20
VIC	Partnership Act 1958	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Consumer & Business Affairs 03 9627 6111
QLD	Partnership Act 1891*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Office of Fair Trading 07 3246 1500
SA	Partnership Act 1891*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Office of Consumer & Business Affairs 08 8204 9777
WA	Partnership Act 1895*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Ministry of Fair Trading 08 9282 0777
TAS	Partnership Act 1891*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Office of Consumer Affairs & Fair Trading 03 6233 4567
ACT	Partnership Act 1963*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Office of Fair Trading 02 6207 0400
NT	Partnership Act 1891*	Partnership – principles, formation, rights & duties of partners to one another, partnership property & dissolution of partnerships subject to provisions of Partnership Agreement which may provide for ADR.	Office of Consumer Affairs & Fair Trading 08 8999 1999

- NOTE
- (1) Various provisions of State and Territories Fair Trading Acts can also apply. Refer to Trade Practices and Consumer pages 39 and 41 respectively.
 - (2) NSW, VIC, QLD, WA and TAS have Partnership (Limited Partnership) Acts which may apply in certain situations.
 - (3) The Federal Sex Discrimination Act (S17), NSW Anti-Discrimination Act (S42A), VIC Equal Opportunity Act (S14), ACT Discrimination Act (S14): prohibit discrimination (sex, race, disability, religion, age, marital status) in deciding who should be a partner and the terms and conditions of the partnership and expulsion, subject to certain exceptions. Refer to Anti-Discrimination Authorities.

THE BUILDING INDUSTRY

The building industry is prone to disputation due to the complex nature of the projects and the need to use sub-contractors to complete many building projects. Construction may involve the owner, an architect, engineer, builder, various tradesmen under sub-contract, and building material suppliers. The nature of the work usually results in changed circumstances from the original contract and, depending on such variables as the weather, is likely to end up with both cost and time overruns.



Many building contracts include dispute resolution provisions and in most states there are dispute resolution services provided and/or mandated under State Legislation. Refer to contact details on the following page.

Case Study *The Building Industry*

Background

The owners of a large Federation house in a city suburb decided to carry out significant renovations. They contracted an architect, Jeremy Jones, whom they had used on several other projects to draw up the plans and supervise the work. Jeremy called tenders and after some negotiation appointed a reputable builder, Barry Burns, to carry out the work for an agreed sum.

During the course of the work the owners chose to alter the scope of the project, involving extra time, materials, and labour costs. Jeremy Jones advised Barry of the changes in writing and they agreed to submit the additional claims at the time the monthly progress payments were due. As the work progressed and time became critical, Jeremy requested changes over the phone and Barry acting in good faith and conscious of the time constraints, completed the work without written confirmation.

The Dispute

Although the additional costs were not paid with the progress payments, Jeremy was able to convince Barry that everything was OK and the payments would be made in due course. When the project was completed a final account was submitted with the architect's approval to the owners. It was rejected. The owners agreed to pay the total as per the original contract plus those authorised in writing. All attempts by Barry to make representation directly to the owners failed and he sought relief under the contract which specified arbitration as the dispute resolution process.

The Facts

The architect had approval to manage the project on the owner's behalf.
Additional work had been carried out by the builder outside the scope of the project.
The contract specified disputes would be settled by arbitration.
The builder had not received the final progress payment.
There was no dispute over the quality of the work performed.

The Process

The arbitrator was appointed and both sides engaged legal counsel. The process required significant preparation detailing all aspects of the project and assembling the necessary documentation. Statements of claim and counter claim were lodged and discovery of documents required. During the arbitration much of the legal discussion revolved around the contract and the agreed terms, and how and who was authorised to approve any additional work. Evidence was given by both sides to support their claims, however under the arbitration process Barry was not able to question Jeremy Jones directly. Although Barry was clear in his mind that all work had been authorised and cost agreed, Jeremy did not agree and supported the owner's position that the original contract fee should apply and only the work authorised in writing be paid as extras.

The Arbitrated Outcome

That Barry Burns be paid the value of the original contract plus amendment approved in writing and that all other variations should not be paid for.

Lessons to be Learnt

Arbitration is an adversarial based dispute resolution process similar to litigation, and is most suitable where you need a binding decision on dispute from a third party.

Changes in the scope of building projects should be approved in writing as specified by the contract.

Mediation should be considered as a viable alternative to litigation and arbitration in building disputes.

The fundamental problem in this dispute arose due to poor communication between the parties. Although the owner had requested changes to the plans Jeremy Jones failed to fully explain the additional costs. Mediation is very effective in resolving this type of communication problem at a lower cost than arbitration and with more creative and flexible solutions.

Expert determination could be considered as a viable alternative in building disputes.

	MAIN LEGISLATION/ CODES OF CONDUCT	KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Master Builders Australia National Code of Practice for Building & Construction Industry	Applies to standards of conduct, behaviour & ethics for Master Builders Australia members. Handles complaints but not in relation to contract dispute provisions.	Master Builders Australia 02 6249 1433
NSW	Building & Construction Industry Security of Payment Act 1999 Fair Trading Act 1987 Contractors Debts Act 1897	Adjudication of Payment Claims due to Sub-contractors & those supplying goods & services for building & construction work performed in NSW. Similar provisions & remedies to Trade Practices Act. Contract Debtors Act, enables workmen, tradesmen, subcontractors to recover wages up to a certain limit.	Department of Public Works & Services 02 9372 8877 Department of Fair Trading 13 32 20
VIC	Fair Trading Act 1985	Similar provisions to Trade Practices Act (FED).	Consumer & Business Affairs 03 9627 6111
QLD	Fair Trading Act 1989 Subcontractors Charges Act 1974	Similar provisions to Trade Practices Act. Protection of monies due to subcontractors on giving a Section 10 Notice.	Office of Fair Trading 07 3246 1500
SA	Fair Trading Act 1987 Workers' Liens Act 1893 Misrepresentation Act 1971-72	Registration & enforcement of certain liens & charges to protect monies owed to subcontractors. Provides additional remedies where there has been a misrepresentation. (Misrepresentation Act).	Office of Consumer & Business Affairs 08 8204 9777
WA	Fair Trading Act 1987	Similar provisions to Trade Practices Act.	Ministry of Fair Trading 08 9282 0777
TAS	Fair Trading Act 1990	Similar provisions to Trade Practices Act.	Office of Consumer Affairs & Fair Trading 03 6233 4567
ACT	Fair Trading Act 1992	Similar provisions to Trade Practices Act.	Office of Fair Trading 02 6207 0400
NT	Consumer Affairs & Fair Trading Act 1990 Workers' Liens Act 1893	Similar provisions to Trade Practices Act. Registration & enforcement of certain liens & charges to protect monies owed to subcontractors.	Office of Consumer Affairs & Fair Trading 08 8999 1999
FED	Trade Practices Act 1974 (Operates nationally)	Prohibits misleading conduct & certain false statements. Prescribes consumer warranties. Only applies where the builder is a company or an unincorporated business which trades on an interstate basis.	Australian Com- petition & Consumer Commission 02 6243 1111

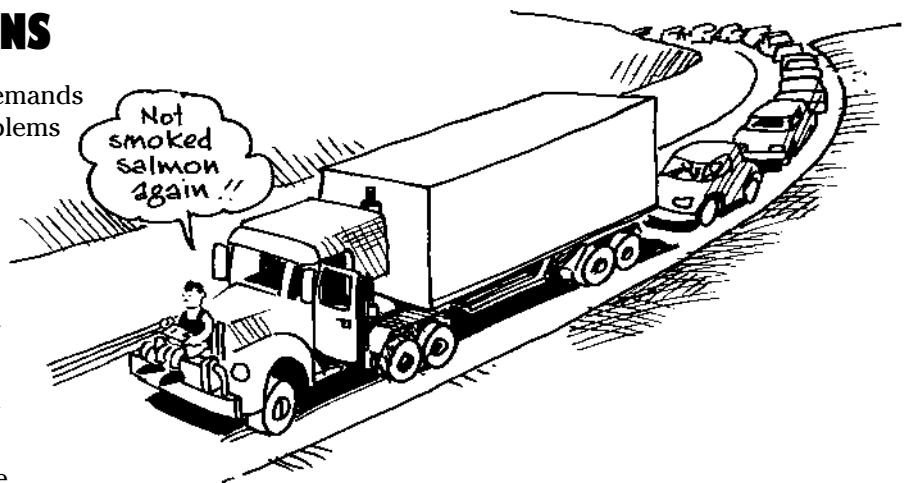
- NOTE (1) Most standard type Building Contracts provide for arbitration of disputes or negotiation within a specified period. Refer to your contracts "Dispute" section setting out the procedure to be followed.
- (2) Private home building contract disputes are dealt with by specialist Tribunals or Boards which can provide extensive remedies under specific State and Territory legislation administered by Departments of Fair Trading or Offices of Consumer & Business Affairs (as above).

WORKPLACE RELATIONS

Dealing with the expectations and demands of employees can create unique problems for small business.

The advent of workplace bargaining provides management and workers the opportunity to restructure relationships with particular regard to their local needs, without many of the rights and obligations that characterise awards of the industrial relations statutory tribunals.

The challenge is to undertake change to the benefit of all the parties in a manner that builds and enhances trust and the financial security of the enterprise and its employees.



Case Study Workplace Relations

Background

Super Transport was a regional carrying company involved in bulk deliveries in the local area. The company had been in operation for many years and had developed certain workplace practices which were now established as the norm.

During a review of their company's profit performance, management realised that the employees were being paid double time for the lunch break (crib break) on Saturday.

The Dispute

Management advised the drivers that in future the crib break would be paid at normal time. A two day strike resulted and the Australian Industrial Relations Commission was notified. A compulsory hearing was called, however no settlement was reached. The prospect of waiting two to three months for arbitration was not attractive to the parties, and they agreed to a co-mediation process with each side nominating one of the mediators.

The Facts

The employees had been paid double time for the crib break for many years.

The Award was silent on the issue and only made reference to the crib break being payable.

The Process

The mediators confirmed that they would act as impartial facilitators and assist the parties to work together to a settlement. The mediators also developed a strategy for working together during the mediation, with each taking responsibility for different aspects of the process. The drivers were represented by the Union delegates and the company by senior management.

Initially, each side's position was fixed, with the drivers convinced that the status quo should remain, and the company equally firm that there was no obligation to pay double time as it was not in the award. During the discussions it was realised that the crib break was only payable if the employee was asked to work less than an eight-hour shift. If it was a full eight hours a normal unpaid lunch break would be taken.

At this point the mediators were able to explore the various options which would involve both sides moving from their original positions. Considerable goodwill was generated during the mediation as the parties gained more confidence in a successful outcome.

The use of co-mediators proved helpful in gaining initial agreement to mediate and also during the process in managing some of the relationship issues which threatened to undermine the outcome.

The Mediated Outcome

Super Transport would pay the drivers double time for crib breaks taken up until the mediated settlement. The employees agreed that they would take a half hour unpaid lunch break on Saturdays for shifts not less than eight hours.

Lessons to be Learnt

Use of a third party to facilitate negotiations can assist difficult workplace negotiations.

MAIN LEGISLATION		KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Workplace Relations Act 1996	Allows enterprise bargaining – certain employers/employees can opt out of awards by signing Certified Agreements or Australian Workplace Agreements (AWAs) covering employment conditions. Mediation available. Also Unfair Dismissal/Termination requirements. Employment Advocate can advise on AWAs.	Department of Employment Workplace Relations & Small Business (DEWRSB) 02 6121 6000
NSW	Workplace Relations Act 1996 Industrial Relations Act 1991 (S.275)	Allows enterprise bargaining subject to “no disadvantage test”. Minimum entitlements of employees as set by awards. Conciliation or arbitration available S.275 Industrial Court has power to set aside a contract of employment which is unfair, harsh, unconscionable or against public policy.	Department of Industrial Relations 02 9243 8888
VIC	Adopted Federal Workplace Relations Act 1996 Fair Employment Bill 2001	Same as Federal legislation – changes proposed. Under review	DEWRSB 03 9954 2510
QLD	Workplace Relations Act 1996	Similar to Federal Act. Enterprise bargaining in certified agreements & QLD Workplace Agreements to be approved by Industrial Commission. Dispute resolution procedure to be followed. No unfair dismissal.	Industrial Relation Commission 07 3227 8060
SA	Industrial & Employees Relations Act 1994 as amended 1997	Similar to Federal Act. Enables employer/employee agreements, employer/union agreements & Greenfield Agreement. Employee Ombudsman available. Dispute resolution procedures to be followed.	Department of Administration & Information Services 08 8226 5000
WA	Workplace Agreements Act 1993	Commissioner for Workplace Agreements can register collective agreements & individual agreements between employer & employees. Dispute resolution procedures. No unfair dismissals.	Department of Productivity & Labour Relations 08 9222 7700
TAS	Industrial Relations Amendment (Enterprise Agreements & Workplace Freedom) Act 1992	Enterprise agreements to be negotiated at enterprise level between employers/employees – certain minimum conditions apply. Agreements must be approved & registered by the Enterprise Commissioner.	Workplace Standards Tasmania 03 6233 7657
ACT	Workplace Relations Act 1996	Same as Federal legislation.	DEWRSB 02 6121 6000
NT	Workplace Relations Act 1996	Same as Federal legislation.	DEWRSB 08 8936 5000

- NOTE (1) Common Law covers responsibilities of employers for employees’ acts and relationship of employer/employee etc.
- (2) Prohibition against discrimination in the workplace because of sex, race and disability. At Federal level under Sex Discrimination Act 1984, Racial Discrimination Act 1975 and Disability Discrimination Act 1992. Contact Human Rights & Equal Opportunity Commission (HREOC). Similar Anti-Discrimination legislation in all States and Territories and which also prevents discrimination in employment based on age. Refer State or Territory Anti-Discrimination Tribunals/Boards.
- (3) Extensive occupational health and safety laws in State and Territories apply to physical aspects of work places and conditions.

TRADE PRACTICES AND FAIR TRADING DISPUTES

Trade Practices cases involve such areas as price fixing, price discrimination, restraint of trade (including certain types of exclusive dealing eg. third-line forcing), abuse of market power, misleading and deceptive conduct, and unconscionable conduct.

The Act provides certain product warranties for consumers, and extensive damages and other remedies can be awarded by the courts for breaches of the Trade Practices Legislation.



Case Study Trade Practices

Background

The case revolves around the business dealings of a small family business and a financial institution. Paul and Tina Roma emigrated to Australia and over a period of 20 years were able to build up several retail businesses as well as purchase investment properties. Funding to acquire the assets and run the business had been secured through the one bank. It was a good relationship for both parties.

The problem started when Paul approached the bank to borrow \$500,000 to purchase a shopping complex. The bank agreed and contracts were signed. Very shortly afterwards, Paul presented plans to renovate the property and increase the earning capacity. Again the bank was prepared to fund the business, although no formal correspondence changed hands. In the interim, the bank released the funds for the original purchase and continued to respond positively to regular reports on progress for the redevelopment project.

Considerable development costs were incurred and existing tenants paid to exit their leases to prepare for the renovations. As part of the total refinancing of the project Paul provided mortgage security over the family home.

The Dispute

At the last minute, and following council approval to proceed with the development, the bank advised it was not prepared to provide the finance. The property was now not earning any income and without the prospect of the renovations was not able to fund the current level of debt. On this basis the bank proceeded to recover its outstanding loans through its mortgage security including the family home.

The Facts

Paul Roma had a long and successful relationship with the bank.

The bank did disburse the original loan to purchase the property.

The bank did not advise that there was a problem with the additional funding until late in the process.

Paul Roma had spent considerable money and time on the proposed redevelopment.

The bank had justified the mortgage over the family home in the light of the total funding requirement.

The Process

Paul Roma contacted the Australian Competition & Consumer Commission (ACCC) who advised him that he might be able to bring a case against the bank for 'Misleading and Deceptive Conduct'. Paul contacted a solicitor who advised him he would only recover a substantial financial loss by taking legal action for damages resulting from the actions of the bank. The original case went in favour of the bank and the matter proceeded to the Court of Appeal. Eventually the Court ruled in favour of Paul Roma holding that damages were payable and that the mortgage over the family home was invalid.

Both parties decided to have the claim for damages mediated. The mediator decided to work with both parties separately to estimate the damages each believed was appropriate. The judgement had established a date when damages would commence and the negotiation revolved around the elements which made up the total value and how to assess the value of the elements, including interest rates, lost rent and likely rent increases.

The mediator continued to question and test the methodology of each party to narrow the gap. At this stage neither party was aware of the other's proposed offer. When the mediator was confident that they had made every effort to present a realistic proposal the parties were brought together to negotiate a settlement.

The Mediated Outcome

Final agreement took several sessions to resolve, however, agreement for damages was achieved.

Lessons to be Learnt

Companies must train their staff of their obligations under the Trade Practices Act, in particular the "Misleading and Deceptive" and "Unconscionable Conduct" provisions.

You should consider mediation at the outset of any dispute. Mediation can be used in conjunction with litigation or other forms of dispute resolution. If you have to seek financial compensation ADR will not be appropriate.

MAIN LEGISLATION		KEY PROVISIONS INCLUDING ADR (if any)	CONTACT
FED	Trade Practices Act 1974* (Operates nationally) Trade Practices Amendments (Fair Trading) Act 1998	Prohibits price fixing, certain exclusive dealing, boycotts, abuse of market power, misleading, false & unconscionable conduct; product warranties. Damages for breach & other remedies available. Section 51 (AC) unconscionable conduct criteria for small business transaction. Extensive remedies available.	Australian Competition & Consumer Commission 02 6243 1111
NSW	Fair Trading Act 1987 Contracts Review Act	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages for breach & other remedies. Consumer contracts can be reopened if 'unjust' – (Contracts Review Act NSW).	Department of Fair Trading 13 32 20
VIC	Fair Trading Act 1985	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Consumer & Business Affairs 03 9627 6111
QLD	Fair Trading Act 1989	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Office of Fair Trading 07 3246 1500
SA	Fair Trading Act 1987	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Office of Consumer & Business Affairs 08 8204 9777
WA	Fair Trading Act 1987	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Ministry of Fair Trading 08 9282 0777
TAS	Fair Trading Act 1990	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Office of Consumer Affairs & Fair Trading 03 6233 4567
ACT	Fair Trading Act 1992	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Office of Fair Trading 02 6207 0400
NT	Consumer Affairs & Fair Trading Act 1990	Prohibits misleading, unconscionable conduct, false representations regarding goods & services. Damages & other remedies available.	Office of Consumer Affairs & Fair Trading 08 8999 1999

NOTE * (1) Although none of the Acts specifically provides for ADR, this does not preclude resort to ADR in appropriate matters, if the other party agrees.

(2) For more detailed information refer to "Small Business and the Trade Practices Act" booklet obtainable from ACCC offices.

(3) The terms and conditions of any contract between the parties in dispute should be examined to see if they provide for ADR procedures to be followed.

CONSUMER DISPUTE RESOLUTION

Disputes with customers are a common occurrence for small business and need to be handled quickly and professionally to maintain your goodwill and reduce the risk of financial loss.

It is important that your organisation is fully aware of its obligations under the consumer laws and has procedures in place to ensure compliance on a routine basis. If a complaint does arise it is better that the matter be resolved directly with the customer as quickly as possible. This is consistent with the approach recommended to consumers when they contact the various consumer affairs organisations.

Case Study Consumer Dispute Resolution

To maximise your chances of a successful resolution, you need to:

- listen to what the customer has to say (put yourself in his/her position).
- request documentary evidence if required to verify the facts.
- understand your legal obligations (seek advice from the relevant consumer organisation).
- negotiate face to face in a calm and professional manner.
- if you reach stalemate, refer back to the relevant consumer organisation.

Disputes are inevitable, however, if they are handled successfully, you will generate positive goodwill from customers, their associates, and your own staff.

There are a wide range of organisations and services available to assist in handling consumer disputes. The services vary from government agencies to industry associations, and some of the key services and advice centres are listed below. More detailed information is available in the guide *Directory of Consumer Dispute Resolution Schemes & Complaints Handling Organisations 2000*, published by the Department of Treasury.

For copies Tel 02 6263 4000
Fax 02 6263 2948

These schemes are designed to provide support for both consumers and small businesses in understanding their legal requirements and by doing so allow successful face to face resolution of disputes.

Industry	Organisation	Location	Contact Details
Banking	Australian Association of Permanent Building Societies	National	Tel 02 6281 1588 Fax 02 6285 1674
Banking	Australian Banking Industry Ombudsman	National	Tel 1800 337 444 Fax 03 9613 7345
Banking	Credit Union Dispute Resolution Centre	National	Tel 1800 624 241 Fax 02 9267 3125
Building	ACT Building Electrical & Plumbing Control	ACT	Tel 02 6207 6400 Fax 02 6207 6324
Building	Department of Fair Trading	NSW	Tel 13 32 20 Fax 1300 300 010
Building	Office of Consumer & Business Affairs	South Australia	Tel 08 8204 9777 Fax 08 8204 9763
Building	Domestic Building Tribunal	Victoria	Tel 03 9628 9999 Fax 03 9628 9988

Industry	Organisation	Location	Contact Details
Building	Queensland Building Services Authority	Queensland	Tel 07 3225 2855 Fax 07 3225 2829
Building	Commissioner of Consumer Affairs	Northern Territory	Tel 08 8999 5184 Fax 08 8999 6260
Building	Office of Consumer Affairs & Fair Trading	Tasmania	Tel 03 6233 4567 Fax 03 6233 4882
Building	Builders Registration Board of WA	Western Australia	Tel 08 9476 1222 Fax 08 9476 1299
Building	Master Builders Australia	National	Tel 02 6249 1433 Fax 02 6249 1373
Building	Royal Australian Institute of Architects	National	Tel 02 6273 1548 Fax 02 6273 1953
Consumer Affairs	Office of Fair Trading	National	Tel 02 6207 0400 Fax 02 6207 0424
Consumer Affairs	Office of Fair Trading	Queensland	Tel 07 3246 1500 Fax 07 3246 1589
Fair Trading	Department of Fair Trading	NSW	Tel 13 32 20 Fax 02 9635 6927
Consumer Affairs	Office of Consumer Affairs & Fair Trading	Northern Territory	Tel 08 8999 5184 Fax 08 8999 6260
Consumer Affairs	Office of Consumer & Business Affairs	South Australia	Tel 08 8204 9777 Fax 08 8204 9763
Consumer Affairs	Office of Consumer Affairs & Fair Trading	Tasmania	Tel 03 6233 4567 Fax 03 6233 4882
Fair Trading	Office of Consumer & Business Affairs	Victoria	Tel 03 9627 6111 Fax 03 9627 6223
Ombudsman	Commonwealth Ombudsman	National	Tel 02 9248 2000 Fax 02 9290 1482
Trade Practices	Australian Competition & Consumer Commission	National	Tel 02 6243 1111 Fax 02 6243 1199
Small Claims	Small Claims Tribunal	ACT	Tel 02 6217 4273 Fax 02 6217 4506
Small Claims	Fair Trading Tribunal	NSW	Tel 02 9895 2070 Fax 02 9895 0955
Small Claims	Small Claims Tribunal	Queensland	Tel 07 3247 4578 Fax 07 3247 5555
Small Claims	Residential Tenancies List	Victoria	Tel 03 9628 9800 Fax 03 9268 9822
Small Claims	Magistrate Court	South Australia	Tel 08 8204 2444 Fax 08 8204 0670
Small Claims	Legal Aid Commission	Northern Territory	Tel 08 8999 3000 Fax 08 8999 3090
Small Claims	Small Claims Tribunal	Western Australia	Tel 08 9426 8700 Fax 08 9426 8717

AVOIDING DISPUTES & DISPUTE MANAGEMENT SYSTEMS

Although many disputes are inevitable, there is a lot that small business can do to minimise the risk of disputes developing and to manage them better when they do develop. There is also an opportunity for industry associations to implement dispute management systems for the benefit of their small business members.

This section provides some advice on dispute avoidance and dispute management, with regard to:

- contract clauses that can ensure timely dispute resolution when a dispute does develop.
- information to assist industry associations in establishing dispute management systems for the benefit of their members.

Recommended Contract Clauses

Dispute Resolution clauses should be written into all contracts to encourage joint problem solving before a problem turns into a dispute. Key elements to the clause should include:

- informal discussion of an issue or problem;
- how a complainant can raise a matter in writing with the other party (setting out the grounds for the dispute and what is the preferred solution) and how the parties are to make every effort to resolve the dispute fairly;
- if the dispute is not resolved, provision for a party to use an informal negotiator (eg industry association, business adviser) to assist;
- if the dispute is still not resolved, provision for the matter to go to mediation or conciliation.

Using a Dispute Resolution Contract Clause

Alternative Dispute Resolution (ADR) providers (see pages 11-17) can discuss with you how to develop a dispute resolution contract clause to suit your needs. There are a number of standard dispute resolution contract clauses, and the following clause has been designed to suit the needs of most small businesses.

- (1) If a dispute arises between the parties, then the parties agree to (must) undertake the following steps:
 - (a) The complainant shall raise the matter with the other party setting out the background and the issues in dispute, and the outcome desired.
 - (b) If the dispute is not resolved in accordance with clause (a), the complainant shall raise the matter with the (company name) nominated dispute manager. The parties shall make every effort to resolve the dispute fairly. In doing so, each party agrees to use its best endeavours to:
 - clearly communicate the background facts leading to or causing the dispute;
 - set out clearly what action is required to settle the dispute;
 - select a way of resolving the dispute and explain why that way of resolving the dispute can be said to be a fair resolution of the dispute;
 - discuss specific means of avoiding such disputes arising in the future.
 - (c) If the dispute is not resolved in accordance with clause (b), then the complainant may refer the matter to its industry association for assistance or to an ADR provider in accordance with clause (d).
 - (d) If the dispute is not resolved in accordance with clause (c), then the matter shall be referred to mediation/conciliation (or other agreed form of ADR) to be facilitated by an agreed alternative dispute resolution provider.
- (2) Action taken to settle the dispute at each stage must be undertaken promptly.
- (3) The parties shall equally share the costs associated with the appointment of an agreed alternative dispute resolution provider.

Dispute Management Systems for Industries

Designing your own dispute resolution process

There is a growing awareness in industry and government that the cost for small business of dealing with conflict is too high and is undermining many positive initiatives designed to increase the role of small business in the overall economy.

There are already a range of dispute resolution processes, either operating or being developed, to address low cost dispute resolution and it is in the interest of both large and small business to understand the concepts and support their continued use.

Alternative Dispute Resolution Process – general principles

- Successful resolution of disputes is enhanced by having a defined process which deals with how a problem should be managed from the initial identification through to its logical conclusion.
- The process needs to be well communicated to all participants in the industry and easily accessed.
- The industry must support the concept of ADR and be prepared to participate in the development of the process and support it in practice. The key will be low on administrative effort for the parties in dispute and high on practical solutions.
- The process needs to focus on early resolution by the parties using the lowest cost method to achieve the preferred outcome, but must also be designed so that clear intervention milestones are set out to ensure the dispute will receive appropriate attention and not be allowed to be forgotten. Having defined lead times for action will overcome this issue.
- Finally, it is important to build in a regular review of the process which will allow effective measurement of the performance and changes to meet current needs. Each step in the process needs to resist a quick fix solution, but rather channel the parties to quality decision making.

Having established a dispute resolution process it will need to be well administered and properly skilled if it is to achieve long term success.

Some alternatives

There are a number of alternative dispute resolution systems that industries may wish to consider.

Acting as an adviser – Industry Associations act as a first call adviser to members in response to disputes and provide a range of support. Sections 1,2 and 3, in this booklet provide a checklist which will assist in understanding the dispute and in choosing the most appropriate course of action. The Associations' knowledge of the industry, combined with good conflict management skills, provides a valuable tool to assist members better manage disputes.

Appointment of a Dispute Resolution Adviser (DRA) – The DRA is a specialist dispute resolution adviser who would provide advice on the most appropriate alternative dispute resolution process to be used and assist in the appointment of specialist providers. The DRA needs to be independent of the parties to avoid any conflict of interest which may arise.

The dispute resolution adviser is a person who –

- has an understanding of the range of ADR processes and when to use them.
- has dispute resolution skills.
- is neutral and independent of the parties in the dispute.
- has an understanding of the industry or is able to quickly acquire an understanding.

Use external providers – There are organisations who will provide expert assistance in developing ADR processes, and providing on-going administration of the process (refer to pages 11-17 in this booklet). This may suit many organisations as it provides both independence and dedicated ADR specialists, and in most cases the user pays system is cost effective.

Develop a code of conduct – If the industry has a code of conduct or is developing a code, it should include a dispute resolution process. The combination of a code of practice with a defined dispute resolution process provides a powerful tool for the professional management of an industry.

Common features of dispute resolution processes for industry codes of conduct.

Step 1 Aggrieved party must first seek a resolution with the other party face to face.

Step 2 If unsuccessful, a written request for a resolution follows.

Step 3 Depending on the type of dispute, the association is advised and seeks to facilitate a resolution. The association may act as an advocate for its member in step 4.

Step 4 If unsuccessful, an ADR process is initiated which the parties must use before any legal action is taken.

Step 5 The outcomes and the process should be reviewed regularly to ensure it is effective.

To be effective each step should have strict time frames which keep the process moving and assist in early resolution. It is also important for the parties to resist looking for a quick fix solution which will result in the problem surfacing again at a later stage. ADR is often the most effective method of identifying all the issues and finding a long term solution.