



Benchmarks for dispute avoidance and resolution

a guide

Round table on small/large business disputes

October 1997





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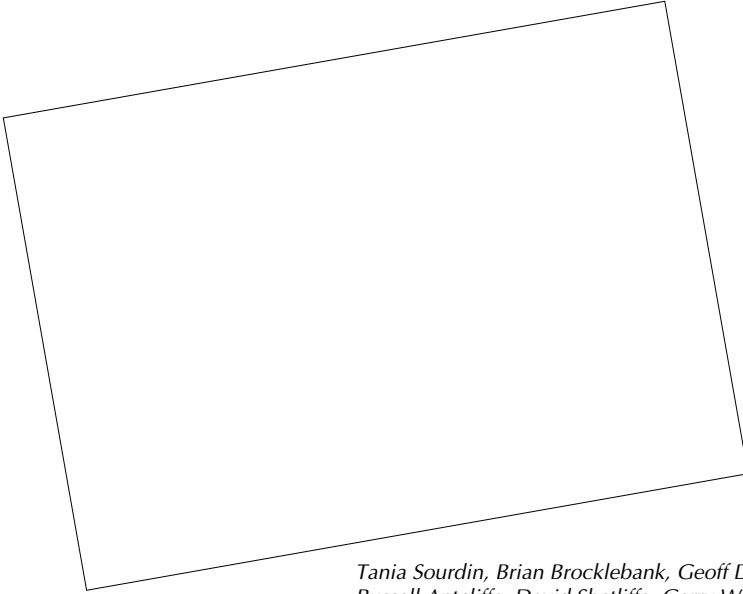
Round table on small business dispute avoidance and dispute resolution

Participants

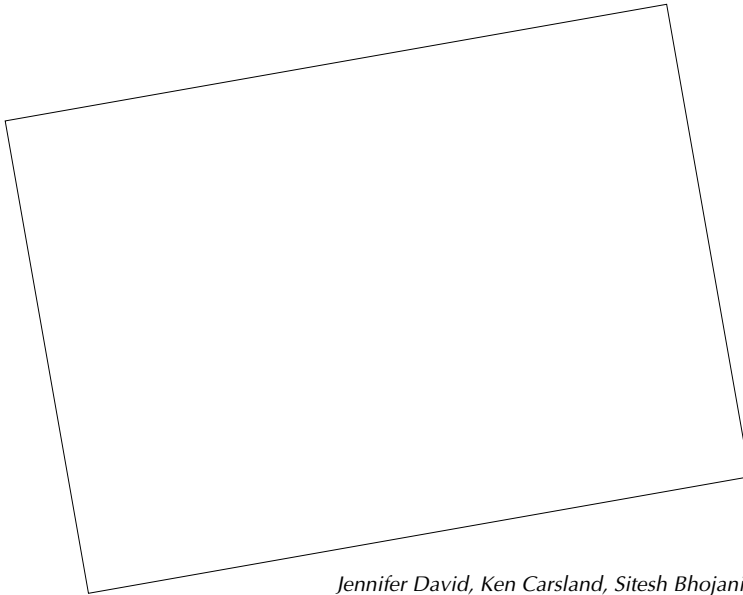
Alternative Dispute Resolution Association
Australian Chamber of Commerce and Industry
Australian Competition and Consumer Commission
Australian Council of Professions
Australian Federation of Business and Professional Women Inc
Australian Institute of Petroleum Ltd
Australian Law Reform Commission
Australian Petroleum Agents and Distributors Association
Australian Retailers Association
Business Council of Australia
Council of Small Business Organisations of Australia
Jennifer David & Associates Pty Ltd
International Institute for Negotiation and Conflict Management
Law Council of Australia, including Baker & McKenzie
Metal Trades Industry Association
Property Council of Australia, including Minter Ellison and Westfield Shopping Centre Management
Real Estate Institute of Australia
Registrar of Retail Tenancy Disputes (NSW)
The Accord Group

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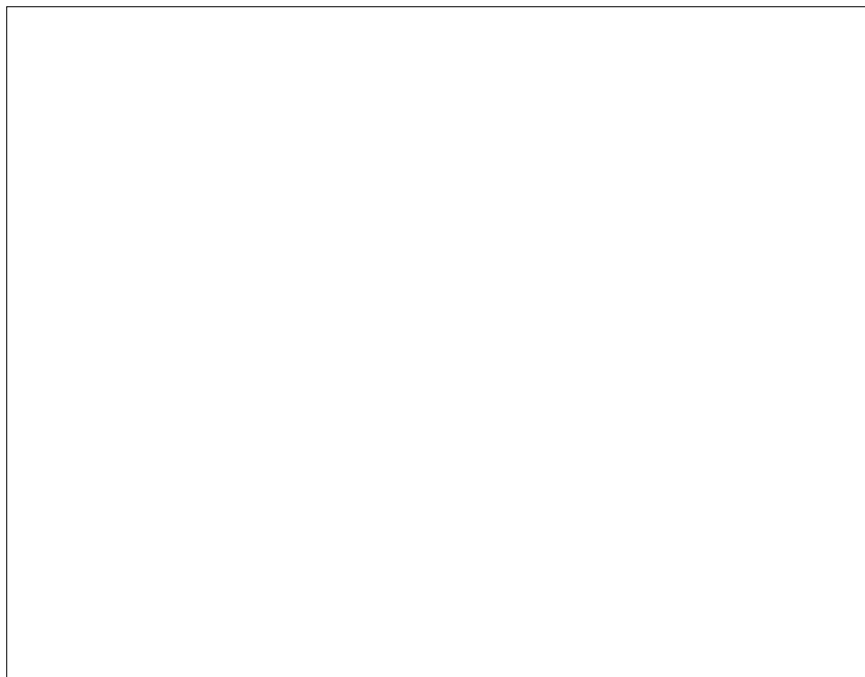


Communique

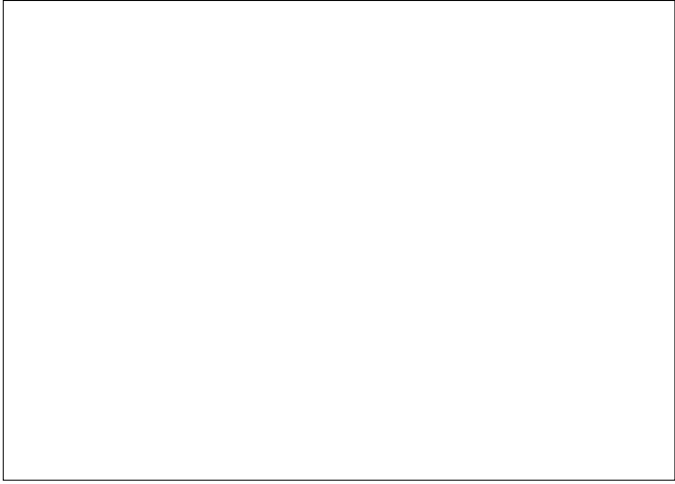
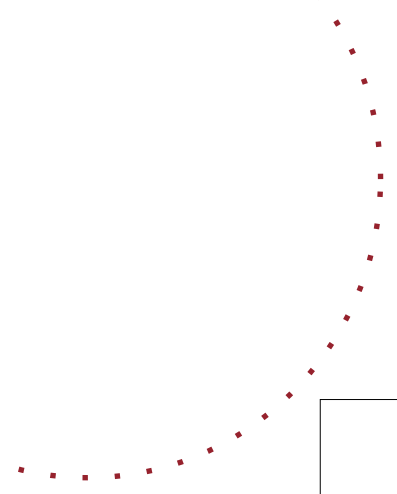
The round table acknowledges that disputes between businesses of all sizes (big, medium, small, micro) exist and will continue to exist. By applying the principles of mutual interest and good faith to business relationships these guidelines aim to:

- add value to and enhance commercial relationships, thereby avoiding many disputes from arising; and
- minimise the costs, inefficiencies and damage often incurred through conventional and/or adversarial processes.

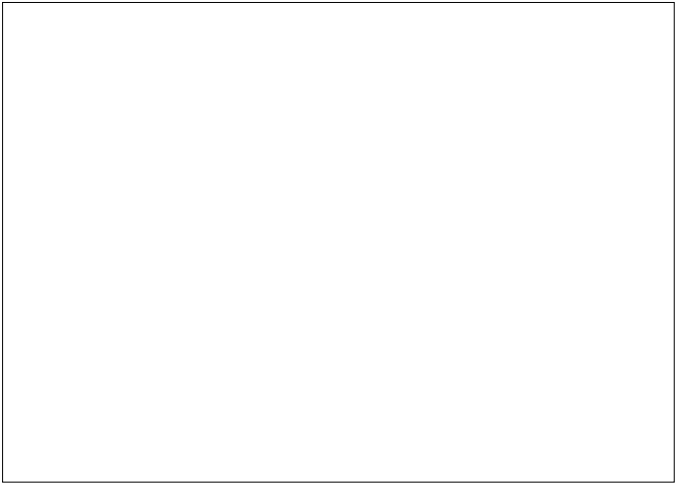
Applying the alternatives to litigation discussed in these guidelines should result in easier and earlier access to dispute resolution processes and more economic outcomes.



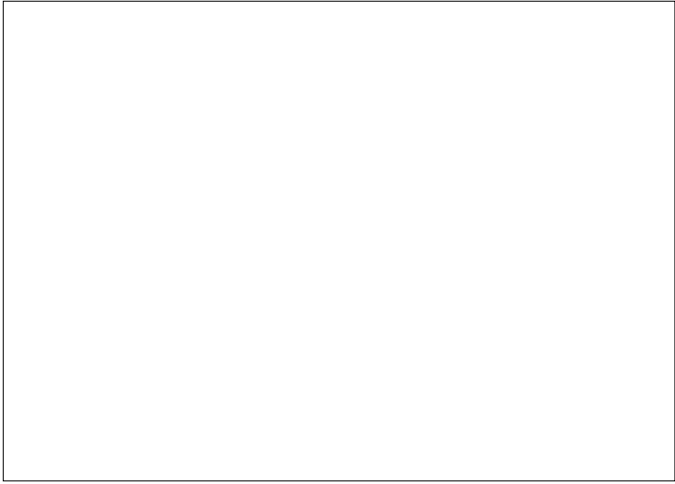
Round table meeting, Canberra, 19 November 1996



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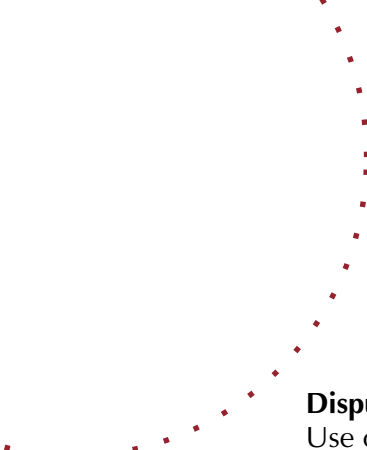
Michael Ahrens, Jon Kenfield





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Summary

Background

The impetus for the round table grew out of the desire by the Australian Competition and Consumer Commission to have the constant number of complaints it receives from small businesses dealt with more effectively in the market place. The Commission felt they were problems which could be better dealt with by the businesses themselves. The Commission receives complaints from businesses involved particularly in commercial relationships with larger parties such as in franchise, retail tenancy, or supply type arrangements.

The suggestion to try a business orientated approach was put to the Commission's Consultative Committee which agreed to the formation of a round table involving representatives from:


- both the small and large business sectors of that committee;
- the Commission's Small Business Advisory Group;
- the alternative dispute resolution sector which has experience in dealing with small/large business type problems; and
- others who have worked in the field of small/large business dispute resolution.

The work of the round table and its smaller task groups centred on making the business case for embedding dispute avoidance practices in everyday operations, for using alternative dispute resolution processes when disputes arise, and for developing benchmarks for both dispute avoidance and dispute resolution.

The business case for dispute avoidance and dispute resolution

The round table found a strong business case for implementing and using dispute avoidance practices, and using alternative dispute resolution mechanisms, including:


- cost savings to prevent management focus from being diverted;

- 
- disputes being dealt with quickly and controlled by the parties themselves;
 - overall less costly form of settling disputes;
 - compliance/risk avoidance mechanism for businesses to avoid contravention of the unconscionable conduct provisions of the Trade Practices Act;
 - encouraging business people to develop business solutions to business problems;
 - allowing for more creative remedies and outcomes compared with litigation;
 - providing a self-regulatory approach to deal with disputes;
 - reducing the risk of bad publicity flowing from disputes and concomitant low morale;
 - the benefits of confidentiality that most dispute resolution processes provide;
 - reduction of stress with concomitant health benefits for all parties; and
 - enhancing the Australian business community's ability to form strong business relationships with culturally different businesses because dispute avoidance and resolution is more suited to the Asian business approach which relies on consensus.

Dispute avoidance

For dispute avoidance the round table suggested benchmarks in the following four areas.

Disclosure. The round table's view is that better disclosure could help lessen disputes. This is because many disputes have their origins in incomplete and misleading information, or information not fully comprehended by the smaller party. This guide sets out benchmarks based on the experience of the Commission and others involved in problem areas in the market place — areas where better and comprehensible disclosure would go a long way to avoiding disputes.





Practices where small businesses come from different ethnic

backgrounds. The round table, in recognising that about one fifth of small businesses are owned and operated by people from non English speaking backgrounds, has included benchmarks to assist with dispute avoidance in situations where language is the problem.

The need for both large and small parties to recognise mutual interests.

Many of the complaints brought to the Commission's attention have their roots in a 'power and rights' approach by the larger parties. The round table has formulated a number of benchmarks aimed at putting the focus on recognising each party's mutual interest, so that relationships start and continue on a better footing and each party's expectation of the other is taken into account.

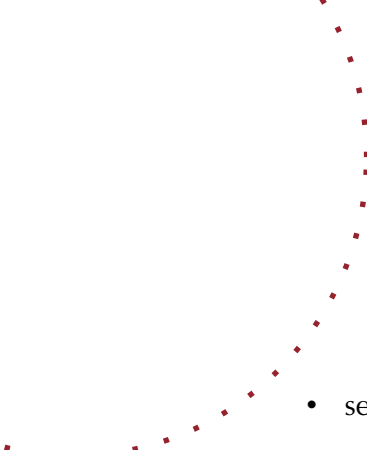
Conflict avoidance practices at the company level. Conflict management at the company level, particularly by a large party whose business involves relationships with smaller parties (e.g. franchisors, lessors, large retailers, large processors), could be a cost effective way of minimising complaints resulting in economic benefits for such an operator. The guide suggests benchmarks to meet this situation.

The round table recognises the growing use of partnering as a mechanism in which there is potential to involve professionals in facilitation and dispute resolution. The round table has developed a checklist of questions that a facilitator may use in the small-large business situation.

Dispute resolution

The guide discusses dispute resolution based on proven processes in the market place. It sets down benchmarks for alternative dispute resolution approaches which are timely, cost effective, more suited for business relationships and aimed at keeping the business relationship on foot if possible. The benchmarks are flexible in that they can be employed by a large company or form the basis of an industry dispute resolution scheme. The benchmarks agreed to by the round table include:

- use of the in-house disputes manager to settle disputes;
- a dispute resolution clause in contracts/codes/disclosure statements;
- recognition/use of a small business negotiator;
- having the right negotiators;

- 
- setting out clear and simple dispute handling policies and procedures;
 - commitment and coverage;
 - early intervention by a neutral third party;
 - establishing panels of appropriately trained and appropriately oriented dispute resolvers;
 - industry awareness, endorsement, and active support, of the scheme;
 - accountability; and
 - administration.

Appendixes

Appendix A is an example of a dispute resolution contract clause.

Appendix B gives background information on the commercial dispute avoidance and resolution processes currently operating in the market place. It sets out not only the different types of alternative dispute resolution available but also discusses their advantages and disadvantages.

Appendix C lists dispute avoidance and resolution benchmarks and their benefits.



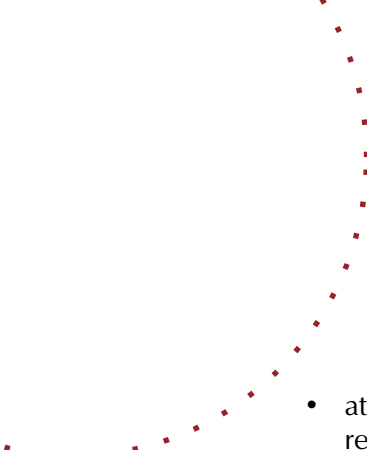
Introduction

The Australian Competition and Consumer Commission, like the Trade Practices Commission before it, receives numerous complaints from small business alleging unfair behaviour by large businesses with which they deal.

Some of these problems arise from the risks attached to being in business — for example from the structure and dynamics of markets, the legitimate use by strong suppliers or buyers of market power, and the everyday forces of supply and demand. Small businesses are often especially disadvantaged by difficulties in gaining access to supply and finance. Common areas of dispute are supply relationships, leaseholds and franchise agreements.

Notwithstanding initiatives taken by some large businesses to lessen the potential for disputes, common features of small business complaints made to the Commission and other bodies include:

- limited ability to negotiate terms of the contract (often pro-forma ‘take it or leave it’ contracts are used);
- inadequate disclosure of relevant and important commercial information of which the weaker party should be aware before entering a transaction;
- inadequate or unclear disclosure of important contract terms, particularly provisions weighted against the weaker party, resulting from, for example:
 - the technical wording of the document;
 - failure to include material information, ostensibly on security or industrial privacy grounds;
 - the ‘theatre’ of the negotiations, where the small business person is under-represented, lacks the legal fire power of the other party, and is discouraged from considering the detail of the contract (or not given the opportunity); or
 - failure to bring to the smaller party’s attention, or fully explain, terms which might operate against its interest;

- 
- attempts by the larger party to vary the terms of a long term relationship, e.g. a lease or franchise, to the disadvantage of the smaller party;
 - absence of effective dispute avoidance or resolution mechanisms or a reluctance by the smaller party to use them for fear of reprisal; and
 - an essentially adversarial relationship based on power and rights rather than mutual interests.

The Trade Practices Act is not often relevant to such disputes unless the problems arise from deliberate and unreasonable exploitation of power by the stronger party in a commercial relationship — or there is misleading and deceptive or unconscionable conduct.

In the retailing sector, petrol, franchising and other areas, examples of initiatives taken to address these problems include:

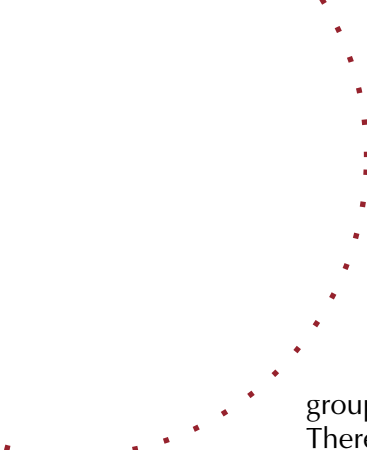
- retail shopping lease legislation in most States and Territories;
- the establishment of the Franchising Industry Code;
- the creation of Oilcode for participants in the oil industry; and
- other initiatives such as provision of retailer education, and giving advice to small businesses about commercial pitfalls.

Despite these initiatives, some of which have been more enduring than others, the steady flow of complaints to the Commission continues.

The Commission believes that, to be enduring, solutions to these problems should reflect a consensus among the businesses concerned on the best way to deal with them.

Against this background the Commission's Consultative Committee agreed that the Commission should convene a 'round table' of representatives of small and large business interests, and people with a background in alternative dispute resolution, to examine the potential for developing such solutions. Participants in the meetings are listed at the front of this document.

Round table meetings were held in Canberra on 19 November 1996, 18 March 1997 and 22 September 1997. Meetings of smaller task



groups were held in Sydney and Melbourne in May, July and August 1997. There was strong support for a continuation of the round table to develop guidelines which would contain benchmarks for avoiding and resolving disputes.

The process undertaken by the round table is complementary to the House of Representatives Standing Committee Inquiry into Fair Trading. Issues such as the underpinning of codes of practice by legislation or the need for a general provision in the Trade Practices Act covering unfair conduct is not the province of this document or the round table process — they are matters for the Commonwealth Government to decide. A number of the round table participants have strong views on these issues which, by and large, are in the public domain in the form of submissions to the Inquiry. Contributions to the round table by participants should be viewed as complementary to their views to the Inquiry and not as derogating from those views.

The guideline

This guide contains the outcomes of round table meetings. Its purpose is to assist the business community in adopting benchmarks for avoiding and resolving disputes either in their individual dealings with other businesses or, alternatively, with sufficient goodwill, through codes of practice for entire business sectors or industries. It is not intended to be prescriptive in content or implementation but deals instead with the general principles that might be applied. There is an underlying emphasis on the need for consensus between the parties as to the form agreement takes and how it should be implemented.

The guide first deals with dispute avoidance, in terms of the elements of a good working relationship between small and large businesses. It endeavours to explain and identify the commercial benefits of such good working relationships. Secondly it deals with dispute resolution and the desirable features appropriate for small versus large business disputes.

While the benchmarks developed for this guide are based mainly on the Commission's experience with supply/franchise/lease relationships, the round table believes they can be adapted to cover dispute avoidance and resolution schemes being developed in other industry sectors. For that matter, these guidelines should be applicable to all business relationships, i.e. big business with big business, small business with small business, and large companies who deal with a number of small businesses.



Why should Australian businesses concern themselves with dispute avoidance and dispute resolution?

Reduce cost of disputation

A cost benefit analysis of alternative dispute resolution (ADR) processes shows that ADR processes can be less costly than traditional alternatives such as litigation or drawn out bilateral negotiations.¹ It has been stated that 'mediation is much cheaper than litigation, and it has been said that the mediation of commercial disputes costs 5 per cent of the costs of litigating or arbitrating the same matters'.²

Evaluations of 'settlement weeks' conducted within the traditional litigation process have also propounded the view that mediation processes result in significant cost savings.³ Such cost savings vary according to the type of matter resolved and the respective probable delay should the matter have proceeded to trial.

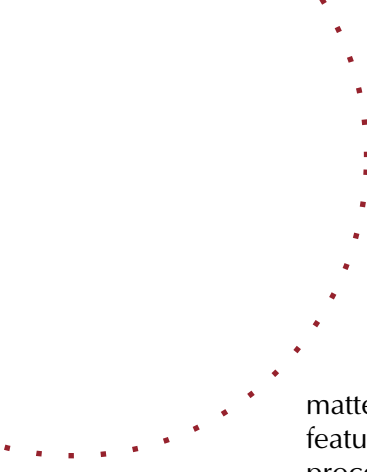
It may be that cost variations are greater amongst different types of cases. However, empirical evidence suggests that where a continuing relationship is at stake, cost savings are greatest.⁴ Also, the calibre of the ADR process is of great importance. Provided that a process does not impose unduly onerous requirements upon the parties in terms of documentation required, and provided the process acknowledges that time limits may be appropriate, then ADR may be more appropriate in most matters in terms of the direct cost benefit standpoint, particularly if the process itself is anticipated to take less time than the alternative. In this regard relatively simple and straightforward issues may be most economically dealt with by evaluation or negotiation. However, any

1 Report of the Chief Justice's Policy & Planning Sub-committee on Court Annexed Mediation, page 9, November 1991.

2 NSW Supreme Court referring to Resolution of Disputes ACDC (1987) Volume 1, No. 2 at page 1.

3 Chinkin C.R. & Dewdney M., '91 Settlement Week in New South Wales: An Evaluation'92 (1992) ADJR at page 93 (see also 1992 and 1993 evaluations).

4 Ibid.



matter which involves a dispute as to credit or continuing relationship features may be better resolved by mediation and other consensual proceedings.⁵

Another cost/benefit flowing from the use of dispute avoidance and resolution principles is that the earlier that problems or disputes are resolved the less costly it will be to all parties. Furthermore, the increasing use of non-litigious means of settling disputes can lessen the cost burden for government flowing from the need to extend the court system.

Flexible outcome

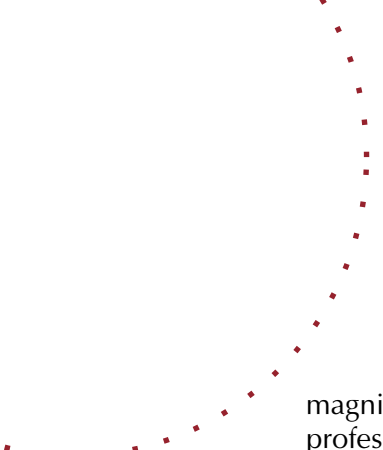
ADR processes often concentrate on more flexible outcomes than traditional processes. The extent to which this occurs can be related to the quality of the process involved. The court system may, in some circumstances, give a remedy with which parties are not satisfied. ADR, on the other hand, provides more scope for creativity and therefore greater potential satisfaction with remedies and outcomes. Empirical research has shown that outcomes may include greater specification of settlement terms, non-monetary arrangements, and/or detailed conditions for implementing the agreement.⁶ The fact that outcomes can be kept confidential can also enhance the flexibility of outcome.

Confidentiality

The confidential nature of most ADR processes and outcomes is also a great benefit to businesses. Not only does the confidential nature of the process and outcome avoid damage to the reputation of the business within the wider business world, but it may also assist to resolve internal disputes and disputes in relation to credibility by ensuring that a more constructive dialogue takes place. It may also help businesses to ensure that internal misunderstandings or internal disputes are not broadcast to a wider audience. As many disputes will inevitably relate to an attack on credibility and a difference of opinion as to representations made, dispute resolution processes that can ensure such differences are not overly

5 Sourdin T., '91Judicial Management and Alternative Dispute Resolution Process Trends'92, *Australian Bar Review*, Volume 14, No. 3, October 1996, p. 206.

6 *Supra.* Goldberg et al, *Dispute Resolution, Negotiation, Mediation and Other Processes*, 2nd edition, Little Brown & Co, USA, 1992, p. 8.



magnified can not only assist to resolve disputes but can enhance the professional standing of an organisation.

Compliance with outcomes

Mediation and other ADR processes, if properly implemented, may be more likely to lead to compliance with the final resolution. Empirical data suggests that more than 70 per cent of mediation agreements with monetary settlements are paid in full, which compares to approximately 34 per cent of adjudications.⁷

This information is very relevant in terms of compliance and costs to businesses. It is possible that an increase in mediated resolutions could result in a reduction in orders sought in courts, writs and garnishments notices, together with actions by the Sheriff's Office and actions of bankruptcy and winding up applications.

Compliance with the law

Implementation of these benchmarks by a large party could serve as part of a compliance mechanism to avoid risking breaches of the unconscionable conduct and misleading and deceptive provisions of the Trade Practices Act.

The catalytic effect

Mediation could also have an important catalytic effect in that the process may not only prompt early settlement of disputes but also prompt early action and set a path for the future. Processes such as mediation could, for example, be used to positively enhance the quality of the working arrangements between parties. It is possible that mediation could be used as a means of resolving disputes earlier, or as a way of facilitating communication in relation to contractual matters. This could enhance understanding of contractual terms and assist to avoid potential problems.

⁷ Goldberg et al, op cit.



Time/cost savings

If management is involved in litigation or complex disputes it means that the manager's focus is diverted from the company's profit making goals and other commercial objectives.

Corporate image

It is not unknown for adverse publicity arising from an acrimonious and public dispute, for example, arising from litigation, to harm the name and reputation of a company. Many companies make substantial investment into promoting brand and corporate image. A publicly-aired dispute is likely to damage a company's corporate image and may put a company's investment in that image in jeopardy.

Other benefits

Other benefits from having an effective conflict management regime include:

- lower direct and indirect disputation costs (internal and external);
- reduced exposure to third party intervention;
- greater control over the processes;
- organisations having a better capacity to adapt to change; and
- better market information and improved channels of communication.



Summary of benefits for business from applying dispute avoidance and dispute resolution benchmarks

Cost savings from preventing management focus being diverted.

Disputes being dealt with quickly and controlled by the parties themselves.

Overall less costly form of settling disputes.

Compliance/risk avoidance mechanism for businesses to avoid contravention of the unconscionable conduct provisions of the Trade Practices Act.

Encouraging business people to develop business solutions to business problems.

Allowing for more creative remedies and outcomes compared with litigation.

Providing a self-regulatory approach to deal with disputes.

Reducing the risk of bad publicity flowing from disputes and concomitant low morale.

The benefits of confidentiality that most dispute resolution processes provide.

Reduction of stress with concomitant health benefits for all parties.

Enhancing the Australian business community's ability to form strong business relationships with culturally different businesses because dispute avoidance and resolution is more suited to the Asian business approach which relies on consensus.



Dispute avoidance

Action designed to avoid disputes should be based on the promotion of good working relationships rather than on restrictions on what either party may do. That is, the emphasis should be positive and constructive rather than pessimistic, positional and adversarial.

This section discusses the elements of such a relationship under the following headings.

- Information
- Cultural differences
- Recognising mutual interests
- Partnering
- Conflict avoidance at the company level

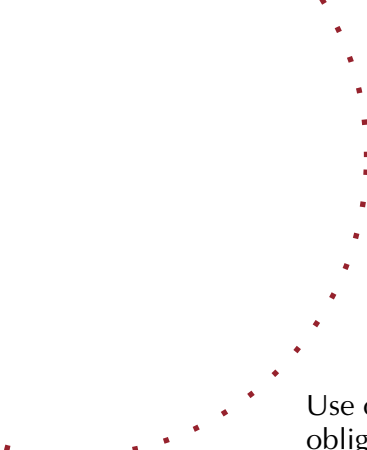
Information

One of the most effective ways of dealing with small business problems arising from relationships with large business is to do so at the source, through accurate and sufficient disclosure leading to understanding of the terms and practical implications of the **total** relationship. Apart from being good business practice, sound disclosure practices are good dispute minimisation practices.

Many of the Commission's complaints from small businesses and many disputes have their origins in incomplete or misleading information or information that is not fully comprehended by the smaller party. Lack of good faith during the operation of the agreement is another source for complaint.

Good relationships are also built on efforts to ensure that all parties share equally the information needed for sound decision making. A relationship of trust between the parties develops when exchange of information is done on the basis of good faith and fairness.

Codes which set down disclosure requirements should cover all issues relevant to informed business decisions by parties to the contract and attempt to identify and deal with information problems likely to arise.



Use of contracts which **clearly** communicate each party's rights and obligations in the relationship can help avoid disputes. However, this can occur only where the main purpose of the contract is not to help win a law suit but to set out rights and obligations of both parties which give expression to a balanced working relationship.

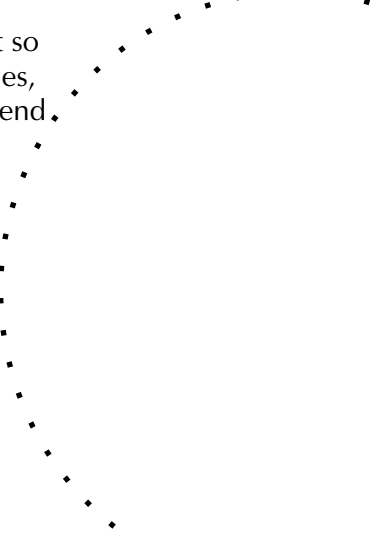
Harsh, oppressive, unconscionable and one-sided terms in 'take it or leave it' contracts are the root cause of many disputes and, as such, their use is inappropriate if a climate of communication, trust and mutual interest is to exist.

Currently all State/Territory retail lease legislation contains provisions requiring a detailed disclosure statement to be provided to lessees before the lease is signed. Disclosure statements include such items as: rent calculation methods, lease period, list of outgoings and proportion to be paid by lessee, contribution to marketing fund, core trading hours, and current and planned tenancy mix. Some industry codes have provided for the issue of disclosure document(s) to all prospective tenants/lessees/franchisees. The Retail Industry Liaison Forum (made up of representatives from the Property Council of Australia and the Australian Retailers Association) is currently working on the harmonisation of disclosure standards for both shopping centre landlords and tenants.

Disclosure of the dispute resolution/problem solving process 'up front' in itself can help avoid conflicts from becoming serious and more costly to resolve.

As important as disclosure is the issue of **understanding**. Given the increasing cultural diversity of contracting parties in business, it will often be necessary to have an interpreter/third party facilitator involved in negotiations to ensure that parties understand each other's intentions. Some problems result from language difficulties, especially where one party is from a non English speaking background. However, smaller parties also frequently have difficulty with professional/ technical/ business language, e.g. especially in market sectors of which they have little experience.

These issues throw light on the idea of 'commercial naivety'. It is not so much that people are careless in their dealings. Particular personalities, background and general abilities limit what individuals can comprehend.



and also their ability to ask relevant questions. Stronger parties who are aware of such limitations on the other side of the table should recommend that the weaker party seek independent, expert advice, or the use of an independent third party facilitator. This applies particularly where terms are weighted in the stronger party's favour.

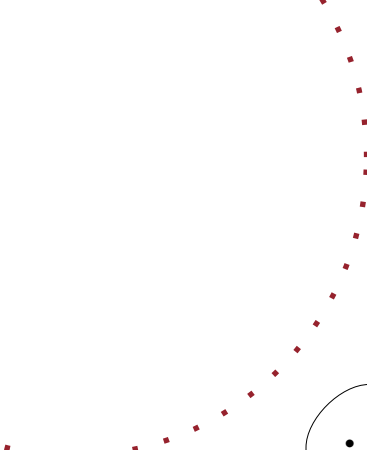
Retail lease legislation already covers many of these issues. However, problems still arise through inconsistencies between States and a lack of understanding by tenants and landlords, particularly the smaller ones, of their rights and obligations under the law.

In the franchising sector there are additional disclosure requirements, e.g. disclosure of the track record of the franchise system and the franchisor's litigation experience.

Benchmarks

Common small business information problems which should be addressed in small/large business relationships which could contribute towards dispute avoidance include:


- disclosure of dispute resolution processes, e.g. who should be contacted about problems, the processes of dispute resolution, etc;
- detailed disclosure of terms and conditions relating to the calculation of the agreement's fees;
- risks and benefits to each party;
- detailed disclosure of terms and conditions for:
 - termination of a franchise/lease (e.g. valuation of franchisee/lessee improvements), supply agreement or sub-contracting arrangement;
 - renewal of a franchise/lease;
 - relocation of a franchisee/lessee;
 - assignment of the franchise/lease;
 - how and when outgoings/fitouts will be required, how they will be calculated and performed, and reimbursement when a lease is terminated or expires;

- 
- profit and loss statements of the franchise/lease;
 - particulars of restrictions on franchise/lease;
 - any territorial limitations or other limitations on suppliers;
 - terms and conditions of supply of goods and services from the franchisor/lessor;
 - terms and conditions of the obligations of the franchisor/lessor and vice versa;
 - practical issues to do with day-to-day performance of the agreement (e.g. in the petroleum industry this would include financial support, standards assessment, etc);
 - whether goodwill is involved and how it will be calculated;
 - disclosure by the franchisor/lessor of any material fact known to the franchisor/lessor in the course of the lease or franchise period which could adversely affect the trading conditions of the franchisee/lessee;
 - clear disclosure of how variations to the contract will be dealt with; and
 - the use of communications and/or other technical experts (e.g. lawyers, accountants, business consultants, trade associations) to ensure that terms and conditions are communicated effectively, and the testing of such material could reduce misunderstanding.

Cultural differences

It is estimated that around 21 per cent of Australia's small businesses (some 180 000 businesses) are owned or operated by people from a non English speaking background.

Disputes may arise with small business people who have a poor understanding of the English language and the Australian business culture. For example, in many Asian countries the actual business relationship is more important than the contractual relationship and disputes are resolved by less adversarial and less adjudicative means.





Benchmarks

Disputes could be avoided in the above situations if a communication strategy was developed and implemented which could include:

- understanding where contracts and dispute resolution sit within the relevant cultural settings;
- producing documentation (such as contracts, advice, instructions) in appropriate languages;
- using nominated 'help professionals' who have appropriate language and cultural understanding skills.

Recognising mutual interests

Some large firms act on the basis that the way to increased profitability is to fully exploit the weaker party's bargaining position, e.g. relying on sole supply arrangements, returns on credit, stock pricing, etc. Increasingly, however, it is recognised that it makes good business sense to work toward common goals. Some large businesses offer the small party continuing advice and seek to help their economic viability and efficiency. Such an approach can eliminate or reduce disputes and may also serve to help avoid breaches of the unconscionable conduct provisions of the Trade Practices Act.

When parties are made aware of each other's expectations and needs and are responsive to them there is less likelihood of disputes arising.

Benchmarks

Typically a large party's expectations of a small party include:

- reliability;
- meeting commitments;
- agreed representation/presentation of goods and services;
- competitive prices;
- performance and maintenance of standards;
- dealing with known individuals;
- being kept informed of the small party's problems.

Where the small party is a **supplier** these expectations will involve:

- meeting specifications;
- delivering on time;
- good product knowledge;
- product improvement;
- competitive prices;
- keeping information confidential;
- providing market information;
- supporting the large party.

Where the small party is a **franchisee** they will involve:

- promoting the product as per the franchise arrangement (usually preferential over other products);
- informing the larger party of problems in advance;
- supporting the larger party's products over a competitor's products;
- ensuring that there are adequately informed and trained salespeople;
- commitment to act proactively to achieve mutual objectives under the franchise agreement.

Where the small party involved is an **authorised dealer** they will involve:

- promoting the manufacturer's/importer's product;
- informing the larger party of problems in advance;
- ensuring that there are adequately informed and trained salespeople.

Where the small party involved is an **independent dealer** they will involve:

- informing the larger party of problems in advance.

To play its part, the **large** party needs to:

- provide timely, adequate, relevant and accurate information;
- inform the small business early of problems it is having with the smaller party or problems it itself is experiencing;
- pay, or offer, a fair price – depending on the circumstances;
- set purchasing criteria that recognises the importance of all the above.

Typically a **small** party's expectations of the large party include being:

- treated fairly and equally;
- provided with timely information on market predictions, specific business plans that affect the small party's business viability;
- paid on time;
- paid or offered a fair price.

To play its part, the **small** party needs to:

- understand the large party's expectations;
- inform the large party early of any problems it is experiencing.



Partnering

Another emerging dispute avoidance mechanism is the use of 'partnering' in which there is potential for involving professionals in facilitation and dispute resolution.

Partnering is being adopted by the building industry, and it would be worthwhile exploring the principles involved for use in other potential conflict areas. While partnering is designed primarily to improve trading outcomes, it also helps to avoid conflict.

Partnering is a form of business relationship used to assist in successfully implementing a contract.

Partnering involves parties agreeing to work together to maximise potential efficiencies and minimise potential conflicts.

Partnering regards conventional contractual obligations and expectations as a baseline from which to improve returns to all parties.

A neutral facilitator may be used to help develop the partnering agreement. The facilitator may also be involved, either on a regular basis or at need, to help maintain the spirit of the agreement, resolve disputes, etc.

Common features of partnering relationships are agreed processes and procedures designed to:

- enhance communications and facilitate the development of constructive synergies between parties;
- help parties work collaboratively to resolve problems without external assistance;
- help parties handle unresolved problems efficiently using a nominated facilitator.

Checklist

The following checklist offers some suggested areas for discussion for successful partnering or other business relationships.

- Is the relationship based on the concept of a genuine partnership to achieve mutual goals or is it based solely on contractual obligations?
- Does the relationship recognise the likelihood of shared pain as well as shared benefits?
- Is there sufficient disclosure of business plans (e.g. expansion plans)?
- Is there scope for variation of business plans to be discussed or negotiated?
- Are there ways to open two-way discussion and resolution of issues?
- Are the input costs commensurate with the services provided and a viable business?
- Can each party easily raise complaints/problems with the other? What are the lines of communications and procedures to deal with issues before they become problems?
- Are there fair termination provisions dealing with changed business needs of the larger party (e.g. reasonable terms for buying back stock)?
- Are there balanced dispute handling methods, initially not involving lawyers? (Appropriately oriented lawyers may have a useful, independent role at strategic points.)
- Will the relationship continue so long as performance targets are met and the larger party's plans remain unchanged — and the parties' aims remain compatible?
- When termination occurs will it be implemented on a fair and reasonable basis?
- Is there potential to build on existing investment in the relationship?
- Are notice periods reasonable, allowing parties to make alternative arrangements?
- Are personal and business goals of individuals agreed and monitored? Does the smaller party play a part in measuring performance?



Conflict management at the company level

A well-managed conflict-averse company could possess the following features.


Staff

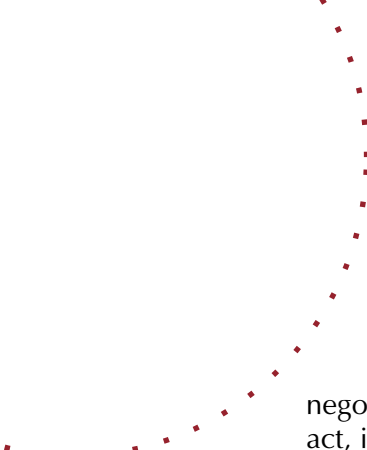
In the course of a franchise/lease/supply agreement disputes do arise as a result of heavy handed tactics by employees of the larger party (e.g. shopping centre managers, franchisor field staff) who believe they are responding to directions or pressure from senior management, or who choose to employ such tactics.

The potential for such disputes can be lowered by demonstrating senior management commitment, the employment of staff with appropriate interpersonal, communication and negotiation skills and industry knowledge, and a management which is aware of the potential for conflict of company policies and how they are applied at the field level. An efficient and effective way of dealing with disputes at the 'coal face' is to give relevant people at lower levels in the company and who have regular interface with small businesses, sufficient authority to deal with problems arising at that level. There also needs to be a process that allows disputes to escalate upwards while, at the same time, not creating fear of retribution for company staff under whose responsibility the dispute arose.

Effective dispute avoidance requires management at all levels and field staff who actually interact with the other party on a day-to-day basis to be trained in and required to act on the good faith operation of the agreement between the parties.

Staff who are trained in facilitated techniques and good communication skills are less likely to enter into conflicts. They are more likely to ensure that agreements are well understood and to confidently advise upon and assist in managing disputes. It is also desirable that there is an experienced senior person within an organisation who has the appropriate training, skills, and authority to ensure that disputes are dealt with effectively and to deal with complex or escalating disputes. That person needs to be in a senior position to ensure that disputes are dealt with at an appropriate level and to be able to liaise with all necessary staff and implement any changes. This person should be in a position to





negotiate and communicate with upper as well as lower management and act, in effect, as a mediator within the organisational structure. Responsibilities may include:

- promoting and setting up partnering processes (e.g. with lessees/franchisees/suppliers);
- setting up a complaints system which, in particular, is visible and accessible to the small business parties to encourage discussion about their problems so potential disputes may be nipped in the bud;
- monitoring complaints/disputes to identify areas which are a common source of complaints, and devise strategies to rectify them;
- training all staff in the company on dispute avoidance measures appropriate to their responsibility;
- being the focal point for resolving lessee/lessor, franchisee/franchisor, supplier/processor or retailer disputes in-house.

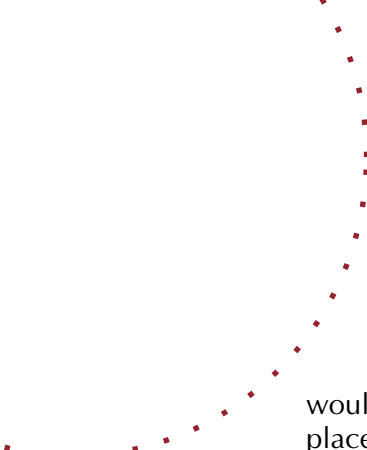
There is some research that indicates that small businesses proceed into court systems as a result of an abrogation of decision making.⁸ There may frequently be a conflict between upper and lower management. In many companies junior employees may be reluctant to admit to the senior management that there are problems. In a company where there is conflict management there would be a regular update between employees and any senior management about the status of relationships with different clients or suppliers. The form of reporting should be informal, and should include, on occasion, partner organisations. Regular telephone and written contact between organisations is also essential to determine whether there are any difficulties.

A conflict-averse company may find it desirable to allocate one person at mid-level to act as a 'go between' should any difficulties arise or should there be any problems with communication.

Resources

For a company to become more conflict aware and facilitative, few additional resources should be required. Apart from ongoing training and kit program approaches, the resources expended would be far less than

8 Sourdin T., An evaluative study of the Commercial Division of the Supreme Court of New South Wales, Dissertation in candidacy for Doctor of Philosophy, 1996.



would be expended in the long term on even small disputes that take place within and outside of companies.

Creating a climate which encourages the raising of problems: aggressive conflict avoidance

Many small businesses are in a relationship where the raising of problems is not encouraged. In fact, quite often the reverse is true through fear of victimisation or subsequent retribution. In this climate problems are not raised early and 'nipped in the bud'. In some circumstances the problem deteriorates to an adversarial situation with attendant costs and bitterness.


A company that actively avoids conflict will practice aggressive conflict avoidance. This means that raising problems is encouraged and that as soon as an issue arises, either through correspondence, telephone conversations or through some other means, the company will respond. This is because it has a policy of responding promptly to such issues.

The response will, no doubt, depend on the circumstances. A middle to senior level management response is desirable and direct telephone contact is probably the most appropriate way to respond to any initial issues that are raised.

Developing and maintaining communication avenues, for example regular newsletters, group meetings, face-to-face meetings, facilitated business development/planning sessions, etc., can help to remove mistrust and antagonism between the parties.

Some companies actively use mentors/business advisers to give their lessees/franchisees/suppliers advice and help with their business. This approach helps to strengthen the relationship between the parties and develop an atmosphere of trust where information is exchanged and problems are encouraged to be raised early.

In recognition of the need to move away from a hostile relationship with their franchisees, oil company franchisors established franchise councils of the kind long known in other sectors, such as fast food franchising. These councils in many instances have improved franchisor/franchisee relationships in the petroleum products industry, particularly when both parties entered into these arrangements in good faith.





Benchmarks

- appointment of an in-house disputes manager at a senior level;
- staff training in communication skills, identification of areas likely to generate conflict, and the significance of the agreements involving smaller parties;
- empowering field staff to resolve problems while continuing to permit, if necessary, access to more senior management;
- identification of areas likely to generate conflict;
- policy and procedures for conflict avoidance;
- creating a climate which encourages the raising of problems sooner rather than later;
- development and implementation of a communications strategy;
- using mentors/business advisers to give advice.



Dispute resolution

Even in relationships with an emphasis on dispute avoidance, disputes will arise in business dealings — whether from simple misunderstanding, communications breakdown or as the result of a legitimate grievance.

It is preferable for this potential to be acknowledged in advance by the adoption of agreed dispute resolution mechanisms rather than in an ad hoc, reactive fashion when disagreements do occur.

Development of effective resolution procedures requires essentially the same attributes as dispute avoidance — common sense and good faith (commercial reality, good communications and negotiating skills) which includes the ability to see the other point of view.

Benchmarks

This section discusses a range of benchmarks for effective alternative dispute resolution systems suggested by the Commission's experience and observations:

- use of the in-house disputes manager to settle disputes;
- a dispute resolution clause in contracts/codes/disclosure statements;
- recognition/use of a small business negotiator;
- having the right negotiators;
- setting out clear and simple dispute handling policies and procedures;
- commitment and coverage;
- early intervention by a neutral third party;
- establishment of panels of appropriately trained and appropriately oriented dispute resolvers;
- industry awareness, endorsement, and active support of the scheme;
- accountability;
- administration.



Use of the in-house disputes manager to settle disputes

The employment by large companies and/or their associations of a disputes manager with alternative dispute resolution skills (see page 22) could help nip small business problems in the bud.

Such persons could be a reference point for small businesses, promoting confidence that their concerns can be dealt with informally, quickly and without recrimination. The negotiators would need sufficient authority to make decisions on behalf of the large company.

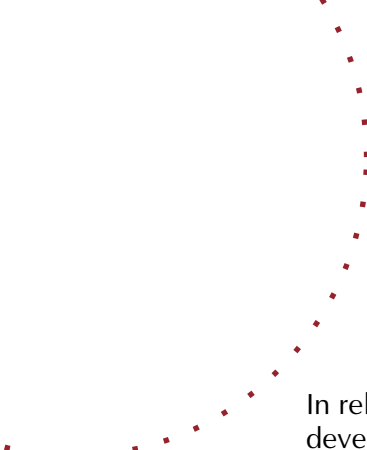
Dispute resolution clause in contracts/codes/disclosure statements

It is important to create a climate in which joint problem solving is encouraged before problems ever become disputes.

The inclusion of dispute resolution clauses in contracts and/or industry-wide codes of conduct covering the relationship between small and large businesses would send signals to the smaller party that they had a right to have their disputes dealt with and that they could be handled quickly and cost effectively, without fear of recrimination.

Such a problem solving/resolution clause could be along the following lines:

- Step** informal verbal advice of issue or problem;
- Step** the complainant raises the matter in writing with the other party (setting out the grounds for the dispute and what remedial action they are seeking) and the parties make every effort to resolve the dispute fairly;
- Step** if the dispute is not resolved the smaller party may use an informal negotiator (e.g. his/her association's negotiator or someone appointed or agreed under the contract to be an informal negotiator) to raise the issue with the larger party's in-house trained negotiator/conflict manager;
- Step** if the dispute is still not resolved, the matter goes to conciliation or mediation (e.g. an industry conciliator or one selected from a panel) or to an independent dispute resolution adviser who can select the most appropriate and cost effective means of resolution.



In relation to retail tenancy, dispute resolution procedures are being developed and refined, for example one proposal puts forward the following.

Objective: to provide in each State and Territory a low cost, efficient and equitable dispute settlement procedure.

Key elements of the procedure

- appointment of a registrar to deal with retail disputes;
- registration of a dispute with the registrar;
- attempt at informal mediation by the registrar;
- formal mediation by registrar or specialist mediator appointed by registrar;
- reference of a matter not resolved at mediation to a three person tribunal comprising a legal member as chairperson and representatives who have knowledge of the interests and practices of lessors and lessees.

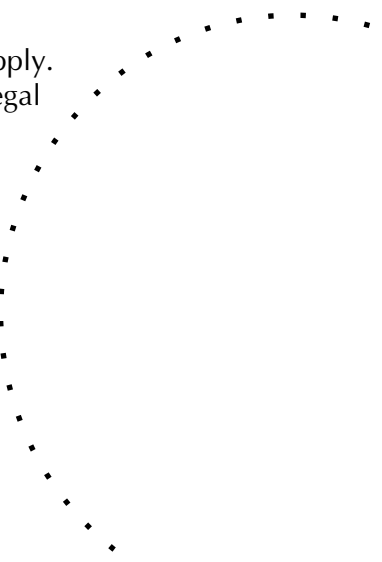
Key issues

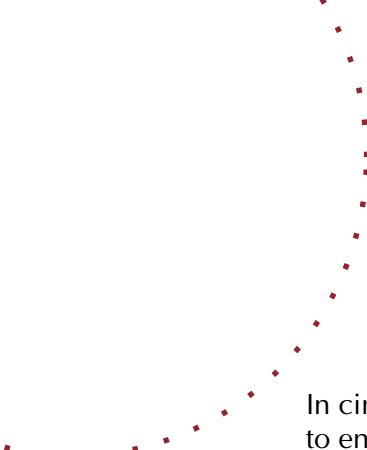
- registrar must be adequately resourced to provide quick response;
- costs at each level should be kept low and, for mediation and appearance before the tribunal, should be shared equally by both parties;
- process should not become over-legalistic but should aim to provide practical solutions.

Where a dispute resolution process does not exist the parties may agree to develop their own dispute resolution process/clause. A model dispute resolution clause is at Appendix A.

Recognition/use of a small business negotiator

Small businesses often feel intimidated in disputes with larger parties because of the other’s superior bargaining power — including the ultimate power to not renew a lease or to interrupt or discontinue supply. Such a climate is not conducive to the smaller party exercising any legal rights it may have.





In circumstances like these a cultural change in the large party is needed to ensure that it recognises that complaints by the small business may indicate a potential for improvement to the benefit of both — rather than the threat of a concession or diminution of power.

In some circumstances there may be a role for the small business industry association to act as a negotiator for its members.

In the absence of a small business association negotiator there may be scope for the parties to agree to appoint as an intermediary a nominated dispute resolution adviser with whom the smaller parties feel comfortable. In general, the appointment of such an intermediary should be a joint cost.

Unless the parties agree the adviser's role should not extend to settlement options (other than in principle), but should allow for limited ventilation and exploration of the issues to determine:

- the dynamics of the relationship between the parties;
- what, if any, problem/dispute exists;
- approaches to resolve the dispute;
- who can best help resolve the dispute.

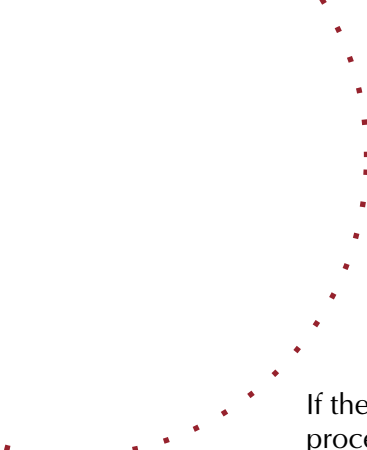
Having the right negotiators

Readily accessible people from the large companies and those representing small business interests with appropriate skills could resolve many problems and disputes quickly and at little or no cost, particularly where the representatives are capable of seeing the other side's point of view.

Problem and dispute handling procedures

Dispute handling procedures should be so structured that efforts at resolution are made early, before formal conciliation or mediation is required.

Where a dispute relevant to any part of a code arises, the party concerned should raise the matter in writing with the other party so that they can together attempt to resolve the issue.



If the dispute is not resolved it should be handled through an intermediate procedure — for example, one involving an association’s negotiator or an agreed facilitator dealing with the larger party’s negotiator.

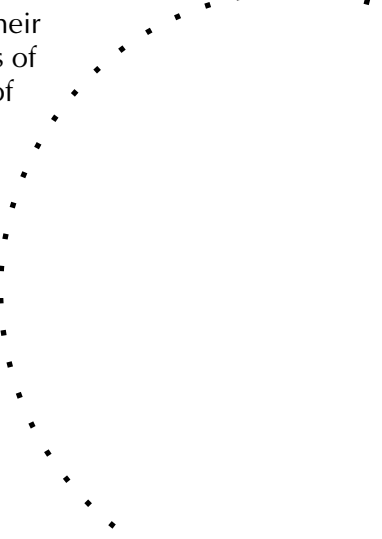
Should that fail, the dispute could be referred by either participant to an independent conciliator or mediator or a dispute resolution adviser who could advise on the most appropriate form of dispute resolution in the circumstances.

Experience has shown that alternative dispute resolution mechanisms such as conciliation and mediation are more appropriate than litigation or full scale arbitration in resolving the vast majority of disputes. Advantages over litigation and arbitration are that:

- the procedures are relatively simple;
- the process is not adversarial and often does not require the involvement of legal practitioners;
- emphasis is placed on preserving the relationship between the parties, and where this is not possible, ending the relationship fairly;
- emphasis is on a win/win outcome;
- the problems/issues are often dealt with quickly;
- costs to the parties are relatively small, especially in comparison with litigation and full scale arbitration;
- the process enables the disputants to reach a mutually agreeable solution, rather than having one imposed, with the result that there may be a greater commitment to abiding by the solution;
- the process distils the issues from the passions;
- the procedures can provide for confidentiality.

In some circumstances the use of co-mediation, e.g. an ADR specialist and industry specialist, can be an effective way of dealing with a dispute.

Examples of the different types of alternative dispute resolution and their advantages and disadvantages are at Appendix B. The circumstances of each particular dispute will often suggest the most appropriate form of dispute resolution.





Commitment and coverage

Where a code is used as a means of providing an industry-wide or sector-wide dispute resolution process its effectiveness will be commensurate with the amount of coverage of the scheme.

Early intervention of a neutral third party

Provision for the early intervention of a neutral third party/disputes resolution adviser may prevent the dispute from escalating further or, at the least, help in selecting the most cost effective dispute resolution process in the circumstances.

Panels of trained dispute resolvers

It is important for dispute resolvers to have adequate training and experience in alternative dispute resolution methods. They should also have some understanding of the dynamics and psychology of small/large business relationships — e.g. franchisor/franchisee, lessor/lessee and supplier/processor or retailer.

Industry awareness, endorsement and support

Unless small and large businesses (e.g. franchisees and franchisors) are aware of what alternative dispute resolution is and the benefits it offers, schemes are less likely to be used.

Large corporations will be more likely to avail themselves of alternative dispute resolution where the CEOs are aware of the commercial benefits that the process offers and therefore actively support the process through company policy.

In the retail sector, Government and industry-sponsored explanatory booklets to help all parties understand the assistance available have been produced in some States.



Accountability

If dispute resolution is provided on an industry or sector-wide basis by means of a code of conduct, it is important for codes to include transparency provisions on the operation of the scheme itself (but not the actual ADR hearings/negotiations themselves). Code administration committees should produce annual reports, permitting periodic assessment of the scheme's effectiveness by industry members, its customers and the public at large.

Administration

Where dispute resolution is provided on an industry or sector-wide basis by means of a code of conduct, the setting up of a code administration body may ensure that the code will meet its stated objectives and deliver promised outcomes.

A code administration body should contain representatives of relevant small and large business interests. The use of a mutually agreed independent chair could facilitate the meetings. The appointment of observers from relevant government agencies could provide a public 'window' on the scheme and allow for public interest views to be brought to the table.

The code administration body could:

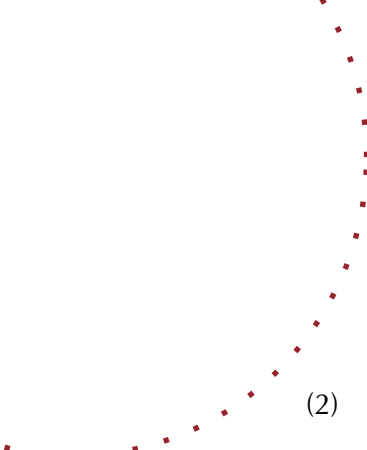
- be responsible for providing adequate financing of the scheme;
- ensure adequate awareness of the scheme amongst the relevant industry participants;
- appoint those responsible for alternative dispute resolution and facilitate the processes for such appointments;
- monitor and recommend amendments to the code;
- set the fee structure for the dispute resolution process.



Appendix A Example of dispute resolution contract clause

If a dispute arises between the parties then the parties agree to [must] undertake the following steps.

- (1) (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), where the complainant is (the smaller party) it shall raise the matter with (the large company's disputes manager). The parties shall make every effort to resolve the dispute fairly. In doing so each party agrees to use their best efforts 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;
 - identify, if the dispute is resolved, how the resolution of the dispute has or could enhance the business relationship between the parties for the future. In particular, by identifying specific means of avoiding such disputes arising between the parties in the future.
- (c) If the dispute is not resolved in accordance with clause (b) then (the smaller party) may refer the matter to its association's facilitator or its negotiator (a nominated facilitator/negotiator).
- (d) If the dispute is not resolved in accordance with clause (c) then the matter shall be referred to mediation/conciliation/(other form of ADR) before (an agreed alternative dispute resolution provider).

- 
- (2) Action taken to settle the dispute at each stage must be undertaken promptly.

Note: Parties may wish to insert actual time limits for the carrying out of the various steps above if they can be reasonably anticipated and agreed upon during negotiations.



Appendix B Background information on commercial dispute avoidance and resolution processes

A disputes resolution mechanism should:

- provide a speedy, cost-efficient, process for resolving most commercial disputes between industry members;
- preserve the relationship between the parties to the dispute;
- create a solution that is acceptable to the parties, commercially viable, and takes into account the public interest; and
- empower the parties to negotiate their own solution.

Examples of types of commercial disputes resolution processes outside the courts follow. It is important to remember that the ultimate form of these processes is not set in concrete and that there is much scope for tailoring a process to the specific needs of the industry concerned.

Disputes resolution adviser

The appointment of a disputes resolution adviser could assist the parties to avoid disputes and to quickly resolve any disputes which do arise. The adviser could also select the most appropriate form of alternative dispute resolution process in the circumstances.

The disputes resolution adviser is a person who:

- has an understanding of the range of alternative dispute resolution processes and which is the most suitable alternative dispute resolution option(s) in any given circumstances;
- has dispute resolution skills;
- is neutral and independent of both parties to the dispute; and
- has an understanding of the industry concerned or the ability to quickly acquire such an understanding.



Direct negotiation

This is fairly self explanatory and should be the first stage in any dispute resolution process. Only if parties are not able to find an acceptable solution between themselves, should resort be had to mechanisms that involve some third party involvement or intervention.

It may be helpful to have a level two process: direct negotiation and, if that fails, negotiation assisted with a common accepted body such as an industry association.

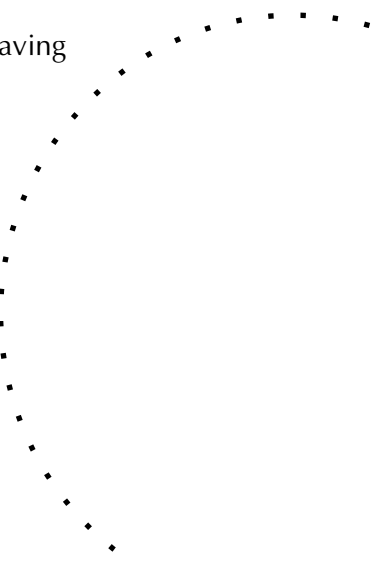
Mediation and conciliation

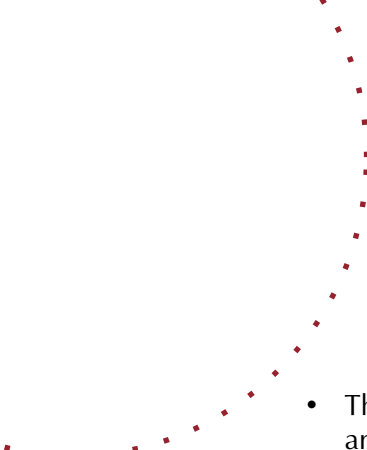
There is often confusion in terminology between mediation and conciliation, however, in the context of alternative dispute resolution the terms are sometimes considered interchangeable. In both cases, a neutral third party, independent of the disputing parties, assists the parties themselves to isolate and discuss the issues in dispute, to develop options for resolution, and to reach an agreement which accommodates the interests of all the disputants as much as possible.

The mediator or conciliator does not impose a solution upon the parties. In some cases a conciliator will go further to facilitate the reaching of agreement between the parties by offering suggestions, opinions or expert advice.

The aim of mediation or conciliation is to find, with a minimum of formality, a solution to the particular dispute that both parties can live with. The presence of an independent third party mediator often enables disputes to be settled that might not have been by direct negotiation.

Advantages

- The process can allow all relevant issues to be considered and a solution can be tailored that takes into account the parties' needs and values.
 - The parties can reach a mutually agreeable solution, rather than having one imposed upon them, and, as a result, there may be a greater commitment to abiding by the solution.
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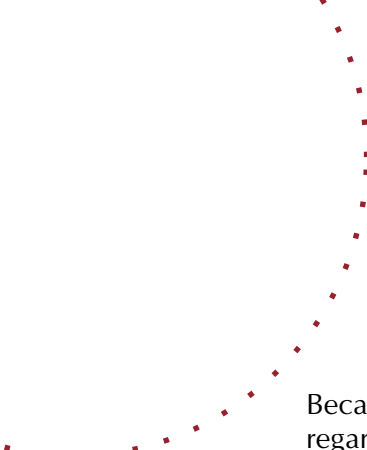
- 
- The absence of an adversarial setting can facilitate the maintenance of an ongoing business relationship.
 - The process usually requires minimal resources.
 - The process can be voluntary, and either party can withdraw if they are not happy.
 - Disputants have greater participation in and control of the process than they do in more formal processes.
 - Statements made during a mediation and conciliation process are usually confidential and inadmissible as evidence in court proceedings.
 - There is no publicity of the proceedings or the outcome.
 - The process can identify and address the real causes of the dispute.
 - The process is relatively inexpensive and speedy.

Disadvantages

- A party with lesser bargaining power or lesser resources may be 'coerced' or intimidated into accepting a solution that they are not completely happy with — because of the costs involved legal proceedings are not a practical alternative for that party.
- Often mediators/conciliators are unaware of new developments in the law and disputants unfamiliar with their rights may give away more than they should.
- The mediator/conciliator does not have the authority to decide the dispute.
- Solutions reached cannot be used as precedents for later situations.

Arbitration

In arbitration a solution is imposed upon the parties to the dispute by means of the arbitrator's decision. Arbitration can take many forms and can have varying degrees of formality. Many dispute resolution processes set up for use by consumers involve arbitration, for example Ombudsman Schemes, and Complaints Panel Schemes. On occasion an arbitrator may adopt a conciliation or mediation approach. If so, this blend of processes is called 'med-arb' or 'rolling arbitration'.



Because a solution is imposed upon the parties arbitration can often be regarded as producing a win-lose result. Despite this aspect, however, in many cases arbitration is appropriate as an alternative to the court system where negotiation with the assistance of a third party is not effective, and where wider interests are involved beyond those of the disputing parties.

Arbitration may involve a panel where relevant expertise is employed, and it may also involve lawyers.

Advantages

- An independent party can make a binding final decision.
- Interests other than those of the disputing parties can be incorporated into the determination.
- The process can be voluntary or compulsory.
- An arbitrator with the necessary expertise can be jointly selected by the disputants.
- Procedural informality — as the rules of evidence and procedure are often relaxed.
- Proceedings are private and therefore shielded from public scrutiny.
- Arbitrators with relevant technical expertise can be used.

Disadvantages

- Can be as expensive, time consuming and as legalistic as litigation.
- A solution is imposed upon the parties, they have a lesser involvement in the process, and therefore there may be a lesser commitment to complying with the decision.
- The process can be as adversarial as litigation, with the same consequences for ongoing business relationships.
- The party with the greatest resources may be able to draw out the process at the expense of the financially weaker party.
- The arbitrated decision is often appealed in the courts.



Variations on the major forms of alternative dispute resolution

Variations on these basic processes of mediation/conciliation and arbitration include the following.

Short-form arbitration

Short-form arbitration is a specifically structured form of arbitration designed to overcome some of the disadvantages concerned with arbitration in its traditional form. Short-form arbitration may include some of the following characteristics.

- It should involve one claim or issue or, with the written agreement of the parties (and, if a disputes resolution adviser is used, that disputes resolution adviser), a limited number of distinct claims or issues.
- If it involves one claim or issue the arbitration will be conducted and concluded in one day. If it involves more than one distinct claim or issue, the parties (and any disputes resolution adviser) will agree on a revised time scale, taking into account whether or not the arbitration is a consolidated one.
- Each party will have the opportunity to present its case to the arbitrator. This may be through a written presentation, oral evidence, or the use of affidavits and documents only.
- The arbitrator will fairly allocate the amount of time within the day for each presentation, as well as allowing time for questions and answers.
- The arbitrator will have seven days to make a written award which will contain concise, reasoned decisions. The award will enable the parties to appreciate the outcome.
- If the arbitration contains a quantum (time or money) dispute, then this will be resolved in accordance with a final offer arbitration procedure. The arbitrator will have limited authority to render an award selecting one or other figure as the more reasonable. The arbitrator will not be permitted to make his or her own award.



Final offer (baseball) arbitration

In final offer arbitration, the arbitrator does not have the authority to compromise between the parties' positions but must accept one of their final offers as his/her own. Each is thus under pressure to make its final offer more reasonable than the other's, anticipating that the arbitrator will adopt the more reasonable final offer as his/her decision. In doing so, each party will move toward the position of the other — in many cases enough so that they will be able to bridge whatever gap remains by negotiation. This procedure is most attractive when there is no well-defined rights/standard for arbitral decision, so that a compromise decision is likely. It has been used successfully to bring about the negotiated resolution of disputes about the salaries of major league baseball players as well as about the terms of public-sector collective bargaining contracts.

Under this process the mediator shall also act as arbitrator unless both parties agree on a different person as arbitrator.

Upon appointment the arbitrator shall meet with the parties to understand their final offers. The arbitrator can request further submissions on the final offers of the parties.

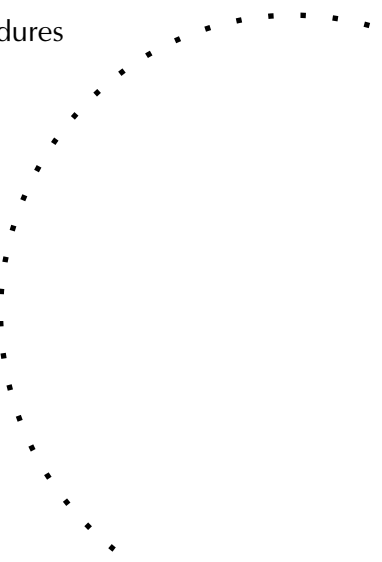
The arbitrator may obtain more information or advice from an independent expert where both parties agree in which case the arbitrator shall make both parties aware of the information and advice provided.

Before making a decision the arbitrator shall allow both parties maximum opportunity for further negotiation and mediation.

Either party may change its final offer, where the other party so agrees, until the decision by the arbitrator is made.

The arbitrator shall give reasons for the decision where either party so requests.

Arbitration proceedings shall be as informal as is consistent with the proper hearing of the matter. Rules of evidence and discovery procedures shall not apply.





Independent expert appraisal

This is the practice of referring specific (generally factual) issues in dispute to a neutral third party who has expertise in a particular area. The third party advises the disputants of the optimal solution to the dispute. The decision of the expert is not binding but may be used as the basis for a negotiated settlement.

Expert determination

This process is similar to expert appraisal. In an expert determination, however, the parties agree, as part of their contractual relationship, to be bound by the decision of an independent expert in the case of a dispute. This process is often used in disputes of a technical nature and where the scope of the issues is relatively narrow. It is not generally suitable for a complex dispute. In an expert determination the expert tends to have a more inquisitorial role and is not bound by rules of evidence. The process is therefore more informal than litigation or arbitration and the issues can be quite confined. It has gained favour recently as a relatively cheap and speedy process.

Senior executive appraisal

This is commonly also referred to as a 'mini-trial', or case presentation, and is essentially a particularly structured version of mediation. Both parties have a limited time to present their best arguments to a meeting of senior executives from both disputants and (optionally) a neutral third party adviser. The senior executives then try to negotiate a settlement. The role of the third party can be anything that the disputants decide, from strictly observing, to mediating, to providing an opinion. For the process to be effective the senior executives must have authority to settle the matter, and should not have been involved in the underlying dispute.

Early neutral evaluation

In this process a senior lawyer, often a retired judge, will give a non-binding opinion as to how the dispute may be handled and resolved by a court.



Structure of dispute resolution schemes

Most dispute resolution schemes are multi-tiered, providing for resolution of the disputes at a number of levels, with each stage generally being more interventionist than the last. These may include, for example:

- direct negotiation between the disputing parties — the complainant is required to raise the matter in writing with the other party, and the parties are required to make every effort to resolve the dispute fairly;
- negotiation by the parties' representatives (e.g. a trade association negotiator, a firm's conflict manager);
- referral to an independent dispute resolution adviser who advises and assists the parties on the most appropriate form of dispute resolution processes, given the nature of the dispute and other relevant circumstances (e.g. the relevant financial resources of both parties).



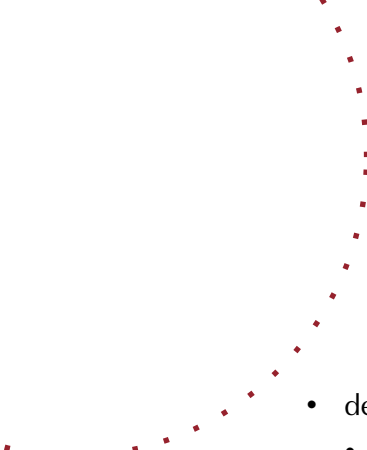
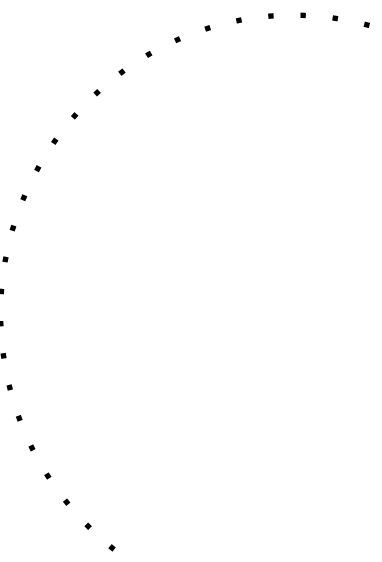
Appendix C **Dispute avoidance and resolution benchmarks and their benefits**

Summary of benefits for business from applying dispute avoidance and dispute resolution benchmarks

- Cost savings from preventing management focus being diverted.
- Disputes being dealt with quickly and controlled by the parties themselves.
- Overall less costly form of settling disputes.
- Compliance/risk avoidance mechanism for businesses to avoid contravention of the unconscionable conduct provisions of the Trade Practices Act.
- Encouraging business people to develop business solutions to business problems.
- Allowing for more creative remedies and outcomes compared with litigation.
- Providing a self-regulatory approach to deal with disputes.
- Reducing the risk of bad publicity flowing from disputes and concomitant low morale.
- The benefits of confidentiality that most dispute resolution processes provide.
- Reduction of stress with concomitant health benefits for all parties.
- Enhancing the Australian business community's ability to form strong business relationships with culturally different businesses because dispute avoidance and resolution is more suited to the Asian business approach which relies on consensus.

Dispute avoidance benchmarks

- disclosure of dispute resolution processes, e.g. who should be contacted about problems, the processes of dispute resolution, etc;
- detailed disclosure of terms and conditions relating to the calculation of the agreement's fees;
- risks and benefits to each party;

- 
- detailed disclosure of terms and conditions for:
 - termination of a franchise/lease (e.g. valuation of franchisee/lessee improvements), supply agreement or sub-contracting arrangement;
 - renewal of a franchise/lease;
 - relocation of a franchisee/lessee;
 - assignment of the franchise/lease;
 - how and when outgoings/fitouts will be required, how they will be calculated and performed, and reimbursement when a lease is terminated or expires;
 - profit and loss statements of the franchise/lease;
 - particulars of restrictions on franchise/lease;
 - any territorial limitations or other limitations on suppliers;
 - terms and conditions of supply of goods and services from the franchisor/lessor;
 - terms and conditions of the obligations of the franchisor/lessor and vice versa;
 - practical issues to do with day-to-day performance of the agreement (e.g. in the petroleum industry this would include financial support, standards assessment, etc);
 - whether goodwill is involved and how it will be calculated;
 - disclosure by the franchisor/lessor of any material fact known to the franchisor/lessor in the course of the lease or franchise period which could adversely affect the trading conditions of the franchisee/lessee;
 - clear disclosure of how variations to the contract will be dealt with;
 - the use of communications and/or other technical experts (e.g. lawyers, accountants, business consultants, trade associations) to ensure that terms and conditions are communicated effectively, and the testing of such material could reduce misunderstanding.
- 



Cultural differences benchmarks

- understanding where contracts and dispute resolution sit within the relevant cultural settings;
- producing documentation (such as contracts, advice, instructions) in appropriate languages;
- using nominated 'help professionals' who have appropriate language and cultural understanding skills.

Recognising mutual interests benchmarks

Typically a large party's expectations of a small party include:

- reliability;
- meeting commitments;
- agreed representation/presentation of goods and services;
- competitive prices;
- performance and maintenance of standards;
- dealing with known individuals;
- being kept informed of the small party's problems.

Where the small party is a **supplier** these expectations will involve:

- meeting specifications;
- delivering on time;
- good product knowledge;
- product improvement;
- competitive prices;
- keeping information confidential;
- providing market information;
- supporting the large party.



Where the small party is a **franchisee** they will involve:

- promoting the product as per the franchise arrangement (usually preferential over other products);
- informing the larger party of problems in advance;
- supporting the larger party's products over a competitor's products;
- ensuring that there are adequately informed and trained salespeople;
- commitment to act proactively to achieve mutual objectives under the franchise agreement.

Where the small party involved is an **authorised dealer** they will involve:

- promoting the manufacturer's/importer's product;
- informing the larger party of problems in advance;
- ensuring that there are adequately informed and trained salespeople.


Where the small party involved is an **independent dealer** they will involve:

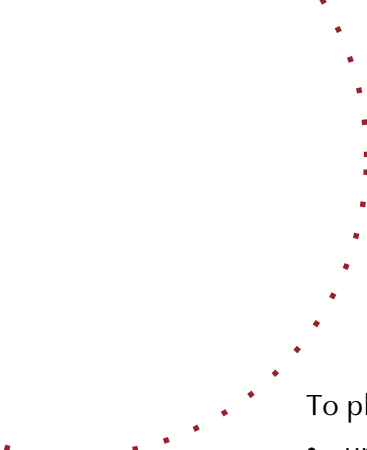
- informing the larger party of problems in advance.

To play its part, the **large** party needs to:

- provide timely, adequate, relevant and accurate information;
- inform the small business early of problems it is having with the smaller party or problems it itself is experiencing;
- pay, or offer, a fair price —depending on the circumstances;
- set purchasing criteria that recognises the importance of all the above.

Typically a **small** party's expectations of the large party include being:

- treated fairly and equally;
 - provided with timely information on market predictions, specific business plans that affect the small party's business viability;
 - paid on time;
 - paid or offered a fair price.
- 



To play its part, the **small** party needs to:

- understand the large party's expectations;
- inform the large party early of any problems it is experiencing.

Partnering checklist


- Is the relationship based on the concept of a genuine partnership to achieve mutual goals or is it based solely on contractual obligations?
- Does the relationship recognise the likelihood of shared pain as well as shared benefits?
- Is there sufficient disclosure of business plans (e.g. expansion plans)?
- Is there scope for variation of business plans to be discussed or negotiated?
- Are there ways to open two-way discussion and resolution of issues?
- Are the input costs commensurate with the services provided and a viable business?
- Can each party easily raise complaints/problems with the other? What are the lines of communications and procedures to deal with issues before they become problems?
- Are there fair termination provisions dealing with changed business needs of the larger party (e.g. reasonable terms for buying back stock)?
- Are there balanced dispute handling methods, initially not involving lawyers? (Appropriately oriented lawyers may have a useful, independent role at strategic points.)
- Will the relationship continue so long as performance targets are met and the larger party's plans remain unchanged — and the parties' aims remain compatible?
- When termination occurs will it be implemented on a fair and reasonable basis?
- Is there potential to build on existing investment in the relationship?
- Are notice periods reasonable, allowing parties to make alternative arrangements?



Aggressive conflict avoidance benchmarks

- appointment of an in-house disputes manager at a senior level;
- staff training in communication skills, identification of areas likely to generate conflict, and the significance of the agreements involving smaller parties;
- empowering field staff to resolve problems while continuing to permit, if necessary, access to more senior management;
- identification of areas likely to generate conflict;
- policy and procedures for conflict avoidance;
- creating a climate which encourages the raising of problems sooner rather than later;
- development and implementation of a communications strategy;
- using mentors/business advisers to give advice.

Dispute resolution benchmarks

- use of the in-house disputes manager to settle disputes;
 - a dispute resolution clause in contracts/codes/disclosure statements;
 - recognition/use of a small business negotiator;
 - having the right negotiators;
 - setting out clear and simple dispute handling policies and procedures;
 - commitment and coverage;
 - early intervention by a neutral third party;
 - establishment of panels of appropriately trained and appropriately oriented dispute resolvers;
 - industry awareness, endorsement, and active support of the scheme;
 - accountability;
 - administration.
- 



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The address is: <http://www.accc.gov.au>