

# 7 Access to justice and education

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## Introduction

7.1 A major theme in evidence to the inquiry has been the difficulty that small business has in accessing justice. The statements attributed by Ms Linda Hewitt to Lend Lease employees illustrate the problem. Ms Hewitt submitted she was told by her shopping centre management:

*... legally nobody would take lend Lease on, Lend Lease are too big to fight, they always win, I would run out of money before any action got to court. Politically nobody would want to get involved, publicly nobody would listen and I would be left looking foolish and stupid.<sup>1</sup>*

7.2 Such concerns are not new. The Senate Standing Committee on Legal and Constitutional Affairs inquired into the cost of justice in 1993.<sup>2</sup> The Senate Committee reported on what it saw as a truly bleak picture. That Committee considered that the legal system has obvious and endemic weaknesses. There was no point in having unenforceable or non-exercisable rights and a legal system that was not affordable or was not accessible. Particular criticisms made by the Committee included:

- the cost of conducting litigation;
- the delays in having matters heard;
- an apparent tolerance for unwarranted tactical manoeuvres rather than action to resolve the issues in dispute; and
- a disparity in the quality of representation before the courts.

7.3 Similar criticisms have been made to this Committee.

7.4 Among the principles enunciated by the Senate Standing Committee on Legal and Constitutional Affairs was that the legal system should be structured and administered to avoid, as far as practicable, the need for litigation or the creation of a litigious society. The Committee also reported that the adversarial system often militates against the early and inexpensive finding of the facts of a situation. Legal proceedings should not simply provide a weapon to beat an opponent into submission or to delay the relief to which an opponent is entitled, but must resolve disputes as fairly, quickly and cheaply as possible.

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1 Linda Hewitt, *Submission No. 114*.

2 Senate Standing Committee on Legal and Constitutional Affairs, *The Cost of Justice: Foundations for Reform*, (1993).

## **Alternative Dispute Resolution**

7.5 As indicated in Chapter 1, providing effective alternative dispute resolution processes is an essential part of the Committee's proposed strategy for dealing with unfair conduct. Importantly, the Committee believes that providing effective alternative dispute resolution processes can encourage non-litigious behaviour.

7.6 Mediation is a process where parties to a dispute appoint an independent third party to assist them to resolve the dispute. The role of the mediator is not to impose a solution, but to assist parties to negotiate their own agreement by:

- establishing effective communication;
- assisting parties to understand each others' needs and wants;
- identifying the real interests of each party;
- raising and clarifying issues;
- moderating unrealistic demands; and
- exploring alternative solutions.

7.7 Proposals to make mediation or other processes mandatory in certain types of disputes have received considerable attention in recent years, and during the course of this inquiry there was widespread support for such processes from, for example, the Australian Chamber of Commerce and Industry (ACCI).<sup>3</sup> This support is reflected in the active and cooperative participation of a wide range of business groups in workshops on commercial dispute resolution conducted by the Australian Competition and Consumer Commission (ACCC) in November 1996 and March 1997.

7.8 In this inquiry alternative dispute resolution processes have mostly been discussed in only general terms. In its submission, the ACCC placed considerable emphasis on early intervention when problems arise.<sup>4</sup> The ACCC went on to suggest some benchmarks for an effective dispute resolution system involving:

- using a 'troubleshooter' or informal mediator;
- having the right negotiators;
- setting out clear and simple dispute handling procedures;
- the need for total coverage;
- industry awareness of the scheme;
- administration of the dispute resolution scheme; and
- accountability.

7.9 The ACCC proposal is particularly directed to dispute resolution procedures under codes of practice. The Committee has endorsed the development of codes of practice and would see early dispute resolution procedures as an essential part of any such codes. There remains, however, a need for a more general provision to cover situations in which there is no code of practice or where its applicability is disputed.

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3 ACCI, *Submission No. 75*.

4 ACCC, *Submission No. 62*.

7.10 A variety of other bodies have also made suggestions as to how such processes should operate. To some, mediation is defined by a voluntary entry into the process.<sup>5</sup> To others, mandatory entry into the process is not seen to have an adverse impact upon process.<sup>6</sup> Some models for referral are based on judicial or quasi judicial persuasion or attendance at a mandatory alternative dispute resolution session or a mediation orientation session. Two main options have been proposed:

- making mediation or negotiation compulsory in court proceedings; and
- making mediation compulsory prior to commencing court proceedings.

7.11 There are legislative examples of both of these types of schemes. The Committee believes that both have advantages and it is not essential to make a choice between them. Rather, mandatory mediation should normally occur at the pre-litigation stage, but the court should have the power to order such mediation during the course of proceedings if the court believes that mediation is desirable. Importantly, such a back-up provision would provide greater weight to the pre-litigation process.

7.12 The Committee considers it is essential that codes of conduct make provision for compulsory mediation and that disputes under the new fair conduct clause the Committee proposes<sup>7</sup> for inclusion in the Trade Practices Act be routinely referred for compulsory mediation prior to any litigation.

### 7.13 Recommendation 7.1

**The Committee recommends that the *Trade Practices Act 1974* be amended:**

- (a) to provide for mandatory pre-trial mediation of actions under the new Section 51AA prohibiting unfair conduct in commercial transactions; and**
- (b) to provide that in assessing costs for litigation under the new Section 51AA, the court should take into account the good faith in which parties have participated in any pre-trial mediation.**

7.14 The Committee also notes that actions under its proposed new Section 51AA will often be associated with actions under other clauses. For that reason the clause as enacted might usefully take account of this possibility.

5 New South Wales Law Society 1993 Guidelines.

6 Law Council of Australia, Mediation Plan endorsed 1995, 30(5) *Australian Lawyer* 15.

7 Recommendation 6.1 of this report.

**7.15** Compulsory mediation would be complemented by easy, low cost access to the courts. During evidence to the Committee, a representative from the Attorney-General's Department, Ms Janine Ward, indicated that the Department was examining the possibility of developing a federal magistracy.<sup>8</sup> The Department of Industry, Science and Tourism agreed that a review is needed of the systematic barriers that prevent small business from accessing justice.<sup>9</sup> The Department suggested that the range of possible options is considerable, from changing the rules of court for some cheaper judicial mechanism (such as a small claims tribunal) through to establishing new judicial processes.

**7.16 Recommendation 7.2**

**The Committee recommends the Attorney-General explore with the States and Territories low cost options for improving small business access to legal tribunals for commercial disputes.**

**Education**

*The Property Council believes that much more can and should be done by governments, investors, managers and retailers (and their representative bodies) to improve the skill levels of Australian retailers.<sup>10</sup>*

**7.17** There has been concern over a very long period about the rate of small business failure. It has also been widely agreed that a lack of management skill on the part of small business owners is a major cause of small business failure. For example the 1990 report of the House of Representatives Standing Committee on Industry, Science and Technology, *Small Business in Australia*, noted evidence from the Small Business Corporation of South Australia on the need to improve management comprehension and skill. The Corporation had submitted that 75% of small business owners had never studied or been trained beyond year 12. Concepts of business management and control were largely unknown to them and their crucial importance remained unrecognised. The report noted that this leaves owner managers starting businesses without adequate planning in marketing, sales and capital requirements.<sup>11</sup>

8 Janine Ward, Attorney-General's Department, *Transcript of evidence*, p. 851.

9 Department of Industry Science and Technology, *Submission No. 177*.

10 Property Council of Australia, *Submission No. 119*.

11 House of Representatives Standing Committee on Industry, Science and Technology, *Small Business in Australia: Challenges, Problems and Opportunities* (AGPS, 1990), p. 210.

7.18 More recently the Employment and Skills Formation Council's report, *The Shape of Things to Come: Small Business Employment and Skills*,<sup>12</sup> and the report of the Industry Taskforce on Leadership and Management Skills, *Enterprising Nation: Renewing Australia's Managers to meet the Challenges of the Asia-Pacific Century*<sup>13</sup> both recommended that there be a major program aimed at the development of enterprise education in Australia. Indeed, in March 1995 Commonwealth, State and Territory education and industry departments agreed in principle to the elements of an Enterprise Education Strategy. The current Government in *More Time for Business* highlighted the need to equip students with the skills to create and manage businesses.

7.19 There has also been strong support for such education throughout the inquiry. For example Mr Alan Briggs, on behalf of the Property Council of Australia, said:

*In education, we share the view articulated by the ACCC that education and access to information is a key component to solving problems for small and microbusinesses in the shopping centre industry. The industry has committed millions of dollars within major companies educating centre executives with the bulk going to retailer education. All of the companies that are represented here spend an enormous amount of money internally educating their own people and educating retailers.<sup>14</sup>*

7.20 Mr Ian Gilbert, on behalf of the Australian Bankers' Association, said:

*Whatever can be done should be done to ensure that when people go into commercial relationships, particularly commercial tenancies, attention is drawn to the pitfalls, the upsides, the downsides, of that relationship.<sup>15</sup>*

12 Employment and Skills Formation Council, *The Shape of Things to Come: Small Business Employment and Skills* (AGPS, Canberra, 1994).

13 Report of the Industry Taskforce on Leadership and Management Skills, *Enterprising Nation: Renewing Australia's Managers to meet the Challenges of the Asia-Pacific Century* (April 1995).

14 Alan Briggs, Property Council of Australia, *Transcript of evidence*, p. 778.

15 Ian Gilbert, Australian Bankers Association, *Transcript of evidence*, p. 206.

7.21 Mr Gilbert went on to say:

*I think small business organisations themselves would say that there are some people who should not be in small business, and there needs to be a mechanism to, as it were, siphon off those people who should not go in and risk that superannuation money or whatever the nest egg is that they happen to have. It is a tragedy for the community and a tragedy for the individual when it happens.<sup>16</sup>*

7.22 While the need for improved business education has long been recognised at both State and Commonwealth levels it remains true that many, if not most, small business entrants do not undertake such education. Little evidence has been produced to the Committee addressing the reasons for this failure. However, the Committee does not believe that carelessness provides an adequate explanation. It is more likely that the need and the benefits are simply not understood. As well, those considering establishing a small business or those who have established one are faced with many competing pressures on time and resources. In this regard, Mr Peter Russo, a solicitor, said:

*[Education] is not the answer. Whilst the aim of educating small business is admirable, it must be remembered that generally the educational standard of most Shopping Centre retailers is very basic. How can you hope to educate a person or persons working 80 hours plus who is already possessed of limited education? Whilst one may live in fond hope one would have to be somewhat cynical about the prospects of success for such a recommendation.<sup>17</sup>*

7.23 Despite these formidable difficulties the Committee believes that awareness raising efforts need to be redoubled and targeted where they can do most good.

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16 Ian Gilbert, Australian Bankers Association, *Transcript of evidence*, p. 208.

17 Paul Russo, *Submission No. 178*.

**7.24 Recommendation 7.3**

**The Committee recommends that the Minister for Industry, Science and Tourism develop education strategies for existing and prospective small business operators which would include targeting:**

- (a) chambers of commerce;**
- (b) trade associations;**
- (c) local government development units;**
- (d) public and private sector enterprises that may be facing restructure of their activities, necessitating employee lump sum payouts for retirement or redundancy; and**
- (e) financial institutions.**

**7.25 Recommendation 7.4**

**The Committee recommends that:**

- (a) a national campaign be undertaken to raise awareness by potential small business entrants of the need to undertake adequate business education prior to committing themselves to such entry; and**
- (b) the campaign be coordinated by the Commonwealth Government and delivered by State and Territory Governments.**

7.26 The Committee notes, however, that improved education is not seen as an adequate solution to the problems of unfair business conduct by small business groups or, indeed, by the individual small business people who appeared before the inquiry. While small business education programs have a very important role to play in informing small business entrants of the skills they need and the hazards they face, such education cannot prevent unfair conduct being encountered during the course of a business relationship.

7.27 The Committee's recommendations would provide big business with a strong incentive to redouble their efforts to ensure that potential partners undertake such training. The only other available strategy would be to mandate such education and the joining of an appropriate business association as part of entry requirements. Such a strategy has been widely adopted in Europe. The Queensland Chamber of Commerce and Industry (QCCI) made specific reference to those European arrangements and to the role performed in them by the Chambers of Commerce.<sup>18</sup> In a similar context, Professor Andrew Terry said:

*I posed this question at the last franchising residential. We were talking about these sorts of issues and everyone there - the majority were franchisors - agreed that if it were possible to erect some barrier to entry into the franchising sector, it would be a very good thing.<sup>19</sup>*

7.28 Making small business training and industry association membership compulsory for new entrants would represent a radical change from past Australian practice. It would also require action at the State level, as the Commonwealth's constitutional powers do not extend to the regulation of unincorporated firms not engaged in interstate trade. The Committee suggests that State Governments could usefully look at such requirements.

The Hon Bruce Reid MP  
Chair

May 1997

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18 QCCI, *Submission No. 81*.

19 Professor Andrew Terry, *Transcript of evidence*, p. 89.