

RESOLUTIONS OF SMALL BUSINESS DISPUTES

Response to Options Paper dated May 2011

The dilemma of the costs of and access to the law has been debated within Federal Government circles for years.

Over the decades, numerous reports have emanated from the Australian Law Reform Commission and various Standing Committees addressing the adversarial system and the difficulty in accommodating parties in dispute.

Until the perceived problem is resolved by putting the optimum resolution in place, these reports and discussion papers will continue to proliferate on the same, worn subject.

As your options paper points out:

“There are many channels for dispute resolution.....The following sections aim to briefly describe (sic) the many approaches to dispute resolution, including ADR. This is not an exhaustive list of all possible mechanisms available across the public and private sectors, but it gives an indication of the range of mechanisms that currently exist.”

A full range of mechanisms is indeed already in place. The Federal Government already has its own mechanism designed to assisting a party in dispute called; Access to Justice (see:

<http://www.accesstojustice.gov.au/agnet/accesstojustice.nsf/home.html>)

The Home page proclaims:

“Do you have a legal problem? Not sure?”

Access to Justice is about helping you find someone in your area who can provide information, help you understand your options, and decide what to do.”

ADR is an established and well accepted mechanism in the resolution of disputes and is overseen by a long established, reputable association in the form of NADRAC.

Luminaries such as Sir Laurence Street have been advocating ADR for years, while organisations such as the Australian Mediation Association proudly proclaim themselves to specialists in “preventative law”.

So the question is; does Australia need more mechanisms, or should we be looking further “outside of the box” to address the perceived problem?

It must be incumbent on the government to consider all facets if it wishes to strive for (or even being seen to strive for) the “optimum resolution”.

To this end, I strongly commend the private sector and the provision of a commercial benefit which would incorporate a legal email helpline, available to the small businessman within a few clicks, for free, comprehensive and unlimited advice; and an insurance policy that covers the legal costs and expenses an SME may necessarily incur in resolving a dispute.

In the United Kingdom, this is known as Before the Event Legal Expenses Insurance (BTE).

It is an accepted line of insurance, and vigorously supported as the ultimate “legal risk management programme” for an SME.

In January 2010, BTE was given a ringing endorsement by Justice Rupert Jackson in a report entitled: “Review of Civil Litigation Costs – Final Report”

(<http://www.judiciary.gov.uk/NR/ronlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>)

In his Foreword, Justice Jackson simply said:

“In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.”

And on page 76, he comments;

I remain of the opinion, expressed in the Preliminary Report, that BTE insurance is beneficial for small businesses. The average small business is better able to negotiate with insurers than the average personal injury claimant and will have a better understanding of its rights under the policy. A substantial extension of BTE cover for small businesses, in respect of litigation costs as well as tribunal costs, would in my view be highly beneficial.

On the basis that the many pay for the few and that most small businesses do not get embroiled in litigation in any given year, the premiums ought to be affordable at least by some small businesses, if they are prepared to attach sufficient priority to LEI.

I do, recommend that both insurers and the Department for Business, Innovation and Skills should make serious efforts to draw to the attention of SMEs, and especially micro businesses, the forms of BTE insurance available and the costs. In my view, a greater take-up of BTE by small

businesses would be one way of promoting access to justice. In other words, in relation to BTE insurance for small businesses.

BTE, with an advisory email helpline, is the missing element in Australia for the ultimate “coherent package” in promoting access to justice.

The cover provided by the insurance is comprehensive, in order to address the varied areas of potential dispute as possible. Main areas of potential dispute include; employment, contract, property, tenancy, statutory licence, prosecution, employee protection, data protection and tax audit.

The cover is pro active (or “preventative”) in that insureds are made very well aware of the helpline and are encouraged to use it.

For instance, it is a condition that an employer must use the helpline for advice before dismissing an employee. If the subsequent advice is followed and an unfair dismissal complaint is the result, the employer’s costs of defending the matter will be covered.

(Please refer here: <http://www.smh.com.au/technology/technology-news/shop-fined-10000-for-firing-worker-in-cowardly-text-20110530-1fctp.html>: for a simple example from today’s press (similar examples are reported daily), of how a complacent employer may have been assisted by the programme.)

Employment disputes (and thus claims) are minimised and the premium for such BTE benefit is correspondingly minimised.

On the subject of price. Pricing insurance is driven by exposure to claims. Effective claims handling is crucial in minimizing claims. In the handling of BTE claims, great stress is given on preventing disputes from reaching the “toxic” stage and ADR mechanisms are strongly promoted.

The fact that one party has the cover is by no means a “carte blanche” to incur limitless cost. On the contrary, it is in all parties’ interests to resolve disputes under the cover as efficiently as possible.

However, it is certainly the case that small businesses have the support to “punch above their weight” and to defend or pursue properly their rights and interests.

Australia does not have any tradition of this type of insurance and this benefit is not widely understood by the insurance broking fraternity.

We believe that the BTE + helpline programme should be given a wide and emphatic prominence as an integral part of any discussion concerning SME and dispute resolution.

An understanding and acknowledgement of a BTE programme for SMEs in Australia by the Federal Government, with a strong endorsement from the Government will ensure the optimum solution for which the Government is striving.

Please contact me for any further clarification or detail.

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