



Law Council
OF AUSTRALIA

Business Law Section

6 May 2021

Ms Carmel McGregor PSM
Head Reviewer
2021 Australian Small Business and Family Enterprise Ombudsman Review
Department of Industry, Science, Energy and Resources
Industry House Level 9
10 Binara Street
CANBERRA ACT 2601

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Dear Madam

2021 Review of the Australian Small Business and Family Enterprise Ombudsman

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (**SME Committee**) makes this submission in response to the Discussion Paper dated March 2021 with regard to the 2021 ASBFEO Review (**Discussion Paper**).

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

Please note that the SME Committee's submission may differ from those made by other Committees of the Law Council because of our Committee members' perspectives and experiences as advisers to SMEs.

Purpose

The SME Committee notes that under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth) (**the Act**), the Minister for Small Business is required to initiate an independent review of the Australian Small Business and Family Enterprise Ombudsman's (**ASBFEO**) assistance function every four years. The inaugural review was undertaken in 2017 and the SME Committee also made a submission to that process.

The SME Committee also notes that since its establishment, the ASBFEO has developed and enhanced its assistance and advocacy functions and undertakes several new services. The purpose of this 2021 Review is to examine:

1. the kinds of assistance requested during the review period and whether the assistance provided was convenient and effective for the operators of small businesses and family enterprises;
2. how the ASBFEO has responded to the recommendations of the 2017 review;

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3. the interaction and effectiveness of the ASBFEO's functions, including any new roles acquired since the previous review; and
4. whether there are any legislative and administrative improvements that could better support the ASBFEO in the delivery of its functions.

Response and feedback

Thank you for the opportunity to provide a submission in response to the Discussion Paper. The SME Committee has had regular and highly productive interactions with the Ombudsman since the role commenced in March 2016. SME Committee members have made a number of submissions to inquiries conducted by the ASBFEO, have participated in ASBFEO working groups and an ASBFEO representative regularly attends SME Committee meetings in which he participates as an Observer. In addition, the legal practices of most members of the SME Committee are themselves small businesses, as are the majority of legal practices in Australia, and most SME Committee members have small business and family enterprise clients.

The SME Committee particularly notes that since the previous review, there have been a range of unprecedented natural and economic events that have impacted small businesses and family enterprises (referred to further as 'small businesses') including the final years of a long period of drought, the 2019 – 2020 bushfires, the 2021 floods in east Australia, the COVID-19 pandemic and the various State and Federal government initiatives instigated to assist small businesses to maintain viability through this period, some of which continue or the benefits of which have been made permanent.

The SME Committee recognises that the willingness of governments to introduce a number of these initiatives, some of which had been considered and raised previously with governments, should be identified in the 2021 Review as being attributable to the success of the advocacy work undertaken by the ASBFEO. In particular, Ms Carnell's high media profile, together with the high regard in which she and her staff are held by government Ministers and Department and agency staff, enabled practical solutions to issues facing small business that could have caused many of them to cease operating. This was particularly the case during the COVID-19 crisis period. where recommendations suggested by ASBFEO in its COVID-19 Recovery Plan have assisted the Federal government to focus its reforms.

A significant initiative was the ASBFEO's introduction of a mental health support service for people in small business accessible through the ASBFEO's My Business Health web portal.

Even with these important initiatives to support small business through the crisis period, the SME Committee notes that many small businesses unfortunately did not survive the impact of these extraordinary circumstances.

The Discussion Paper lists Consultation Questions provided as a guide for submissions or discussion with the Reviewer. The SME Committee has sought to answer these through providing responses informed by the experiences which SME Committee members have observed with their own small business or with their small businesses or family enterprise clients.

Consultation Questions

1. What kind of assistance has the ASBFEO provided your business during the review period (2017-2021)?

The ASBFEO has continued to provide the assistance that the ASBFEO had been providing when the 2017 Review was undertaken, being the provision of education and a variety of support information services and complaint receipt services for

small businesses and family enterprises that have been effective in allowing small businesses and family enterprises to understand their positions and legal rights and opportunities. Since the previous review, the ASBFEO has also provided supported small businesses through the range of unprecedented natural and economic events that have impacted small businesses over the last three years. The ASBFEO has put together and publicised important information and suggestions as to how and what small businesses could do, and what resources were available for them to access, to help them through these times of economic and pandemic crisis, including establishing services to assist small businesses with mental health issues.

2. Did the assistance provided resolve the issue or dispute? What more could be done to help businesses resolve disputes?

As raised by the SME Committee in the 2017 Review, the Committee considers that the ASBFEO could improve its effectiveness where a dispute requires determinative settlement, by having the ability under its legislation to 'require', rather than only to 'recommend' as is now the case, that the parties involved in the dispute enter into an alternative dispute resolution process, including arbitration, if appropriate.

In addition, the SME Committee is of the view that the ASBFEO should also have the ability to include in such alternative dispute resolution processes the parties integrally involved in the dispute but who do not have a contractual relationship with the small business or family enterprise, such as investigative accountants, valuers and administrators (accountants) appointed by banks and other financiers as the other contracting party, and often paid for by the small business.

In the SME Committee's view, both these changes to the ability of the ASBFEO to resolve disputes under the legislation would enable the ASBFEO to be recognised by small business as having the necessary authority to effectively deal with recalcitrant parties to a dispute.

3. How has the advocacy work performed by the ASBFEO benefited small and family businesses? Are there any improvements that could be made to the advocacy work?

The SME Committee considers the Ombudsman's effectiveness in undertaking the advocacy function in the review period has been exceptional. As mentioned above, the SME Committee recognises that the willingness of governments to introduce initiatives instigated to assist small businesses to maintain viability through a range of unprecedented natural and economic events that have impacted small businesses through the review period, can be attributed to the success of the advocacy work undertaken by the ASBFEO, including recommendations suggested in the ASBFEO's COVID-19 Recovery Plan provided to government.

The initiatives introduced by Federal and State governments to assist small businesses to remain viable and for which the ASBFEO should be recognised as having been responsible for or involved in suggesting, include:

- a. suspension of ability of commercial landlords to terminate leases, and reductions of rentals due to a reduction of business earnings;*

- b. *instant asset write offs;*
- c. *the suspension of actions to render small businesses insolvent;*
- d. *the increase in monetary thresholds for the triggering of insolvency actions (which has now been made permanent);*
- e. *reverse the decision by Australia Post in relation to the delivery of perishable goods;*
- f. *the introduction of Payment Times Reporting Scheme and the requirement to pay small businesses in 30 days;*
- g. *work hour flexibility under the Retail Award;*
- h. *independent review for small businesses of ATO decisions;*
- i. *recovery grants from State governments;*
- j. *funding of access to financial counselling on workplace recovery;*
- k. *SME Loan Guarantee scheme (which has recently been expanded); and*
- l. *removing the application to small businesses of responsible lending requirements for consumers.*

It also remains the view of the SME Committee, as it was in its response to the 2017 Review, that the profile of the ASBFEO, and particularly the Ombudsman, in the media is the most important and effective method to develop trust amongst small businesses and family enterprises that the ASBFEO is a supportive and effective advocate for them, to influence public opinion, and to have a valuable impact on political decision makers, and on organisations that deal with small businesses.

4. How does the ASBFEO work with other key stakeholders such as government agencies, small business commissioners and services such as legal or community services?

From the SME Committee's experience, ASBFEO works effectively with all other stakeholders with which it engages including the SME Committee, government agencies such as the ACCC, ASIC and the ATO, small business commissioners and industry bodies such as COSBOA.

The SME Committee believes that Ms Carnell as the Ombudsman had, and the staff at the ASBFEO have, strong constructive relationships with the relevant organisations and individuals. The SME Committee expects, from its prior dealings with Mr Bruce Billson, the new Ombudsman, when he was the Minister for Small Business, that he will be able to maintain strong and constructive relationships with all stakeholder groups.

The evidence of the ASBFEO's strong and effective working relationship with government has been shown in the willingness of government to introduce initiatives suggested by ASBFEO to assist small businesses to remain viable during the period of crisis caused by unprecedented natural and economic events.

5. Are the current legislative and administrative arrangements that support the ASBFEO fit for purpose or can they be improved?

The SME Committee considers it is important that the ASBFEO be recognised by small business as having authority to effectively deal with recalcitrant parties to a dispute, given that the main activity undertaken by the ASBFEO is the resolution of

disputes. However, currently it cannot require the parties to enter into an alternative dispute resolution process, particularly not a determinative one.

It is the position of the SME Committee that small businesses would benefit from an appropriate, effective and cost efficient forum for determinative resolution of small business disputes if, as previously mentioned both in its response to the 2017 Review and in its answer to Question 2 above, the ASBFEO was to have the ability under its legislation to 'require', rather than only to 'recommend' as is now the case, that the parties involved in the dispute enter into an alternative dispute resolution process, including, if appropriate, arbitration. Further, the SME Committee is of the view that the ASBFEO should also have the ability to include in such alternative dispute resolution processes the parties integrally involved in the dispute but who do not have a contractual relationship with the small business or family enterprise, such as investigative accountants, valuers and administrators (accountants) appointed by banks and other financiers as the other contracting party, and often paid for by the small business.

The SME Committee does not consider that conferring on the ASBFEO the power to 'require' parties to a small business dispute to enter into an alternative dispute resolution process, including arbitration, would, if included in the legislation, raise any risk that the ASBFEO could have any conflict of interest due to it also maintaining an advocacy function. The position of the ASBFEO if it were able to 'require' parties to attend, would not change for practical purposes, other than to provide the ASBFEO with greater authority when dealing with recalcitrant parties to a dispute.

6. Other issues and suggested improvements?

From the SME Committee's experience, and from its dealings with the ASBFEO and its staff, the ASBFEO has to date been very effective in supporting the position of small business through undertaking the advocacy and assistance functions required under the Act, and in performing other functions requested of it by the Minister for Small Business.

The SME Committee will continue to work with and provide its support to the ASBFEO, and looks forward to working with the new Ombudsman.

Further discussion

The SME Committee would be happy to discuss any aspect of this feedback.

Please contact Coralie Kenny, Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours faithfully



Greg Rodgers
Chair, Business Law Section