



Restaurant
& Catering

Review of the Australian Small Business and Family Enterprise Ombudsman

Response to Discussion Paper

APRIL 2017

RESTAURANT & CATERING AUSTRALIA

Restaurant & Catering Australia (R&CA) is the national industry association representing the interests of 35,000 restaurants, cafes and catering businesses across Australia. R&CA delivers tangible outcomes to small businesses within the hospitality industry by influencing the policy decisions and regulations that impact the sector's operating environment.

R&CA is committed to ensuring the industry is recognised as one of excellence, professionalism, profitability and sustainability. This includes advocating the broader social and economic contribution of the sector to industry and government stakeholders, as well as highlighting the value of the restaurant experience to the public.



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EXECUTIVE SUMMARY

Restaurant & Catering Australia (R&CA) welcomes the opportunity to provide comment to the 2017 Review of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). R&CA highly commends the efforts of the ASBFEO as an advocate for small business and family enterprise since the establishment of the position in March 2016. The ASBFEO since its inception has completed a large body of work of significant value and relevance to small businesses in the hospitality sector, including an inquiry on Payment Times and Practices which culminated in a report provided to the Minister for Small Business in April 2017.

R&CA has already provided extensive feedback and comments regarding the ongoing structure and focus of the ASBFEO during previous consultation periods. In May 2014, R&CA provided a written submission in response to the Small Business and Family Enterprise Ombudsman Discussion Paper, outlining its concerns with the functioning of the role. R&CA also provided a written submission to the Legal and Constitutional Affairs Legislation Committee's Inquiry in July 2015. R&CA's concerns regarding the ASBFEO, as expressed within each of its previous submissions, remain of ongoing relevance and are principally related to:

- The limited ability of the ASBFEO to offer small businesses assistance in the dispute resolution process given the Constitutional restraints placed on the role;
- The potential for duplication and inconsistencies in the advice provided to small businesses by the ASBFEO and the Association;
- The unsuitability of the ASBFEO's title given the definitional inconsistency between the term Ombudsman and the reduced dispute resolution function.

STRUCTURE AND FUNCTIONING OF THE ASBFEO

R&CA's concerns regarding the structure and functioning of the ASBFEO relate primarily to its reduced dispute resolution capability due to the Constitutional restraints placed on the role. Furthermore, R&CA is also concerned about the potential for duplication and inconsistencies in the advice given to small businesses between the ASBFEO and the Association.

LIMITED DISPUTE RESOLUTION CAPABILITY

One of the major issues affecting the effectiveness of the ASBFEO is its limited dispute resolution capability which can be attributed to the Constitutional restraints placed on the role. In the hospitality sector, a large proportion of disputes raised by small businesses are related to either human resources or industrial relations issues. As a result of the Constitutional restraints placed on the role, the ASBFEO may be prevented from resolving disputes in these key areas. For instance, the Constitutional requirements governing the role prevent the ASBFEO from intervening in disputes where two small businesses are both unincorporated and both in the same state. R&CA remains concerned that the constitutional restraints placed on the ASBFEO will severely limit its ability to assist businesses in the dispute resolution process. In this way, the Constitutional restraints act as a barrier impeding the ASBFEO's effectiveness in supporting hospitality sector businesses.

R&CA also envisages very limited circumstances in which the Association could refer its member businesses to the ASBFEO due to its limited ability to intervene in the dispute resolution process. Whilst the current advocacy role being played by the ASBFEO is essential to small businesses in the hospitality sector, these businesses often require tailored and technical support in regards to business-to-business disputes which the ASBFEO is unable to provide due to these Constitutional restraints.

DUPLICATION AND INCONSISTENCIES IN ADVICE

In previous consultations concerning the establishment of the ASBFEO, R&CA outlined its concerns regarding the possibility of duplication and inconsistencies between the advisory function of the ASBFEO and that of the Association. As previously mentioned in this submission, much of the advice required by small businesses in the hospitality sector is related to highly technical and complex areas including workplace relations and migration which may be addressed more effectively through the

channels of the Association. At present, R&CA has a dedicated team of in-house workplace relations advisers as well as a migration agent who each possess the specific knowledge and expertise required to provide members with tailored, sector-specific advice on these inherently complicated issues. R&CA remains concerned about the potential for duplication or inconsistency in the advice provided to small businesses in the hospitality sector by the ASBFEO and the Association.

R&CA has previously raised the possibility of establishing a Memorandum of Understanding (MOU) to explicitly outline the areas of cooperation between the two organisations as well as the referral and advisory processes in place. At present, R&CA already has a MOU with the Fair Work Ombudsman (FWO). R&CA believes that a formal arrangement potentially in the form of a MOU would ensure that any duplication or inconsistency in the advice provided to small businesses by the ASBFEO and the Association would be avoided.

CHALLENGES OF IDENTIFYING THE POSITION AS AN OMBUDSMAN

In R&CA's view, the ASBFEO's title in its current form is problematic. This is particularly in relation to the use of the term of Ombudsman. R&CA raised this point in its previous 2014 submission and its position on this matter is unchanged. R&CA argues that including Ombudsman in the title of the ASBFEO is inappropriate as the definition of the term does not sufficiently align with the activities currently being carried out. Furthermore, small business operators may be discouraged from fully engaging with the ASBFEO due to the connotations of the term Ombudsman.

DEFINITIONAL INCONSISTENCIES

R&CA argues that the ongoing use of the term Ombudsman as part of the ASBFEO's title is inappropriate given the current functioning of the role. The fundamental activity carried out by an Ombudsman, as stated by the Australian and New Zealand Ombudsman Association (ANZOA), is 'independent resolution, redress and prevention of disputes'.¹ Given that the Constitutional restraints placed on the ASBFEO significantly impede its ability to intervene in the dispute resolution process, the term Ombudsman therefore does not provide an accurate reflection of the ASBFEO's key functions.

CONNOTATIONS

It is unlikely that businesses in the hospitality sector will engage with the ASBFEO due to the connotations associated with the term Ombudsman. A continuation of this terminology may lead to confusion amongst small business operators and a subsequent underutilisation or avoidance of the ASBFEO entirely. In this way, the continuing use of the term Ombudsman has the potential to detract from the ASBFEO's effectiveness in its advocacy function as some business operators will be reluctant to contact the ASBFEO in the first instance.

¹ Submission 3, Legal and Constitutional Affairs Legislation Committee, *Australian Small Business and Family Enterprise Ombudsman Bill 2015*, August 2015.

Given the definitional inconsistencies and decreased likelihood of hospitality businesses engaging with the ASBFEO given the connotations of the term Ombudsman, R&CA argues that this term be removed from the ASBFEO's title. As such, an alternative title for the ASBFEO without the use of the term Ombudsman should be explored. R&CA's preference for a renaming of the position is using the previous title 'Australian Small Business Commissioner'. The use of such a title would be more appropriate given the Constitutional restraints placed on the ASBFEO's ability to intervene in the dispute resolution process.

CONCLUSION

R&CA welcomes the opportunity to provide comment to this Review on the establishment and operation of the ASBFEO since its creation in March 2016. R&CA commends the significant body of work carried out by the ASBFEO thus far and its effectiveness as an advocate for small business and family enterprises in the hospitality sector. R&CA's original concerns regarding the structure and functioning of the ASBFEO, as previously outlined in its submissions in 2014 and 2015, are of ongoing relevance, namely:

- The limited ability of the ASBFEO to offer small businesses assistance in the dispute resolution process given the Constitutional restraints placed on the role;
- The potential for duplication and inconsistencies in the advice provided by the ASBFEO and the Association to small businesses in the hospitality sector given the need for highly technical and tailored information; and
- The unsuitability of including the term Ombudsman within the ASBFEO's title given that its ability to meet the accepted definition of an Ombudsman has been limited due to Constitutional restraints.

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