

Guidelines for legal advice under the small business dispute help service

1. Purpose

These guidelines set out the policies and processes for a small business in dispute with another business or government agency to access low-cost legal advice under the small business dispute help service that is being run as a pilot program. As part of the pilot, these guidelines will be periodically updated.

2. About the small business dispute help service

Legal advice is available to eligible small businesses under the small business dispute help service (the service). Access to low-cost legal advice may be offered to eligible small businesses at up to two separate stages of the dispute resolution process.

While there is no guarantee that the matter will be resolved through the service, legal advice is provided to assist small businesses to maximise their opportunity to understand their matter and resolve it without having to go to court.

3. Eligibility

Access to the service is through the ASBFEO's assistance function that helps with dispute resolution via case management and is determined after considering the circumstances of the matter including in relation to section 68 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.

Who is eligible?

To be eligible for consideration to access legal advice under the service:

- The entity must be a small business in accordance with the definition of a small business under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* i.e. fewer than 100 employees or revenue of less than \$5m in the previous financial year.
- The entity must not be legally represented.
- The entity must be seeking dispute resolution in relation to a relevant action under section 65 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015* or relevant industry code of practice.
- The entity must have lodged the matter with the ASBFEO via an online webform (or otherwise as agreed).
- The matter must be actively managed by an ASBFEO case manager.
- The ASBFEO is of the view that the matter may benefit from an alternative dispute resolution (ADR) process to help reach a resolution.

In determining whether a matter would benefit from ADR, the ASBFEO may take into consideration all relevant factors that may include:

- whether both parties have expressed a willingness to participate in an ADR process to resolve their dispute;
- the length of time parties have been in dispute and any attempts that they have made to resolve it;
- the value of the dispute;

- other actions of the parties, including indications that the parties are dealing with each other in good faith and whether the matter may be considered to be frivolous or vexatious; and
- taking all relevant factors into account, whether ADR may be an efficient and effective way to resolve the dispute.

Who is not eligible?

A small business is **not** eligible for legal advice under the service if any of the following apply:

- the request for assistance could have been made to another agency of the Commonwealth, State or Territory and that the request could be more conveniently or effectively dealt with by the other agency.
- the small business has legal representation.
- the small business dispute is with an individual in their personal capacity (ie. not in respect of a business that they operated).
- the small business is seeking dispute resolution for a matter that does not relate to a relevant action under the *Australian Small Business and Family Enterprise Ombudsman Act 2015* or relevant industry code of practice.

4. Operation of the service

- Access to the service is by selection through case management by the ASBFEO.
- When a small business lodges a matter with the ASBFEO, a dedicated case manager is assigned to the matter.
- The case manager will work with the small business through self-help options, and if these are unsuccessful, may make contact with the other party to clarify issues and seek their views and there will be a period of correspondence with the case manager.
- If during this time, the ASBFEO forms the view that the issues in dispute require further identification and clarification, that the matter may benefit from an ADR process, and the small business meets the other eligibility criteria, the ASBFEO may offer to refer the small business for Stage 1 Preliminary Legal Advice.
- If the ASBFEO is satisfied that the issues have been identified and clarified, that the matter may benefit from an ADR process, and that the small business meets the eligibility criteria, the ASBFEO may refer the small business for Stage 2 Pre-ADR Advice to receive strategic advice and assistance to prepare for an ADR process.
- Not all matters will be subject to both stages. The ASBFEO will advise whether a matter should proceed directly to Stage 2, taking into consideration whether the issues have been identified and clarified. This includes industry code matters where the other party has been notified of the issues in dispute through a Notice of Dispute.
- While one hour of specialist legal advice will generally be offered for matters that proceed directly to Stage 2, the ASBFEO may offer two hours where this is beneficial given the nature of the dispute. In such circumstances, authorisation from the ASBFEO is required before a second hour is provided by the legal practitioner.
- If both parties in a dispute meet the eligibility criteria, the ASBFEO may provide both parties with access to Stage 1 and/or Stage 2 of the service.

5. Scope of legal advice

Specialist legal advice is available to unrepresented small businesses at up to two stages of the dispute resolution process as follows:

5.1 Stage 1 (One Hour Preliminary Advice)

- If the matter is referred to Stage 1 Preliminary Advice, the ASBFEO case manager will access the ASBFEO's list of legal practitioners and identify a shortlist of suitable legal practitioners from its panel. The shortlist will largely be based on specialisation in relevant areas of law. The small business will be asked to review the shortlist of legal practitioners and provide an order of preference.
- The ASBFEO case manager will issue a work order referring the matter to a preferred specialist legal practitioner, subject to any conflicts of interest or other reasons for the specialist legal practitioner not accepting the matter.
- The specialist legal practitioner will provide one-hour of service to the small business which may include reviewing documents, discussing the matter with the small business and providing a summary email. Subject to the consent of the small business, the legal practitioner will also provide high level information to the ASBFEO about the issues that may be considered at ADR and whether they believe the matter would benefit from proceeding to ADR (and the type of ADR best suited).
- The total time that the legal practitioner will allocate to the matter is one hour. This will include reviewing relevant documents, the consultation with the small business and a follow up email.
- The consultation will assist the small business to identify and clarify the issues in dispute and determine relevant material that may support resolution of the matter.
- The consultation will be undertaken within five to ten business days of receipt of the referral or as or as otherwise agreed with the small business.
- The advice should provide the small business with what options might be available and whether ADR may be an appropriate way to attempt to resolve the dispute.

5.2 Stage 2 (One Hour Pre-ADR Advice)

- If after Stage 1 Preliminary Advice, a small business proceeds to a facilitated ADR process recommended by the ASBFEO or the ASBFEO advises that a matter should proceed directly to Stage 2, or ADR is required by an Industry Code, the Ombudsman, may offer Stage 2 Pre-ADR Advice from the same specialist legal practitioner or another legal practitioner. The ASBFEO case manager will follow the steps outlined in Stage 1 to make the offer of the legal practitioner.
- At this consultation, the specialist legal practitioner will provide strategic advice to assist the small business to prepare for the ADR process. This will include helping the small business prepare documentation, understand what to expect during ADR, identify the outcomes that the small business is seeking, discuss negotiation options and adopt a resolution mindset.
- If the specialist legal practitioner did not provide Stage 1 (One Hour Preliminary Advice) to the small business, this one-hour legal service will also include reviewing any relevant documents.
- The total time that the legal practitioner will allocate to the matter is one hour. This will include reviewing relevant documents, the consultation with the small business and any follow up email.

- The ASBFEO may authorise the provision of two hours where the ASBFEO concludes that this is beneficial given the nature of the dispute.
- The consultation will ideally be undertaken within five to ten business days of receipt of the referral or as or as otherwise agreed with the small business.

6. Payment

- **Stage 1 Preliminary Advice:** A co-payment of \$100 is required from the small business. It must be paid by the small business directly to the legal practitioner, with the ASBFEO to pay the balance of the cost directly to the legal practitioner.
Stage 2 Pre-ADR Advice – Generally no co-payment is required from the small business at the time of the second consultation. The cost will be met by the ASBFEO. However, if the matter proceeds directly to ADR, such as for a Code related matter where the issues have already been identified in a Notice of Dispute and/or where Stage 1 Preliminary Advice has not been required, the small business is required to pay the legal practitioner a co-payment of \$100, with the balance of the cost to be paid by the ASBFEO. This will be advised by the ASBFEO at the time of engagement.
- The service does not include the provision of legal support by the specialist legal practitioner if the matter proceeds to ADR. The small business may independently engage the support of any legal practitioner for this process, and the small business will be solely responsible for the cost of any legal representation or further legal advice.

7. Complaints

Feedback or complaints related to the small business dispute help service may be directed to:

Dr Craig Latham, Executive Director

Phone: 02 5114 6100

Email: craig.latham@asbfeo.gov.au