



Resolution
Institute

A response to the Australian Small Business and Family Enterprise Ombudsman COVID-19 Recovery Plan

18th August 2020

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About Resolution Institute

Resolution Institute is the leading membership body in the southern hemisphere representing the profession of non-litigious dispute resolution. Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 dispute resolution professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

We focus on standards of dispute resolution practice, support services to members and developing an environment in which dispute resolution services are easily accessible. Resolution Institute is committed to promoting and supporting the use of dispute resolution through providing education, training and accreditation or grading, to contribute to the provision of quality dispute resolution services. Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (ACNC) as a not-for-profit organisation.

Our vision is ***‘enabling meaningful access to justice and dispute resolution, effectively resolving conflict in any situation’***

Introduction

While the COVID-19 pandemic has touched every corner of Australian life, small businesses have arguably been deeply impacted. The COVID-19 Recovery Plan published by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) in May 2020 outlines a pathway for reform with the aim of improving the legal, regulatory and compliance environment for small business in Australia, to assist in restarting the economy.

A link to the report can be found below:

<https://www.asbfeo.gov.au/sites/default/files/COVID%20Recovery%20Plan%20v2.pdf>

Resolution Institute applauds the recommendations contained within the Ombudsman's report. Importantly, Resolution Institute notes with pleasure the central role many dispute resolution bodies take in the path to recovery from the economic disruption caused by COVID-19. We believe that such forms of dispute resolution remain the most efficient, cost effective and least stressful path towards achieving desired outcomes within the small business space. Resolution Institute believe that ASBFEO is uniquely positioned to help Australians recover from the impacts of COVID-19 and the broad array of recommendations tabled in the report will go a long way to helping Australia recover. Of the many recommendations in the report, two areas directly involve dispute resolution, and align with the Vision and Values of Resolution Institute and our members. To demonstrate our support, we would like to provide more detailed comments on these two areas: Access to Justice and Farm Debt Mediation. Resolution Institute supports change in these areas and hopes that our considered response will refine and enrich the recommendations made in the ASBFEO COVID-19 Recovery Plan.

Response by Resolution Institute

Access to Justice:

Resolution Institute embraces all recommendations made by ASBFEO and believes that there may already be tools in place to help with some of the recommendations. One such tool is the *Contracts Review Act 1980* (NSW) which renders contracts void if they contain unfair terms.

Recommendation 1. Federal Small Business Claims Tribunal:

Resolution Institute agrees that the cost of pursuing disputes through the court system makes it uneconomical for small businesses to pursue claims for less than \$100,000. This calculation may even understate the issue when the opportunity cost associated with the time loss of pursuing cases within courts, as well as the significant emotional toll on small business owners is taken into account. Therefore, rationalisation and homogenisation of the various state-level tribunals, and even combination into a single, federal business claims tribunal is highly desirable.

Although there may be some constitutional issues with finding a head of power to create such a tribunal on the federal level, Resolution Institute believe that creation of unified legislation and tribunals, with the same thresholds and jurisdictional rules, would work just as well at achieving the desired outcome.

Resolution Institute also fully supports ASBFEO having a triage role in the process. The experience and expertise of this agency make them uniquely and obviously qualified to help filter and triage cases based on their urgency and size. This triage service would help in providing a streamlined system.

Recommendation 2. Codes and Independent Binding Arbitration:

Resolution Institute agrees with and supports the idea of the Ombudsman having the power to refer matters to binding arbitration. As mentioned above the Ombudsman's placement in the industry makes it uniquely able to divine the needs and will of various parties. As such, giving this body an extra power and option to use when deciding how best to resolve such disputes will be an undeniable good for small businesses across Australia.

Resolution Institute's own model of a large pool of experts from which members can be drawn gives credence to the model proposed by the Small Business Ombudsman. Resolution Institute has found that their large membership base has resulted in nominators being able to find mediators with specialist skills suited to the case more often. Not only does this ability to find specialists in the area improve outcomes, it also increases the efficiency of the process and thus reduces the costs borne by each side.

Finally, the inclusion of good faith requirements in all codes which mandate dispute resolution is unequivocally supported by Resolution Institute. Its inclusion would definitely be welcomed as a sign that dispute resolution is not just a 'check box' on the path towards litigation in courts.

Recommendation 3. Unfair Contract Terms:

Resolution Institute support all the recommendations made by the Ombudsman in this section. The changing of unfair contract terms from being voidable to being void, as well as the increase in the cap to \$10 million would both result in improvements for the environment for many small businesses. Nonetheless, there are a few observations that should be made to improve and refine the recommendations.

First, it is unclear how changing unfair contract terms from being voidable to being void would help parties enforce their rights under the scheme, although the overall idea is a positive one. It must be proven by a dispute resolution body that the term in question is unfair in the first place before it can be properly categorised as either void or voidable. Nonetheless, the legal distinction between the two is still important.

Second, there are many pieces of legislation such as the [Contracts Review Act 1980 \(NSW\)](#) which make unfair contract terms void. It may therefore be profitable to investigate these underutilised avenues for striking out unfair contract terms, as well as building a model off

these already existing pieces of legislation. Of interest here is s 7, which outlines the power of courts to make sections void and s 9 which lays out the matters to be taken into consideration by courts when deciding terms are unfair.

Resolution Institute and our members offer our support and expertise in this area to work with ASBFEO to work towards the recommended changes and promoting the various forms of Dispute Resolution in response to situations listed in the recovery plan.

Farm Debt Mediation Scheme:

Resolution Institute believe that there is a great deal of potential for the recommendations to improve the position of farmers in Australia through Farm Debt Mediation, yet there are some areas within the recovery plan that need further refining, most notably the creation of a precedential system and binding outcomes to the mediation. We offer our support to work with ASBFEO to refine these recommendations and advocate for change and give our commitment to support the principles outlined in the recovery plan regarding a rationalised and unified Farm Debt Mediation scheme.

Recommendation 1. Setting a nationally consistent and compulsory scheme:

Resolution Institute strongly supports the idea of a nationally consistent Farm Debt Mediation Scheme and notes that the Rural Finance Minister had promised a National Farm Debt Mediation Scheme by the middle of this year, as seen in the below article:

<https://www.theland.com.au/story/6338951/national-farm-debt-mediation-scheme-expected-by-mid-2020/?cs=512>

Although this scheme has not yet materialised, Resolution Institute supports a national scheme to address the inconsistent adoption of mediation between states and to encourage mediation as a powerful tool for resolving the financial difficulties faced in the farmer-banker relationship. This consistency would also allow banks to adopt national policies and training plans for their employees, making the process far smoother for all involved. These reasons, and others are echoed in the Honorable Kenneth Hayne AC QC's report into banking, as seen below:

<https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf>

There are, however, some points of feedback that Resolution Institute hopes will improve the standing of the Small Business Ombudsman's recommendation, which already has great potential.

The first is that making the scheme compulsory and binding would cause a fundamental shift in the nature of proceedings under this scheme. Many of the benefits of the mediation process are derived from the mutual understanding that neither party is being forced to take a seat at the table and that no binding agreements will be reached unless both parties expressly agree to

it. Such a system would make the scheme indistinguishable from a tribunal or other court, and thus decrease the likelihood that farmers would use it willingly.

Many of the desired outcomes mentioned in the report could be achieved without either of the above criteria. Simplification and unification of the schemes under a single national ruleset, as well as education of farmers about their rights would, by itself, significantly increase the uptake of the scheme as well as how early it is taken up by farmers.

Second, the idea of rulings creating precedent would be antithetical to the idea of a mediation and would very quickly stagnate the industry into a set of binding rules which may overlook the nuance of each case. This system would also put far greater pressure on decision makers, as their views on the case in front of them would be affected by the consideration that their decision could potentially affect many future cases. This will also mean that banks, who finance many farmers and are therefore very likely to be bound by a precedential system well into the future, would be heavily incentivised to use legal experts in order to secure the most favourable outcome to them instead of one that is mutually beneficial, undermining the purpose of mediation as an informal process which achieves mutually beneficial outcomes.

Resolution Institute recommend that the cause of helping farmers understand their rights and role in the process would best be achieved through educational materials, such as those on the Rural Assistance Authority website. A unified ruleset under a national Farm Debt Mediation Scheme would also help this goal. A link can be found below:

<https://www.raa.nsw.gov.au/>

Recommendation 2. National network and educational programs:

Resolution Institute strongly supports both recommendations by the Ombudsman here for the reasons listed in Recommendation 1.

Recommendation 3. Further suggestions:

The Hayne Royal Commission did recommend that mediation should be offered at the earliest possible time to farmers, rather than when things are dire. This would require a change in the Farm Debt Mediation legislation because if a farmer undertook a Farm Debt Mediation too early, they might not be able to undertake another Farm Debt Mediation for a period of time. Resolution Institute think this early process of mediation would ideally be facilitated by a neutral third party with mediation skills and accreditation, to enable a clearing of the air, an independent umpire for the conversation.

Such a system has been implemented in the *Farm Debt Mediation Act 2019* in New Zealand (<http://www.legislation.govt.nz/act/public/2019/0073/latest/LMS165271.html>) which has no limits on when mediations may occur as per s 15 of the Act, provided that they are not under the power of an enforcement certificate. Furthermore, creditors may not take enforcement actions, per s 34 of the Act, unless the farmer has declined mediation or there has already been a mediation made in good faith.