



Law Council
OF AUSTRALIA

Office of the President

15 February 2022

Australian Small Business and Family Enterprise Ombudsman
ANZ Building
Level 2, 15 Moore Street
CANBERRA ACT 2601

By email: bruce.billson@asbfeo.gov.au

Dear Ombudsman

Small Business Natural Disaster Preparedness and Resilience

1. The Law Council is grateful for the opportunity to make a brief contribution to your inquiry into education and engagement practices with respect to promoting small business disaster resilience. The Law Council is grateful to the SME Business Law Committee of the Business Law Section and the National Access to Justice Committee in preparing this submission.
2. In times of major disaster, the emotional impact of human loss and suffering naturally attracts much public attention and, quite rightly, the role of first responders in meeting the most immediate and basic needs of affected communities, including small businesses, is celebrated. However, large scale crises will also raise a range of unexpected legal issues for individuals and small businesses both immediate and longer term. The role of the legal profession in supporting those in need is an integral, but often overlooked, part of the disaster relief effort.
3. Please find below the Law Council's reflections on how the legal profession can be better supported to assist small businesses in the immediate aftermath and period following a natural disaster.

Limited pro bono support for small businesses

4. The strong willingness of the legal profession to provide pro bono legal support to small businesses, community organisations and individuals in the wake of natural disasters over the last two decades has been extraordinary. It is noteworthy that many of the legal advisors providing pro bono support to small businesses reeling from a disaster may also be grappling with the effects of the disaster on their own practices and local communities.
5. Pro bono support provided by the legal profession in the wake of a disaster includes through formal networks that have been established by law societies, bar

associations, legal aid commissions and pro bono brokering bodies,¹ as well as informal or *ad hoc* arrangements. The latter situation is often the case within small, regional legal practices, many of which may have a physical presence in the affected community.

6. The Law Council recognises that regional lawyers (as well as regional bookkeepers and accountants) face tremendous burdens in the immediate aftermath of such natural disasters in trying to help their previous clients who the practitioners may feel they cannot charge (or at least not fully charge) for the time they spend helping to navigate the bureaucratic maze of paperwork to receive Government assistance.
7. Indeed, on many occasions, free legal help for small businesses following a disaster is provided with full knowledge that the client will be unable to afford to become (or return as) a fee-paying client in the foreseeable future. This is reflected in the types of matters that are commonly dealt with through pro bono support for small businesses, including credit and debt issues, insurance assistance, tenancy and leasing matters, and employment law advice.
8. As discussed further below, publicly funded legal assistance services have a critical role to play in the provision of legal support for small businesses impacted by disasters. However, pro bono assistance from the private profession fills a critical gap for those that may be unable to access such services due to capacity constraints or narrowly applied eligibility criteria. It must be remembered that, for the private legal profession, the provision of free legal help is likely to have adverse financial implications for a lawyer's day-to-day practice and, as such, pro bono must be regarded as a finite resource.
9. To better support private legal practitioners responding to the needs of small businesses following a natural disaster, there is a need for adequately funded resource centres with the equipment infrastructure required to establish a presence in affected communities. Government funding should be enshrined to meet this need, and formal disaster help arrangements already set up by the profession should be eligible for that funding upon certification of the need for it by the auspice organisation.
10. Upon recognition of the substantial benefits that legal advice can have for small businesses (and by extension, their communities) following a natural disaster, the Law Council further suggests there is merit in the Ombudsman giving further consideration to a government-funded 'voucher' system targeted to allow small businesses affected by natural disasters to engage professionals (especially lawyers) to provide that small business with required assistance to navigate their compliance obligations in the aftermath of the relevant disaster and/or to pursue their claims under insurance policies.

Legal assistance services

11. The Royal Commission into National Natural Disaster Arrangements acknowledged the role of the legal profession in responding to legal needs arising from natural or

¹ See for example, *Disaster Legal Help Victoria*, co-ordinated by the Federation of Community Legal Centres, Justice Connect, the Law Institute of Victoria, Victorian Bar Association and Victoria Legal Aid <<https://www.disasterlegalhelp.org.au/>>, and Justice Connect's 'Natural disaster community support' page at <<https://justiceconnect.org.au/our-services/natural-disaster-community-support/>>

human generated disasters.² A key aspect of this response is delivered through frontline legal assistance organisations, including legal aid commissions and community legal centres. However, these services are faced with insecure and insufficient resourcing which is only exacerbated in times of crisis.

12. Noting that the legal assistance sector is extremely well-placed to provide immediate support to individuals and organisations affected by natural disasters, the Royal Commission recognised the need for greater coordination of these services and recommended that Australian, state and territory governments expedite the development of pre-agreed recovery programs, including through legal assistance.³
23. Consistent with this recommendation, the Law Council is supportive of steps that would see identified government funding quarantined to support the legal assistance sector in responding to legal needs arising from natural disasters, especially those needs within the small business sector. We suggest that the process for applying the quarantined funding in a disaster response setting should be both clear and transparent, as well as adaptive to the needs of the affected communities.

Recovery phase

13. Small businesses will require quality legal advice and clinical casework assistance long after the media interest in a natural disaster passes. However, what is often underestimated is the breadth of the legal expertise required to meet that need, and the prolonged under-funding of civil legal aid work creates significant challenges in the recovery phase following a natural disaster.
14. There are very few avenues for small businesses to obtain legal representation in disputes over insurance cover, property regulation, criminal or quasi-criminal responsibility for acts during, causing or consequent upon natural disasters, rental disputes, supply chain issues, and intricate *force majeure* clauses in contracts – other than paying for it themselves.
15. After a natural disaster, many small businesses will not have the ability to afford this advice and there is a need for governments to provide targeted funding for natural disaster-related civil legal aid. Key characteristics of such a scheme should be a relaxation of means test provisions (including proof of means), and a fast-track approval process which leaves the forensic decision as to legal merit in the hands of the lawyer proposing to deliver the legal advice and/or service.

Regulator responses

16. As noted above, much of the pro bono legal support offered to small businesses relates to assisting entities to engage with government regulators and insurers where compliance with obligations have become difficult due to financial or emotional hardship. While the Law Council has not had the opportunity to explore in depth examples of where adaptive and flexible responses by regulators have taken place in the wake of a disaster, the Ombudsman's attention is drawn to a recent submission

² *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020), 439 <<https://naturaldisaster.royalcommission.gov.au/publications/royal-commission-national-natural-disasterarrangements-report>>.

³ *Ibid*, recommendation 22.5 .

by the Law Council's Business Law Section on how the Australian Taxation Office (ATO) deals with vulnerable taxpayers.⁴

17. This submission recognises that the ATO appears to have good processes to recognise and respond to short-term external vulnerability for taxpayers affected by natural disasters (droughts, bushfires or floods). However, it also makes a range of recommendations for further improvements within the ATO context, which may be of interest to the Ombudsman in the course of this inquiry.
18. Again, thank you for the opportunity to contribute to this inquiry. Should you wish to discuss any aspects of this submission, please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au.

Yours sincerely

A handwritten signature in blue ink that reads "Tass Liveris".

Mr Tass Liveris
President

⁴ Business Law Section, *Improving how the ATO deals with vulnerable taxpayers* (30 November 2021), <www.lawcouncil.asn.au/resources/submissions/improving-how-the-ato-deals-with-vulnerable-taxpayers>.