



# Small Business Commissioner Bill 2021

Report No. 14, 57th Parliament  
Education, Employment and Training Committee  
November 2021

## Education, Employment and Training Committee

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### Acknowledgements

The committee acknowledges the assistance provided by the Department of Employment, Small Business and Training.

All web address references are current at the time of publishing.

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## Abbreviations

ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASBFEO Act	<i>Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth)</i>
ADR	alternative dispute resolution
Bill	Small Business Commissioner Bill 2021
commissioner	small business commissioner, as proposed by the Small Business Commissioner Bill 2021
committee	Education, Employment and Training Committee
COVID ER Act	<i>COVID-19 Emergency Response Act 2020</i>
Cth	Commonwealth
department	Department of Employment, Small Business and Training
Extension Act	<i>COVID-19 Emergency Response and Other Legislation Amendment Act 2020</i>
Franchising Code	Franchising Code of Conduct (Competition and Consumer (Industry Codes—Franchising) Regulation 2014) (Cth)
HRA	<i>Human Rights Act 2019</i>
LSA	<i>Legislative Standards Act 1992</i>
National Code	<i>Mandatory Code of Conduct SME Commercial Leasing Principles during COVID-19</i>
NSW	New South Wales
OBPR	Office of Best Practice Regulation
OQPC	Office of the Queensland Parliamentary Counsel
QCAT	Queensland Civil and Administrative Tribunal
QLS	Queensland Law Society
Regulation	Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020
RSL Act	<i>Retail Shop Leases Act 1994</i>
SA	South Australia

SME	small and medium-sized enterprise
temporary commissioner	temporary small business commissioner established under the <i>COVID-19 Emergency Response Act 2020</i>
Vic	Victoria
WA	Western Australia

## Chair's foreword

This report presents a summary of the Education, Employment and Training Committee's examination of the Small Business Commissioner Bill 2021.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

Can I take this opportunity to thank the current Small Business Commissioner, Maree Adshead, for her work in supporting Queensland small businesses throughout the COVID-19 pandemic.

On behalf of the committee, I thank those who made written submissions to the inquiry into the Bill. I also thank the Department of Employment, Small Business and Training and our Parliamentary Service staff.

I commend this report to the House.



**Kim Richards MP**  
Chair

## Recommendations

### Recommendation 1

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The committee recommends the Small Business Commissioner Bill 2021 be passed.



# 1 Introduction

## 1.1 Role of the committee

The Education, Employment and Training Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's primary areas of responsibility include:

- Education, Industrial Relations and Racing
- Employment, Small Business, Training and Skills Development.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019* (HRA)
- for subordinate legislation – its lawfulness.<sup>2</sup>

The Small Business Commissioner Bill 2021 (Bill) was introduced into the Legislative Assembly by Hon Di Farmer MP, Minister for Employment and Small Business and Minister for Training and Skills Development (Minister) and referred to the committee on 12 October 2021. The committee was required to report to the Legislative Assembly by 26 November 2021.

## 1.2 Inquiry process

On 15 October 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill.

The committee received a written briefing about the Bill from the Department of Employment, Small Business and Training (department) on 22 October 2021.

Thirteen submissions to the inquiry into the Bill were received (see Appendix A for a list of submitters). Further written advice was provided by the department in response to matters raised in submissions.

On 15 November 2021, the committee held a public hearing and a public briefing (see Appendix B for a list of witnesses).

The submissions, correspondence from the department and transcripts of the hearing and briefing are published on the committee's webpage.<sup>3</sup>

## 1.3 Policy objectives of the Bill

When introducing the Bill, the Minister stated that the main objectives of the Bill are 'to enhance the operating environment for small business in Queensland and to reduce the time and costs associated with resolving disputes involving small businesses'.<sup>4</sup>

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<sup>1</sup> *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

<sup>2</sup> *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

<sup>3</sup> <https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=166&id=4122>.

<sup>4</sup> Queensland Parliament, Record of Proceedings, 12 October 2021, p 2905.

The explanatory notes state that the objectives of the Bill are to:

- give effect to the Queensland Government's commitments to permanently establish a Queensland Small Business Commissioner (commissioner) and a supporting office
- provide a statutory basis for the commissioner's dispute resolution functions relating to retail tenancy disputes and enable mediation for commercial leasing and small business franchise disputes on an opt-in basis only
- cease the operation of the temporary commissioner on commencement of the permanent commissioner, including transitioning the temporary commissioner role from its previous arrangements focused primarily on managing and responding to COVID-19 impacts to a role with wider application to support small businesses.<sup>5</sup>

#### **1.4 Government consultation on the Bill**

The explanatory notes state that consultation to help inform the permanent commissioner model was undertaken in March and April 2021 with other small business commissioners, including Victoria, New South Wales, South Australia, and Western Australia, as well as with the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).<sup>6</sup>

Subsequently, from late May to mid-June 2021, consultation was undertaken with a range of peak bodies including:

- Chamber of Commerce and Industry Queensland
- Australian Industry Group
- Queensland Hotels Association
- National Retailers Association Limited
- Franchise Council of Australia
- Shopping Centre Council of Australia
- Property Council of Australia
- Restaurant and Catering Industry Association
- the Pharmacy Guild of Australia Queensland Branch
- Master Builders Australia
- Master Grocers Australia
- Queensland Social Enterprise Council
- Queensland Law Society
- Institute of Public Accountants Limited
- Australian Retailers Association
- Chartered Accountants Australia and New Zealand
- Certified Practising Accountants Australia.<sup>7</sup>

Targeted consultation on a confidential exposure draft of the Bill was undertaken in September 2021 with key stakeholders. According to the explanatory notes, these stakeholders indicated broad support for the Bill and its objectives.<sup>8</sup>

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<sup>5</sup> Explanatory notes, p 1.

<sup>6</sup> Explanatory notes, p 6.

<sup>7</sup> Explanatory notes, pp 6-7.

<sup>8</sup> Explanatory notes, p 7.

Consultation was also undertaken on the establishment of a permanent commissioner with the Office of Best Practice Regulation (OBPR) through a preliminary impact assessment. The OBPR advised that ‘the proposal to establish the permanent commissioner is unlikely to result in significant adverse impacts, and no further regulatory impact analysis is required under the *Queensland Government Guide to Better Regulation*’.<sup>9</sup>

### **1.5 Should the Bill be passed?**

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill and its policy objectives and consideration of the information provided by the department, submitters, and witnesses, the committee recommends that the Bill be passed.

#### **Recommendation 1**

The committee recommends the Small Business Commissioner Bill 2021 be passed.

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<sup>9</sup> Explanatory notes, p 8.

## 2 Examination of the Bill

### 2.1 Background to the Bill

As stated in the explanatory notes, in April 2020, National Cabinet endorsed the *Mandatory Code of Conduct SME Commercial Leasing Principles during COVID-19* (National Code). The National Code ‘applied to all tenancies that were suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government’s JobKeeper program’.<sup>10</sup>

As part of Queensland’s approach to implementing the National Code, provision was made for a temporary small business commissioner (temporary commissioner) to be established under the *COVID-19 Emergency Response Act 2020* (COVID ER Act).<sup>11</sup>

The temporary commissioner was appointed to deliver advocacy and dispute resolution functions for Queensland small businesses, including:

- providing information and advisory services to the public about matters relevant to small businesses, particularly in relation to the COVID-19 response measures
- assisting small businesses in reaching an informal resolution for disputes relating to small business leases
- administering a mediation process prescribed by regulation for responding to the COVID-19 emergency in relation to small business tenancy disputes.<sup>12</sup>

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (Regulation) was made under the regulation making powers of the COVID ER Act. The Regulation served to implement the National Cabinet agreement on establishing a mandatory code of conduct for the purpose of imposing good faith leasing principles for application to commercial leases, in response to the financial hardship being experienced by some tenants due to business disruptions, closures, restrictions on movement and social distancing arising during the COVID-19 emergency.<sup>13</sup>

The Regulation ‘prescribes the process for the temporary commissioner to administer mediation for eligible lease disputes’, which covers COVID-19 affected lease disputes and small business tenancy disputes.<sup>14</sup> According to the explanatory notes, the Regulation ‘implements the fair leasing principles set out in the National Code for ‘affected leases’ in Queensland for small and medium-sized enterprise (SME) tenants with up to \$50 million in annual turnover that were previously eligible for the Commonwealth Government’s JobKeeper scheme’.<sup>15</sup>

The Regulation was extended by the *COVID-19 Emergency Response and Other Legislation Amendment Act 2020* (Extension Act).<sup>16</sup> While the appointment of the temporary commissioner was initially scheduled to expire on 31 December 2021, the Extension Act removed the reference to this

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<sup>10</sup> Explanatory notes, p 1.

<sup>11</sup> Explanatory notes, p 1; Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020, explanatory notes, pp 1-2.

<sup>12</sup> *COVID-19 Emergency Response Act 2020*, s 20(1). A small business lease means a lease of premises used wholly or predominantly for carrying on a small business. A small business tenancy dispute means a dispute about a small business lease, or about the use or occupation of the leased premises, regardless of when the lease was entered into.

<sup>13</sup> Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020, explanatory notes, pp 1-2.

<sup>14</sup> Explanatory notes, pp 1-2.

<sup>15</sup> Explanatory notes, pp 1-2.

<sup>16</sup> Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020, explanatory notes, pp 1-2.

expiry date.<sup>17</sup> The Regulation prescribes the process for the temporary commissioner to administer mediation for eligible lease disputes until 30 April 2022.<sup>18</sup> The *COVID-19 Emergency Response and Other Legislation Amendment Act 2021* again extended the Regulation, supporting the continued operation of the temporary commissioner.

According to the Minister, in 2020-21, the temporary office of the small business commissioner:

... carried out over 4,500 activities for small business, including enquiries, disputes, outreach and advocacy activities, playing a critical role in supporting Queensland businesses to avoid lengthy and costly leasing disputes during the pandemic with early information, advice and access to mediation services.<sup>19</sup>

On the matter of dispute resolution in particular, the Minister advised that ‘prior to the temporary commissioner being appointed, Queensland small businesses had to negotiate multiple pathways in the dispute resolution process’.<sup>20</sup> Currently, the temporary commissioner continues to administer mediation for both eligible COVID-19 affected leasing dispute matters (retail shop leases and other commercial leases) and small business tenancy disputes. The explanatory notes advise that ‘the percentage of matters received by the temporary commissioner office involving small business tenancy disputes has increased over time’ and ‘is anticipated to increase further as the economy progressively recovers and the services of the commissioner become more widely known’.<sup>21</sup>

## 2.2 Other jurisdictions

New South Wales, South Australia, Victoria, Western Australia all have small business commissioners. The ASBFEO operates at the federal level.<sup>22</sup>

### Functions

The relevant legislation in New South Wales (NSW), South Australia (SA), Victoria (Vic) and Western Australia (WA) establishing a Small Business Commissioner, and in 2 states also establishing a Small Business Commission (Vic) and a Small Business Development Corporation (WA), provides for similar functions to those proposed in the Bill.<sup>23</sup>

Similar to the Bill, the Victorian legislation also provides for the Small Business Commissioner to work collaboratively with the equivalent of the commissioner in other states or the Commonwealth.<sup>24</sup>

### Definition of ‘small business’

The *Small Business Development Corporation Act 1983* (WA) is the only legislation that defines ‘small

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<sup>17</sup> *COVID-19 Emergency Response and Other Legislation Amendment Act 2020*, s 12.

<sup>18</sup> Explanatory notes, pp 1-2.

<sup>19</sup> Queensland Parliament, Record of Proceedings, 12 October 2021, pp 2904-2905.

<sup>20</sup> Queensland Parliament, Record of Proceedings, 12 October 2021, p 2905.

<sup>21</sup> Explanatory notes, pp 1-2.

<sup>22</sup> Previously in Queensland, a Queensland Business Commissioner was appointed in November 2011. The position was abolished in 2012.

<sup>23</sup> *Small Business Commissioner Act 2013* (NSW); *Small Business Commissioner Act 2011* (SA); *Small Business Commission Act 2017* (Vic); *Small Business Development Corporation Act 1983* (WA).

<sup>24</sup> *Small Business Commission Act 2017* (Vic), s 5.

business'.<sup>25</sup>

### Dispute resolution and mediation

Similar to the Bill, dispute resolution and mediation form an important part of each state's legislation.

In NSW, additional powers are given to the Small Business Commissioner to assist with dispute resolution and mediation.<sup>26</sup>

The Western Australian Small Business Commissioner may also request documents, things and information, which must be produced unless the person has a reasonable excuse.<sup>27</sup>

The Victorian Small Business Commission also has functions under the *Owner Drivers and Forestry Contractors Act 2005* (Vic) (disputes between owner drivers/forestry contractors and their hirers), the *Farm Debt Mediation Act 2011* (Vic) (farm debt mediation) and the *Commercial Passenger Vehicle Industry Act 2017* (Vic) (disputes between taxis, hire cars and rideshare drivers and operators).

The South Australian Small Business Commissioner has responsibilities under the *Building and Construction Industry Security of Payment Act 2009* (SA) (providing a mechanism for subcontractors and suppliers in the building and construction industry to claim money that is owing to them), and the *Farm Debt Mediation Act 2018* (SA) (providing for the mediation of disputes between farmers and creditors relating to debt incurred in the conduct of farming operations).<sup>28</sup>

The South Australian Small Business Commissioner has additional responsibilities under the *Work Health and Safety Act 2012* (SA) (consulting with small business and seeking feedback on new codes of practice under the Act) and the *Late Payment of Government Debts (Interest) Act 2013* (SA) (acting as an arbiter in the event that there is a dispute between an agency and a small business vendor as to whether interest is payable on a particular overdue invoice).<sup>29</sup>

### Retail tenancy dispute mediation

The Bill also amends the *Retail Shop Leases Act 1994* so that the commissioner will take on the role previously undertaken by the chief executive of the department in administering the mediation process for retail tenancy disputes (other than an affected lease dispute).<sup>30</sup>

In other mainland states the relevant entities also have dispute resolution functions under retail lease legislation.<sup>31</sup>

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<sup>25</sup> Section 3(1) of the *Small Business Development Corporation Act 1983* (WA), defines small business as:

'a business undertaking —

(a) which is wholly owned and operated by an individual person or by individual persons in partnership or by a proprietary company within the meaning of the Corporations Act 2001 of the Commonwealth and which

- i. has a relatively small share of the market in which it competes; and
- ii. is managed personally by the owner or owners or directors, as the case requires; and
- iii. is not a subsidiary of, or does not form part of, a larger business or enterprise; or

(b) which is declared by the Governor by Order in Council pursuant to subsection (2) to be a small business for the purposes of this Act'.

<sup>26</sup> *Small Business Commissioner Act 2013* (NSW), s 18.

<sup>27</sup> *Small Business Development Corporation Act 1983* (WA), s 14BA.

<sup>28</sup> [https://www.sasbc.sa.gov.au/about\\_us/our\\_services](https://www.sasbc.sa.gov.au/about_us/our_services).

<sup>29</sup> [https://www.sasbc.sa.gov.au/about\\_us/our\\_services](https://www.sasbc.sa.gov.au/about_us/our_services).

<sup>30</sup> Department of Employment, Small Business and Training, correspondence dated 22 October 2021, p 3.

<sup>31</sup> *Retail Leases Act 2003* (Vic); *Retail Leases Act 1994* (NSW); *Retail and Commercial Leases Act 1995* (SA); *Small Business Development Corporation Act 1983* (WA).

## Advocacy

The Bill broadly provides for an advocacy role for the commissioner on behalf of small business to the state, the Commonwealth, another state or a local government, or any other entity involved in administering a matter relevant to small business. Other activities may be carried out by the commissioner to further the objects of the proposed Act, at the direction of the Minister.<sup>32</sup>

The legislation in some states provides for a more specific advocacy role than proposed in the Bill. For example, the Victorian legislation provides for the Victorian Small Business Commission to: review proposed legislation in terms of its potential to adversely affect small businesses; investigate compliance with industry codes of practice and assist with the development of industry codes of practice that promote alternative dispute resolution; and monitor and report to the Minister on any emerging trends in market practices that adversely affect small businesses.<sup>33</sup>

In NSW, the legislation allows the Small Business Commissioner to: conduct investigations into the way in which small businesses are treated by other businesses or government agencies; facilitate the development of codes of practice by industry that deal with issues concerning the small business sector; and make a special report on any matter relating to the functions of the Commissioner directly to the Presiding Officer of each House of Parliament.<sup>34</sup>

The *Small Business Commissioner Act 2011* (SA) provides for the South Australian Small Business Commissioner to monitor, investigate and advise the Minister about non-compliance with industry codes that may adversely affect small businesses, and market practices that may adversely affect small businesses.<sup>35</sup>

Legislation for the Western Australian Small Business Development Corporation provides for a wide range of activities to help small business.<sup>36</sup> The legislation also makes specific provisions regarding the role of the Western Australian Small Business Development Corporation in assisting public sector bodies, by providing assistance to develop legislation, policies and administrative procedures that take into account the interests of small business, improve the capacity of small business to comply with legislative and other requirements, and simplify and minimise small business compliance requirements.<sup>37</sup>

### **2.3 Issues raised about aspects of the Bill**

While all submitters supported the Bill's objective to permanently establish a Queensland small business commissioner, the issues reported in the explanatory notes as having been raised by stakeholders in the development of the Bill continued to concern stakeholders who made submissions to the committee's inquiry. These issues related to:

- the independence of the commissioner
- the definition of 'small business'

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<sup>32</sup> Bill, cl 6.

<sup>33</sup> *Small Business Commission Act 2017* (Vic), s 5; Victorian Small Business Commission, About us and what we do, <https://www.vsbcc.vic.gov.au/about-vsbcc/>.

<sup>34</sup> *Small Business Commissioner Act 2013* (NSW), ss 14, 26; NSW Government and Small Business Commissioner, *Supporting small businesses in NSW: NSW Small Business Commission Annual report 2020*, p 24, <https://www.smallbusiness.nsw.gov.au/sites/default/files/2021-04/NSWSBC%202020%20Annual%20Report.pdf>.

<sup>35</sup> *Small Business Commissioner Act 2011* (SA), s 5(1); Small Business Commissioner South Australia, Our Services and Legislation, [https://www.sasbc.sa.gov.au/about\\_us/our\\_services](https://www.sasbc.sa.gov.au/about_us/our_services).

<sup>36</sup> *Small Business Development Corporation Act 1983*, s 11.

<sup>37</sup> *Small Business Development Corporation Act 1983*, s 11.

- functions of the commissioner
- the scope of disputes for which the commissioner should provide mediation
- mediation fees.

Submitters raised additional concerns about aspects of the Bill including:

- the interaction between the mediation process proposed, the Franchising Code,<sup>38</sup> and the responsibilities of the ASBFEO in small business franchise dispute resolution
- the right to legal representation for parties involved in a mediation process
- the exclusion of other jurisdictions to hear a dispute
- publication of a dispute register and information about parties who refuse to enter dispute resolution processes
- the notice period for a mediation conference
- provisions regarding confidentiality of sensitive information provided by parties during a dispute resolution process
- the proposed scheduled review of the legislation.

The matters raised by submitters in regard to the issues listed above are summarised in the following sections.

### **2.3.1 Definition of ‘small business’**

The Bill does not include a definition of ‘small business’. The Bill does provide, in relation to applications for mediation of disputes, that:

for deciding whether or not a dispute is a small business dispute ... the commissioner may, for example, have regard to the following -

- (a) the number of employees each party employs
- (b) the annual turnover of each party to the dispute.<sup>39</sup>

Submitters were concerned about there being no definition of ‘small business’ in the Bill for the following reasons:

- the commissioner’s functions refer to ‘small businesses’, a term which is not defined<sup>40</sup>
- having no definition for ‘small business’ creates uncertainty about seeking advice or assistance from the commissioner<sup>41</sup>
- under cl 21(1)(a) parties to a small business dispute may only apply for mediation of their dispute if they have attempted to resolve the dispute by seeking informal assistance from the commissioner. If there is no definition of small business, parties might be discouraged from contacting the commissioner<sup>42</sup>
- not defining ‘small business’, while providing flexibility, may be an area of potential dispute and a rationale for parties not agreeing to enter into dispute resolution processes.<sup>43</sup>

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<sup>38</sup> The Franchising Code of Conduct (Competition and Consumer (Industry Codes—Franchising) Regulation 2014) is a mandatory industry code under the Commonwealth *Competition and Consumer Act 2010*. The Franchising Code regulates Australian franchisees and franchisors. The Australian Small Business and Family Enterprise Ombudsman’s Office provides support and access to mediation services.

<sup>39</sup> Bill, cl 23(3).

<sup>40</sup> Queensland Law Society, submission 9, p 2.

<sup>41</sup> Queensland Law Society, submission 9, p 2.

<sup>42</sup> Queensland Law Society, submission 9, p 2.

<sup>43</sup> Australian Small Business and Family Enterprise Ombudsman, submission 7, Appendix A, pp 2-3.

Some submitters recommended specific definitions or criteria be included in the Bill.<sup>44</sup> For others, the particular criteria were of less concern, rather that criteria to define 'small business' actually be included in the Bill, and that:

- threshold criteria should use an existing framework understood by business and the community
- the criteria should include a discretionary element to allow the commissioner to accept an application where the circumstances warrant, such as disputes arising due to impacts of a natural disaster on a particular area or industry
- the Bill should also include clear discretion for the commissioner to accept a dispute where one party is a small business, but the other is not.<sup>45</sup>

In its response to submissions, the department noted that no single definition of small business is used consistently across government legislation or programs in Australia, and that 'on balance, it was considered that not defining small business in the Bill allows some flexibility and discretion for the Commissioner to support businesses who are small in nature but may sit just outside a definition based on Full-Time Equivalent (FTE) or maximum turnover'.<sup>46</sup>

#### Committee comment

The committee notes the points raised by submitters and the department's rationale for not including a definition of 'small business' in the Bill. In the absence of a legislated definition, the committee encourages the commissioner to publish an operational definition of 'small business' to aid businesses that are considering seeking the assistance of the commissioner.

#### **2.3.2 Functions of the commissioner**

The proposed functions of the commissioner are:

- (a) to provide a central point of contact in relation to matters affecting small businesses; and
- (b) to provide information and advisory services to the public about matters relating to small businesses; and
- (c) to assist parties in reaching an informal resolution for small business disputes, including by facilitating the exchange of information between the parties; and
- (d) to provide alternative dispute resolution services and administer a mediation process for small business disputes; and
- (e) to advocate on behalf of small businesses to—
  - (i) the State, the Commonwealth, another State or a local government; or
  - (ii) any other entity involved in administering a matter relevant to small businesses; and
- (f) to work collaboratively with the equivalent of the commissioner in other States or the Commonwealth to enhance conditions for small businesses; and
- (g) to perform functions conferred on the commissioner under another Act; and
- (h) to carry out other activities to further the objects of this Act, as directed by the Minister.<sup>47</sup>

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<sup>44</sup> Australian Lease & Property Consultants, submission 1, p 4; Australian Small Business and Family Enterprise Ombudsman, public hearing transcript, Brisbane, 15 November 2021, p 4.

<sup>45</sup> Queensland Law Society, submission 9, p 2.

<sup>46</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 2.

<sup>47</sup> Bill, cl 6.

Submitters' comments about the functions proposed for the commissioner primarily related to advocacy. In particular:

- an additional part should be included in the Bill on what the commissioner's advocacy functions entail, specifically including a mandate to identify the concerns of small businesses and conduct self-initiated research and inquiries in addition to matters referred by the Minister<sup>48</sup>
- this function should focus on advocating for small business within and across government, as multiple industry bodies already exist to advocate on behalf of their members<sup>49</sup>
- seeking clarification about the advocacy function, as advice from the office of the commissioner 'is not and should not be a proxy as the voice of small business in the development of government strategy and policy' and there continues to be a critical role for consultation with business and the industry organisations and peak bodies representing their interests.<sup>50</sup>

In relation to submitters' comments the department stated that the advocacy function as provided for in the Bill 'is considered sufficiently broad' and that 'the Bill purposely does not define 'advocacy' as by doing so, it may inadvertently narrow the scope of the Commissioner's advocacy function'.<sup>51</sup> In addition, the department advised that 'the Commissioner is not intended to replace input and advice from industry stakeholders, which will still continue to inform the development of the Government's small business policy and program activities'.<sup>52</sup>

Submitters also observed in relation to the functions of the commissioner in the Bill:

- small business commissioners in other jurisdictions have broader powers including the ability to investigate unfair treatment or unfair contracts, and market practices that may adversely affect small business<sup>53</sup>
- the commissioner should have the ability to conduct inquiries and request that state government departments produce data and information on interactions, performance and delivery of services to small businesses and their customers<sup>54</sup>
- the role and functions of the commissioner and the department will require more clarity and coordination, particularly when engaging with industry to remove any duplicative processes, information-sharing and consultations.<sup>55</sup>

The department advised that 'the power for the Commissioner to commence inquiries, and the power to investigate unfair treatment and unfair contracts is considered unnecessary given existing mechanisms in place to triage these issues'<sup>56</sup> and noted that the Office of Fair Trading 'has existing

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<sup>48</sup> Australian Small Business and Family Enterprise Ombudsman, submission 7, Appendix A, p 3.

<sup>49</sup> Chamber of Commerce and Industry Queensland, public hearing transcript, Brisbane, 15 November 2021, p 15; submission 11, p 2.

<sup>50</sup> Chamber of Commerce and Industry Queensland, submission 11, p 2.

<sup>51</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 10.

<sup>52</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 16.

<sup>53</sup> Master Electricians Australia, submission 6, pp 1-2.

<sup>54</sup> Master Electricians Australia, submission 6, p 2; Chamber of Commerce and Industry Queensland, correspondence dated 17 November 2021, response to question taken on notice at the public hearing on 15 November 2021, p 1.

<sup>55</sup> Chamber of Commerce and Industry Queensland, submission 11, p 2.

<sup>56</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 6.

jurisdiction about unfair treatment, while matters relating to competition or misuse of market power can be referred to the Australian Competition and Consumer Commission'.<sup>57</sup>

The department also noted that the Minister's statement of expectations (cl 18) 'would be a key mechanism to further clarify the Commissioner's role and to ensure no overlap of the functions and activities of the Commissioner and the Department occurs'.<sup>58</sup>

### **2.3.3 Independence of the commissioner**

The Bill provides for the Minister to give the commissioner a written direction about a matter relevant to the performance of the commissioner's functions (cl 17). The Bill also provides for the Minister to give the commissioner a written statement about the Minister's expectations for the performance of the commissioner's functions (cl 18).

A number of submitters commented on the independence of the commissioner's role, noting that:

- to truly advocate on behalf of business is likely to be a challenge for the office, given that it is a body that reports to the Minister<sup>59</sup>
- it is important that the commissioner has an appropriate degree of independence from government. Clause 17 (Ministerial direction) conveys a potential for the role to be highly dependent on government and subject to operational instruction and should be omitted. The Bill should retain only cl 18 (Statement of expectations) which provides a mechanism for establishing clear objectives, conveying strategic priorities and ensuring a broad contribution to and alignment with the whole-of-government goals and ambitions<sup>60</sup>
- the concern with the ministerial direction power is that it might be used to guide the commissioner away from subject matter that might be awkward or difficult for government of the day.<sup>61</sup>

In response to submitters' concerns about the independence of the role, the department advised:

The power for the Minister to issue directions is not intended to undermine the Commissioner's independence, but rather to increase the Commissioner's responsiveness to emerging issues as needed to support Queensland small businesses. The Bill also requires under Clause 17(3) that the Commissioner must include details in its annual report of any Ministerial directions during the financial year and the actions taken by the Commissioner as a result of the direction. This provides for public transparency and accountability.<sup>62</sup>

### **2.3.4 Mediation function**

Part 3 of the Bill prescribes the requirements and processes associated with the commissioner's mediation function. The commissioner is to provide informal dispute resolution assistance and administer a voluntary mediation process for small business disputes.

The Bill provides that:

- the commissioner will administer an alternative dispute resolution service and a mediation process for small business lease disputes and small business franchise disputes

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<sup>57</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 6.

<sup>58</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 16.

<sup>59</sup> Chamber of Commerce and Industry Queensland, public hearing transcript, Brisbane, 15 November 2021, p 15.

<sup>60</sup> Australian Small Business and Family Enterprise Ombudsman, submission 7, Appendix A, p 1.

<sup>61</sup> Australian Small Business and Family Enterprise Ombudsman, public hearing transcript, Brisbane, 15 November 2021, p 2.

<sup>62</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 7.

- the commissioner will also administer the mediation process for retail tenancy disputes under part 8 of the *Retail Shop Leases Act 1994* (RSL Act) (the mediation process for retail tenancy disputes is a mandatory process)
- an application for mediation may only be made by parties to a dispute if:
  - o the parties to the dispute have attempted to resolve the dispute by seeking informal assistance from the commissioner
  - o the dispute is within a mediator's jurisdiction to mediate
  - o any requirements prescribed in regulation have been complied with by the parties to the dispute
  - o for small business lease disputes (a dispute about a small business lease, other than a retail shop lease under the RSL Act), all parties agree to mediate the dispute
  - o for small business franchise disputes (disputes about a franchise agreement to which the Franchising Code of Conduct applies), all parties agree to mediate the dispute and the dispute has been referred to the commissioner by the ASBFEO
- a party may withdraw the application for mediation at any time
- a party to a small business dispute who enters into a mediation agreement may apply to a court to enforce the agreement.

The Bill also includes transitional provisions for dispute resolutions that commenced under the temporary commissioner and which are unresolved by the commencement of the Act.<sup>63</sup>

#### 2.3.4.1 Scope of disputes to be provided mediation

The ASBFEO recommended that the commissioner be empowered to assist with a broader range of disputes, specifically business-to-business disputes and business to government disputes, as:

- including a business-to-business dispute resolution function rather than the franchising dispute resolution function would allow the commissioner to assist with franchising disputes through the business-to-business dispute resolution process and would remove ambiguity about who handles franchising disputes under the national Franchising Code of Conduct, providing more effective and streamlined dispute resolution for small business
- including a business-to-government dispute resolution function for small businesses who are in disputes with government agencies would provide an appropriate means to handle these disputes.<sup>64</sup>

Master Electricians Australia submitted that allowing the commissioner to administer mediation only for lease disputes and franchise disputes will limit the effectiveness of the commissioner in achieving the stated goal of reducing red tape for small business.<sup>65</sup>

In response, the department stated:

Whilst mediation will only be provided for a subset of all possible disputes, the permanent Commissioner will be able to provide information, advice, referral, and relevant general support in relation to any small business dispute. This is intended to support small businesses to resolve disputes informally where possible, and also connect them to existing dispute resolution pathways.<sup>66</sup>

The department further advised that the provision of advice and assistance (not mediation or investigation) is intended to make accessing support easier for small businesses without duplicating

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<sup>63</sup> Bill, Parts 3 – 6; Explanatory notes, pp 2, 3, 11-13.

<sup>64</sup> Australian Small Business and Family Enterprise Ombudsman, submission 7, p 1.

<sup>65</sup> Master Electricians Australia, submission 6, p 1.

<sup>66</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 4.

or overlapping existing processes.<sup>67</sup> The department provided the following information in regard to referral to existing dispute resolution pathways:

- Under Clause 6(b) of the Bill, the Commissioner will have a function to provide information and advisory services to the public about matters affecting small businesses. Under this function, the Commissioner will be able to provide initial advice and assistance regarding all disputes, and referral support to enable small businesses to connect with the right resolution process where the matter sits with another agency.<sup>68</sup>
- There are existing dispute resolution mechanisms in Queensland for other small business disputes, such as business-to-business and business-to-government disputes. For example, the *Queensland Civil and Administrative Tribunal Act 2009* gives the Queensland Civil and Administrative Tribunal (QCAT) jurisdiction to hear and decide minor civil disputes, this includes 'business-to-business' disputes where the amount claimed is up to \$25,000 (excluding interest).<sup>69</sup>
- In relation to franchising disputes, the proposed Commissioner mediation services are complementary to ASBFEO's existing function in mediating franchising disputes. ... Parties to a franchising dispute in other jurisdictions with a small business commissioner can already choose to have their matter mediated through their state commissioner, with ASBFEO referring the matter to the relevant jurisdiction for mediation. Franchise agreements may also have provisions in relation to dispute resolution, which enable alternative dispute resolution arrangements to occur.<sup>70</sup>
- The Queensland Ombudsman has existing jurisdiction to investigate complaints about Queensland public agencies' actions and decisions. Under the Bill, the Commissioner's office can provide small businesses with initial assistance where a small business has a dispute with local or state government, guiding small businesses through agency complaint management processes.<sup>71</sup>

#### 2.3.4.2 interaction between the mediation process proposed, the Franchising Code, and the responsibilities of the ASBFEO in small business franchise dispute resolution

Clause 21(2) of the Bill states that parties to a small business franchise dispute may apply for mediation only if the ASBFEO has referred the dispute to the commissioner.

The Queensland Law Society (QLS) submitted that it will be important to ensure that there are no gaps between the Franchising Code/ASBFEO arrangements and the Queensland framework, including ensuring that the ASBFEO and the parties involved can comply with the requirements of the Franchising Code if a dispute is referred to the commissioner. In particular, the QLS stated that there needs to be some clarification in the Bill as to the status of a small business franchise dispute mediation which is referred by the ASBFEO to the commissioner, since the mediation process is mandated under the Franchising Code, while the Bill provides for a voluntary process.<sup>72</sup>

Further, the QLS submitted:

There are compulsory steps which must be taken under the Franchising Code by the ASBFEO and the parties to a dispute.

The ASBFEO has an assistance function pursuant to section 15(b) of the ASBFEO Act [*Australian Small Business and Family Enterprise Ombudsman Act 2015* (Cth)] to make recommendations about how the dispute may be managed, including a recommendation that an ADR process be used to manage the dispute.

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<sup>67</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, pp 6, 7.

<sup>68</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 6.

<sup>69</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 5.

<sup>70</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 5.

<sup>71</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 6.

<sup>72</sup> Queensland Law Society, public hearing transcript, Brisbane, 15 November 2021, p 9.

In addition, the ASBFEO must appoint an ADR practitioner within 21 days after the notice of dispute is issued (section 40A(5) of the ASBFEO Act).

The Queensland bill provides for a dispute to be referred by the ASBFEO, at which time a party can apply for mediation of the dispute and the commissioner will then decide under clause 23 whether or not to accept the application. This process does not fulfil the Franchising Code requirement for the ASBFEO to appoint the ADR practitioner.<sup>73</sup>

In regard to the Bill's consistency with the Franchising Code, the QLS also submitted:

- clause 25 is inconsistent with s 41A(3) and (4) of the Franchising Code in regard to who is required to attend a mediation conference is the party is a corporation, trust or partnership<sup>74</sup>
- clause 27 is inconsistent with s 41A(3) of the Franchising Code, as cl 27 specifically provides that a party to the dispute cannot be compelled to attend the mediation conference<sup>75</sup>
- consider amending cl 23 to allow for similar disputes to be heard together, as allowed under the Franchising Code (s 40B) where if 2 or more franchisees have similar disputes with the same franchisor they can agree to resolve their disputes in the same way.<sup>76</sup>

The department provided the following information in response to these issues:

The Department notes this feedback, but has assessed that these amendments are not required for the following reasons:

- Under Section 40A(2) of the Franchising Code, the parties to a franchise agreement must, after the complainant notifies the other party of the dispute under 40A(1), try to agree how to resolve the dispute.
- The parties may agree to resolve the dispute under 40A(2) by using an dispute resolution process, including the mediation process offered by the Commissioner. ASBFEO assists the parties to make these decisions by informing them about their options (including State based dispute resolution). If the parties agree to use State based dispute resolution, ASBFEO will 'refer' the parties to the Commissioner.
- There is no requirement for State based dispute resolution processes chosen by the parties to comply with Part 4, Division 3, Subdivision B of the Franchise Code. States are not bound to use the Code.
- Accordingly, the mediation process offered by the Commissioner simply provides an alternative form of dispute resolution parties to a franchise agreement can elect to use to resolve their dispute.

The department has had ongoing discussions with ASFBEO during the development of the Commissioner model, who have confirmed the above position regarding the Bill's proposed approach regarding franchise dispute mediation and its compliance with the Franchising Code. As part of implementation of the Bill, necessary administrative arrangements will be put in place between ASBFEO and the Commissioner to support this process.<sup>77</sup>

The QLS also submitted that the definition of 'small business franchise dispute' (disputes about a franchise agreement to which the Franchising Code of Conduct applies) should include a jurisdictional link to Queensland.<sup>78</sup>

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<sup>73</sup> Queensland Law Society, submission 9, p 4.

<sup>74</sup> Queensland Law Society, submission 9, p 6.

<sup>75</sup> Queensland Law Society, submission 9, pp 6-7. See also Australian Lease & Property Consultants, submission 1, p 2.

<sup>76</sup> Queensland Law Society, submission 9, p 5.

<sup>77</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 11.

<sup>78</sup> Queensland Law Society, submission 9, p 3.

In response to this suggestion, the department advised that a link 'was not included as the Commissioner has discretion in accepting matters for mediation and will not accept matters if no jurisdictional link to Queensland exists'.<sup>79</sup>

#### 2.3.4.3 Notice period for a mediation conference

The Property Council of Australia submitted that the seven day notice period for a mediation conference<sup>80</sup> should be increased to 14 days as a more realistic timeframe to allow both parties more time to prepare for mediation.<sup>81</sup>

In response to this point the department advised:

The ability for parties to request a change of date for their mediation conference will be prescribed in the regulation and apply to both small business disputes under the Bill and retail tenancy disputes under the RSL Act. It is proposed that these provisions will be modelled on Section 27(3) to 27(6) of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020.<sup>82</sup>

#### 2.3.4.4 Legal representation for parties involved in a mediation process

Clause 25 provides that each party at the mediation conference must represent their own case and may only be represented by an agent approved by the mediator if the party is a corporation or the mediator is satisfied an agent is permitted to represent the party.<sup>83</sup>

The QLS submitted that that the Bill be amended to provide for the right of each party to a small business dispute to be legally represented at a mediation conference. The QLS stated that the Bill creates an imbalance between parties involved in the mediation process, as cl 25 would allow that an in-house lawyer or someone who is providing legal advice within a corporation structure may be given authority to resolve a dispute as the appropriate 'agent' to attend a mediation conference, but a small business that does not have in-house legal counsel will not automatically be able to have a legal representative attend.<sup>84</sup>

In regard to this concern, the department advised that:

The intention of this clause is to ensure that where possible and appropriate, parties should conduct their own case at a mediation conference. ... By permitting legal representation in all cases, the mediation process offered by the Commissioner may be inconsistent with a main objective of the legislation, which is to reduce the time and costs associated with resolving disputes involving small businesses.

As 'agent' is not a defined term in the Bill, this clause still permits a party to be legally represented if the mediator is satisfied a party should be represented.<sup>85</sup>

#### 2.3.4.5 Exclusion of other jurisdictions

The Bill requires that once an application for mediation is made, a dispute must not be referred to arbitration or heard by a court or tribunal, unless:

- the application is withdrawn, or
- a proceeding about the matter in dispute was started in a court or tribunal before the application was made, or
- an application for an injunction order about the matter in dispute is made to a court, or

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<sup>79</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 10.

<sup>80</sup> Bill, cl 23(6).

<sup>81</sup> Property Council, submission 5, p 1.

<sup>82</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 4.

<sup>83</sup> Explanatory notes, p 12.

<sup>84</sup> Submission 9, pp 5-6; public hearing transcript, Brisbane, 15 November 2021, p 9.

<sup>85</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 12.

- a mediator refuses to mediate because the dispute is not within the mediator’s jurisdiction, or
- the mediator has given a notice about the outcome of the dispute.<sup>86</sup>

The QLS submitted that the ability for a party to a mediation process to commence an action should not be excluded, ‘to ensure that a party that needs to commence an action, for example, by a particular period of time, so they do not lose their right to bring a claim, is still able to do so and then that matter can be stayed by the court or tribunal until this process is determined’.<sup>87</sup>

The department advised that the intention of this provision is to prevent a matter that is subject to mediation being heard concurrently by a court or tribunal, noting that ‘the Bill permits each party to the dispute to withdraw their application at any time (Clause 33). If an application for mediation is withdrawn, parties maintain all existing rights to have their matter heard by a court or tribunal with jurisdiction to hear the matter’.<sup>88</sup>

#### 2.3.4.6 *Mediation fees*

The Bill provides the power for regulations to be made for:

- the fees payable under the Act
- the obligations of parties to a small business dispute in relation to the mediation process
- the practices and procedures of the mediation process
- setting a maximum of 20 penalty units<sup>89</sup> for a contravention of the regulation.<sup>90</sup>

Submitters supported subsidised mediation services and for no or low fees to be charged,<sup>91</sup> and for the legislation to contain a hardship clause for businesses in extreme financial circumstances.<sup>92</sup>

The department provided the following information about mediation fees:

- ‘a standard, low-cost mediation fee for all mediations (\$175 per party per session)<sup>93</sup> will be introduced through regulation under the Bill. This fee ‘only partially recovers the cost of mediation services, with any indexation to be consistent with whole-of-government fees and charges’<sup>94</sup>
- ‘subordinate legislation (regulation) under the Bill will provide the Commissioner with the ability to waive mediation fees in cases of individual financial hardship or on a broader basis for regions or sectors affected by natural disasters and/or based on economic conditions’.<sup>95</sup>

#### 2.3.4.7 *Dispute register*

The ASBFEO submitted that the commissioner should have the power to publicise when a party does not follow the recommendation to enter dispute resolution processes in order to leverage participation in mediation processes<sup>96</sup> and to encourage parties to engage in a mediation process in

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<sup>86</sup> Bill, cl 34.

<sup>87</sup> Queensland Law Society, public hearing transcript, Brisbane, 15 November 2021, p 10.

<sup>88</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 11.

<sup>89</sup> As at 1 July 2021, the value of a penalty unit is \$137.85; Penalties and Sentences Regulation 2015, s 3; *Penalties and Sentences Act 1992*, s 5A.

<sup>90</sup> Bill, cl 41.

<sup>91</sup> See submissions 7, 9, 10, 11.

<sup>92</sup> Small Business Financial Counselling Service – Southern Queensland, submission 10, p 4.

<sup>93</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 9.

<sup>94</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 15.

<sup>95</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 14.

<sup>96</sup> Australian Small Business and Family Enterprise Ombudsman, submission 7, Appendix A, p 2.

good faith.<sup>97</sup> Further, the ASBFEO stated that publication of a register of parties frequently involved in disputes could be a useful source of intelligence for small businesses contemplating dealing with them.<sup>98</sup>

In contrast, other stakeholders expressed a preference for encouraging parties to participate in mediation rather than using a power to publicise when parties refuse to participate,<sup>99</sup> noting that the Bill provides that both parties are required to sign an application for mediation of a dispute and that they can withdraw from the process at any time.<sup>100</sup>

The department advised that 'it is considered inappropriate for the Bill to include a mechanism for the Commissioner to publish the details of parties who refuse to participate in a voluntary mediation process'<sup>101</sup> The Bill also amends the RSL Act to omit s 116 of that Act to remove the publicly available register of retail shop lease disputes.<sup>102</sup>

### **2.3.5 Confidentiality**

The Bill includes provisions regarding the disclosure of information.

Clause 31 provides that that it is an offence for a person, other than a mediator, to make an official record of anything said at a mediation conference, with the maximum penalty for committing the offence of 40 penalty units (\$5,514).

Clause 38(2) provides that a person must not disclose confidential information that the person obtains performing a function under the Act, or they will have committed an offence with a maximum penalty of 50 penalty units (\$6,892.50). This offence does not apply if the disclosure is:

- made in the performance of a function under the Act, or
- with the consent of the person to whom the confidential information relates, or
- required or permitted by law.

Clause 38(3) provides that a party to a small business dispute or another person who obtains confidential information under or as a result of the operation of the Act must not disclose the information unless the disclosure is:

- to a professional advisor or financier who agrees to keep the information confidential, or
- with the consent of the person to whom the confidential information relates, or
- required or permitted by law.

This offence has a maximum penalty of 20 penalty units (\$2,757).

Clause 38 also defines the term 'confidential information' and provides that these offences do not relate to mediators, who are subject to a separate offence for disclosing confidential information under s 113 of the RSL Act.<sup>103</sup>

In addition, cl 37 provides that the commissioner may enter into an information-sharing arrangement

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<sup>97</sup> Australian Small Business and Family Enterprise Ombudsman, public hearing transcript, Brisbane, 15 November 2021, pp 2-3.

<sup>98</sup> Australian Small Business and Family Enterprise Ombudsman, public hearing transcript, Brisbane, 15 November 2021, p 3.

<sup>99</sup> Queensland Law Society, public hearing transcript, Brisbane, 15 November 2021, p 10.

<sup>100</sup> Queensland Law Society, public hearing transcript, Brisbane, 15 November 2021, p 10.

<sup>101</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 8.

<sup>102</sup> Bill, cl 71.

<sup>103</sup> Bill, cl 38(4).

with a relevant agency to assist the commissioner or the agency to perform their functions.<sup>104</sup>

Stakeholders raised concerns about confidentiality of information shared during processes provided for by the Bill.<sup>105</sup>

The Chamber of Commerce and Industry Queensland submitted that the commissioner should inform parties that sensitive or confidential information they disclose may be provided to other agencies.<sup>106</sup>

The QLS queried whether cl 38(3) applies to information the parties would obtain during a mediation conference or another process under the Bill, and noted that this is not typical of other dispute resolution processes.<sup>107</sup>

The department confirmed that this provision would apply to anyone who obtains confidential information in the mediation conference.<sup>108</sup>

### **2.3.6 Review of the legislation**

The Bill provides for a review of the effectiveness of the legislation, 5 years after commencement.<sup>109</sup>

In relation to the review and proposed timeframe, submitters suggested that:

- an expanded scope of the commissioner's powers be examined as part of the proposed review<sup>110</sup>
- the first review of the Act occur after two years.<sup>111</sup>

The department advised that there is no standard review period contained in Queensland legislation, but that a 5 year review period is consistent with other Queensland legislation containing mediation processes, and with the approach in other jurisdictions for legislation establishing other small business commissioners. The department also noted that the RSL Act 'is due for review by 2023 and any implications for the Bill would be considered as part of this process'.<sup>112</sup>

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<sup>104</sup> A 'relevant agency' includes a chief executive of a department, a local government, the equivalent of a commissioner in another state or the Commonwealth, an agency of the Commonwealth or state prescribed by regulation, or another entity involved in administering matters relevant to small businesses prescribed by regulation; see Bill, cl 37(4).

<sup>105</sup> See submissions 1, 9, 11.

<sup>106</sup> Chamber of Commerce and Industry Queensland, submission 11, p 3.

<sup>107</sup> Queensland Law Society, submission 9, p 7.

<sup>108</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 13.

<sup>109</sup> Bill, cl 39.

<sup>110</sup> Master Electricians Australia, submission 6, p 5.

<sup>111</sup> Australian Lease & Property Consultants, submission 1, p 4.

<sup>112</sup> Department of Employment, Small Business and Training, correspondence dated 8 November 2021, p 2.

## 3 Compliance with the *Legislative Standards Act 1992*

### 3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992 (LSA)* states that fundamental legislative principles are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

#### 3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

##### 3.1.1.1 *Privacy – information-sharing arrangement*

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of individuals.<sup>113</sup>

As discussed in greater detail in section 4.1.1 of this report, the Bill permits the commissioner to enter into an information-sharing arrangement with specified entities for the purposes of sharing or exchanging information:

- held by the commissioner or relevant agency, or
- to which the commissioner or relevant agency has access.<sup>114</sup>

Thus, information about a person’s financial or commercial position or other personal information may be shared between various entities.

The explanatory notes justify any potential departure from fundamental legislative principles on the basis that information-sharing is necessary for the commissioner to perform its role:

... the sharing of information is necessary for the commissioner to adequately undertake its core functions, such as providing a central point of contact in relation to matters affecting small businesses. To adequately perform its role, it is necessary for the commissioner to share information with other agencies to engage and represent the interests of small businesses.<sup>115</sup>

The explanatory notes add that safeguards are in place to preserve the confidentiality of the information and hence assist in providing that sufficient regard is had to the rights and liberties of individuals:

The potential infringement of this fundamental legislative principle is mitigated by clause 38, which provides that it is an offence to disclose confidential information obtained in performing a function under the Act during the mediation process. Moreover, the commissioner and the other agencies will be subject to the *Information Privacy Act 2009*, which will provide safeguards for the use and management of any information obtained through the information-sharing arrangements.<sup>116</sup>

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<sup>113</sup> Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC notebook*, January 2008, pp 95, 113; *Legislative Standards Act 1992 (LSA)*, s 4(2)(a).

<sup>114</sup> See Bill, cl 37.

<sup>115</sup> Explanatory notes, p 5.

<sup>116</sup> Explanatory notes, p 5.

Committee comment

The committee is satisfied that any inconsistency with fundamental legislative principles with respect to privacy is justified because the only information that may be shared is information that assists the commissioner in performing its functions under the Act, or the relevant agency in performing its functions, and the information is necessary for the commissioner to perform its role.

The committee also notes that there are significant maximum penalties for persons who unlawfully disclose confidential information.

3.1.1.2 Natural justice - limited right of representation

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation is consistent with the principles of natural justice.<sup>117</sup>

A key principle of natural justice is that procedural fairness should be accorded to a person. This involves adopting fair procedures that are appropriate and adapted to the circumstances of the particular case.<sup>118</sup>

Under the Bill, at a mediation conference, each party to the small business dispute must conduct the party's own case and may be represented by an agent approved by the mediator only if:

- the party is a corporation, or
- the mediator is satisfied an agent should be permitted to represent the party.<sup>119</sup>

This provision means that a person cannot be represented by a lawyer or other agent unless the mediator is satisfied an agent should be permitted to represent the person, and the agent is approved by the mediator. As a result, the legislation may be considered to lack procedural fairness and therefore have insufficient regard to the rights and liberties of individuals.

The explanatory notes do not address this potential inconsistency with fundamental legislative principles, but they relevantly state that one of the main objectives of the Bill is to reduce the time and costs associated with resolving disputes involving small businesses.<sup>120</sup>

Limiting the circumstances whereby a party can be represented by an agent at a mediation will reduce the costs associated with mediation for most parties. The Bill does, however, provide some flexibility regarding agents by giving the mediator discretion to permit an agent to represent a party.

Committee comment

Given that one of the main objectives of the Bill is to reduce the time and costs associated with resolving disputes involving small businesses, and that there are certain circumstances in which a party may be represented by an agent, the committee is satisfied that, on balance, the legislation has sufficient regard to the rights and liberties of individuals.

3.1.1.3 Penalties

The imposition of penalties is relevant to determining whether legislation has sufficient regard to the rights and liberties of individuals. A penalty should be proportionate to the offence.<sup>121</sup>

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<sup>117</sup> *Legislative Standards Act 1992*, s 4(3)(b).

<sup>118</sup> OQPC, *Fundamental legislative principles: the OQPC notebook*, p 25.

<sup>119</sup> Bill, cl 25.

<sup>120</sup> Explanatory notes, p 2.

<sup>121</sup> OQPC, *Fundamental legislative principles: the OQPC notebook*, p 120; *Legislative Standards Act 1992*, s 4(2)(a).

Under the Bill, a person faces a maximum penalty of 40 penalty units (\$5,514) for making an official record of anything said at a mediation conference.<sup>122</sup>

The explanatory notes provide the following justification for this new offence:

This offence is justified and appropriate as records made by parties may undermine the confidentiality of mediation proceedings and erode confidence in the mediation process. In addition, the maximum penalty of 40 penalty units is proportionate to like offences in other legislation, such as the penalty for the same conduct in section 62 of the RSL Act [*Retail Shop Leases Act 1994*].<sup>123</sup>

A maximum penalty of 50 penalty units (\$6,892.50) applies to a person who discloses confidential information except in specified circumstances.<sup>124</sup> A smaller maximum penalty (20 penalty units (\$2,757)) applies to a party to a small business dispute or another person who discloses confidential information obtained under the Act unless the disclosure meets certain criteria.<sup>125</sup>

With respect to these offences, the explanatory notes state that any infringement on the rights and liberties of individuals is justified:

... on the basis that such offences are necessary to uphold public confidence in the commissioner and to ensure small businesses and individuals that engage with the commissioner have their private information protected. This offence also mitigates the FLP concerns regarding privacy that is infringed by the provisions that permit the commissioner to enter into information-sharing arrangements with relevant agencies.

The penalty for committing an offence against this provision has similarly been developed to be proportionate to like offences in other legislation. The maximum penalty of 50 penalty units for the disclosure of confidential information obtained by a person performing a function under the Act is the same as for similar conduct in section 27 of the *Jobs Queensland Act 2015*. Moreover, the maximum penalty of 20 penalty units for disclosure of confidential information obtained during a mediation process is the same as the current penalty for this offence in section 20 of the Leases Regulation [*Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020*].<sup>126</sup>

#### Committee comment

The committee is satisfied that the penalties are proportionate to the proposed new offences and therefore the provisions have sufficient regard to the rights and liberties of individuals.

### **3.2 Explanatory notes**

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's objectives.

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<sup>122</sup> Bill, cl 31.

<sup>123</sup> Explanatory notes, p 5.

<sup>124</sup> Bill, cl 38(2).

<sup>125</sup> Bill, cl 38(3).

<sup>126</sup> Explanatory notes, pp 5-6.

## 4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.<sup>127</sup>

A Bill is compatible with human rights if the Bill:

- (a) does not limit a human right, or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA.<sup>128</sup>

The HRA protects fundamental human rights drawn from international human rights law.<sup>129</sup> Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility.

The committee brings the following to the attention of the Legislative Assembly.

### 4.1 Human rights compatibility

#### 4.1.1 Right to privacy

A person has the right not to have their privacy unlawfully or arbitrarily interfered with.<sup>130</sup>

The scope of the right to privacy is very broad.<sup>131</sup> Amongst other things, the right to privacy protects personal information,<sup>132</sup> which would include a person's financial information.

The Bill limits the right to privacy in that it permits the commissioner to enter into an information-sharing arrangement with a relevant agency.<sup>133</sup>

#### Information-sharing arrangement

The Bill proposes to enable the commissioner to enter into an information-sharing arrangement with a relevant agency for the purposes of sharing or exchanging information held by the commissioner or relevant agency or which the commissioner or relevant agency has access.<sup>134</sup>

A 'relevant agency' is:

- the chief executive of a department, or
- a local government, or

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<sup>127</sup> HRA, s 39.

<sup>128</sup> HRA, s 8.

<sup>129</sup> The human rights protected by the HRA are set out in ss 15 to 37 of the Act. A right or freedom not included in the HRA that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in the HRA or is only partly included; HRA, s 12.

<sup>130</sup> HRA, s 25. Arbitrary interferences include interferences which may be lawful, but are unreasonable, unnecessary and disproportionate: Human Rights Bill 2018, explanatory notes, p 22.

<sup>131</sup> Queensland Human Rights Commission, 'Fact sheet: Right to privacy and reputation', [https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/19894/QHRC\\_factsheet\\_HRA\\_s25.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0004/19894/QHRC_factsheet_HRA_s25.pdf).

<sup>132</sup> Human Rights Bill 2018, explanatory notes, p 22.

<sup>133</sup> See Bill, cl 37. Like other rights under the HRA, the right to privacy may be limited only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA: HRA, s 8.

<sup>134</sup> Bill, cl 37(1).

- a person who is the equivalent of the commissioner in another state or the Commonwealth, or
- an agency of the Commonwealth, or another state, prescribed by regulation, or
- another entity involved in administering matters relevant to small businesses prescribed by regulation.<sup>135</sup>

Under an information-sharing arrangement, the commissioner and the relevant agency are, despite another Act or law, authorised to:

- ask for and receive information held by the other party to the arrangement or to which the other party has access
- disclose information to the other party.<sup>136</sup>

The statement of compatibility sets out the reason for the information-sharing:

As the permanent small business commissioner is proposed to act as a single point of information and advice for small business enquiries, it is necessary for the small business commissioner to be able to share information, including the contact details for the small business, when referring applicants to different services. An example of this function is the potential sharing of information relating to a franchise dispute, which can be referred to the small business commissioner by the Australian Small Business and Family Enterprise Ombudsman. Conversely, it may be necessary for the small business commissioner when referring the applicant to other agencies to provide applicant's details to assist in the referral.<sup>137</sup>

The statement of compatibility advises that providing for information-sharing in legislation is the least restrictive and most reasonably available way to enable the commissioner to be the central point of contact in relation to matters affecting small business:

There is no less restrictive way to enable the small business commissioner to share information other than through a legislated ability to enter into information-sharing arrangements. While other mechanisms exist to enable this sharing of information, including memorandums of understanding, these alternatives do not provide a less restrictive way to enable the information-sharing.<sup>138</sup>

The statement of compatibility notes that the Bill includes safeguards on information-sharing: the information must only be shared if it assists the commissioner or the relevant agency in performing their functions, the *Information Privacy Act 2009* applies to the information, only certain entities are specified as relevant agencies, and penalties apply for the unlawful disclosure of information.

In all cases, the power to enter into information-sharing arrangements is not unfettered and the information that is shared must be for the purpose of assisting the small business commissioner or the relevant agency to undertake their functions. The term 'relevant agency' is also a defined term and ensures that the information-sharing arrangements can only be entered into with a defined set of entities.

In both cases where the right to privacy is limited by the Bill, information will be managed in line with the *Information Privacy Act 2009*, which will mitigate the limitation on the right to privacy. A further mitigation on the engagement of this right is the offence for disclosing confidential information obtained under or as a result of the operation of the Bill, unless the disclosure is authorised under the Bill. This offence is provided in clause 38 of the Bill.<sup>139</sup>

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<sup>135</sup> Bill, cl 37(4).

<sup>136</sup> Bill, cl 37(3).

<sup>137</sup> Statement of compatibility, p 2.

<sup>138</sup> Statement of compatibility, p 3.

<sup>139</sup> Statement of compatibility, p 3. See also the offence in s 113 of the *Retail Shop Leases Act 1994*, as amended by cl 69 of the Bill.

Committee comment

The committee is satisfied that the human rights limitations identified are reasonable and are demonstrably justified, having regard to s 13 of the HRA.

**4.2 Statement of compatibility**

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA. The statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

## Appendix A – Submitters

<b>Sub #</b>	<b>Submitter</b>
001	Australian Lease & Property Consultants Pty Ltd
002	Restaurant and Catering Australia
003	Megawog Mowing
004	MGA Independent Retailers
005	Property Council of Australia
006	Master Electricians Australia
007	Australian Small Business and Family Enterprise Ombudsman
008	The Pharmacy Guild of Australia, Queensland Branch
009	Queensland Law Society
010	Rural Solutions Qld Inc
011	Chamber of Commerce and Industry Queensland
012	Consult Australia
013	Australian Retailers Association

## Appendix B – Witnesses at public hearing and public briefing

### 15 November 2021 – Public hearing

#### **Australian Small Business and Family Enterprise Ombudsman**

- Hon Bruce Billson, Ombudsman
- Dr Craig Latham, Deputy
- Alexandra Hordern, Director – Advocacy and Policy

#### **Queensland Law Society**

- Kara Thomson, Vice President
- Toby Boys, Chair, QLS Alternative Dispute Resolution Committee
- Kate Brodnik, QLS Senior Policy Solicitor

#### **Master Electricians Australia**

- Jason O’Dwyer, Manager - Policy and Advocacy
- Geoff Egan, Communications Advisor

#### **Chamber of Commerce and Industry Queensland**

- Amanda Rohan, General Manager for Policy and Advocacy
- Michael Merlo, Policy Advisor

### 15 November 2021 – Public briefing

#### **Department of Employment, Small Business and Training**

- Rebecca Atkinson, Deputy Director-General, Strategy
- Jackie Ingram, Executive Director, Strategic Policy
- Wendy Migheli, Director, Strategic Policy
- Christine Beraldo, Manager, Strategic Policy
- Riccardo Rivera, Principal Legal Officer, Strategic Policy and Legal Services

## Statement of reservation

### LNP Opposition Statement of Reservation

Small businesses are collectively the biggest employer in Queensland, and a powerhouse of our economy. Their owners are overwhelmingly “mums-and-dads” who work very hard. They have taken a chance to invest, without guaranteed outcomes, in order to employ themselves and their staff, and to create and supply the goods and services that Queensland needs. Importantly, the tax revenue derived from these businesses, their owners and their employees, pays a large proportion of the cost of government services, infrastructure and social security measures in our state and nation.

The LNP Opposition understands this. We are committed to giving small businesses a voice and a strong cop on the beat who can do more than just dispute resolution and tenancy dispute mediation. We want the Small Business Commissioner to have the resources, powers and independence necessary to make the Queensland Government treat small businesses fairly and to listen to and respond to their concerns.

We believe that the Small Business Commissioner Bill 2021 does not provide the Commissioner with sufficient powers to properly serve the interests of small businesses in Queensland. The bill fails to provide the Commissioner with the ability to:

- initiate inquiries and investigations into areas of concern for small business; and
- compel state government departments and entities to cooperate in such investigations

Furthermore, the bill fails to provide the Commissioner with the necessary independence to properly advocate for the needs and interests of small business, particularly when state government policy or activities are involved. In particular, we believe that under this bill, the Commissioner is unduly dependent on the executive for administrative support and direction, and that this situation undermines the Commissioner’s freedom to act in the best interests of Small Business.

Currently, it is not obvious that the Commissioner is free to speak and act independently on matters concerning the interests of small business, and the bill in its current form does nothing to correct this failure.

We believe that the Small Business Commissioner should report to the Parliament, and that they should be legislatively granted explicit independence from the government of the day.

Our perception that the Small Business Commissioner is not independent from government has been reinforced by the failure of the Small Business Commissioner to appear before the committee during the public hearing concerning this bill, although the Commissioner was present in person to observe proceedings. As there was more than 30 minutes of hearing time remaining when the final witness’ appearance concluded, the Deputy Chair of the committee proposed that the Commissioner be invited to come before the committee to speak and answer questions. In spite of the available time and the presence of the Commissioner, this request was refused by the Chair. In recounting this event, we make no reflection upon the Chair.

The LNP Opposition believe that a conspicuously independent Small Business Commissioner, empowered to conduct investigations, report to Parliament, and publicly advocate for and defend small businesses in Queensland, is essential. This bill falls well short of these expectations.



James Lister MP  
Member for Southern Downs  
Deputy Chair



Mark Boothman MP  
Member for Theodore