

Education, Employment and Training Committee

Inquiry into the Small Business Commissioner Bill 2021

Background and current arrangements

1. The Queensland Small Business Commissioner (QSBC) was temporarily established in 2020 under the *COVID-19 Emergency Response Act 2020* (COVID-19 ER Act), to support small businesses impacted by the COVID-19 pandemic.
2. Under the COVID-19 ER Act, the QSBC has the following functions:
 - to provide information and advisory services to the public about matters relevant to small businesses, particularly in relation to the COVID-19 response measure; and
 - to assist small businesses in reaching an informal resolution for disputes relating to small business leases; and
 - to administer a mediation process prescribed by regulation under the Act in relation to small business tenancy disputes.
3. The *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Leases Regulation) was established under the COVID-19 ER Act and prescribes the mediation process that the temporary QSBC administers in relation to eligible lease disputes (affected lease disputes and small business tenancy disputes). The Leases Regulation also prescribes that its mediation process, and not the mediation process in Part 8 of the *Retail Shop Leases Act 1994* (RSL Act), applies if an eligible lease dispute arises in relation to a retail shop lease.

Policy drivers for the proposed legislation

4. Small business needs are distinct from those of larger businesses, and effective assistance and support are required. Queensland does not have permanent arrangements in place for a QSBC who can act as a single point of information and advice, particularly in relation to dispute resolution services, for small businesses.
5. The complexity of the operating environment for small businesses increased considerably in 2020 following the impact of measures to reduce the spread of COVID-19. This has highlighted the significant service gap in Queensland's support for small businesses as the only mainland state without a permanent small business commission. The absence of this support placed Queensland small businesses at a disadvantage to other jurisdictions and hampered their ability to easily access advice and support that is relevant to the Queensland legal context and small business environment.
6. The Queensland Government has committed to the permanent establishment of a QSBC and supporting office. The *Big Plans for Small Business Strategy 2021-23* also includes an action to establish a permanent QSBC.
7. The permanent QSBC and supporting office will provide tailored support and advice to Queensland small businesses and provide timely and affordable access to dispute resolution support through the permanent QSBC's dispute resolution function.



Proposed arrangements - Small Business Commissioner Bill 2021

8. The Small Business Commissioner Bill 2021 (the Bill) proposes to permanently establish a QSBC. The Bill provides that the two main objectives of the QSBC are to:
 - enhance the operating environment for small businesses in Queensland; and
 - reduce the time and costs associated with resolving disputes involving small businesses.
9. To support the main objectives, the Bill provides that the permanent QSBC would have eight main functions (an increase on the three functions of the temporary QSBC):
 - to provide a central point of contact in relation to matters affecting small businesses; and
 - to provide information and advisory services to the public about matters relating to small businesses; and
 - to assist parties in reaching an informal resolution for small business disputes, including by facilitating the exchange of information between the parties; and
 - to provide alternative dispute resolution services and administer a mediation process for small business disputes; and
 - to advocate on behalf of small businesses; and
 - to work collaboratively with the equivalent of the commissioner in other States or the Commonwealth to enhance conditions for small businesses; and
 - to perform functions conferred on the commissioner under another Act; and
 - to carry out other activities to further the objects of this Act, as directed by the Minister.
10. The Bill further provides provisions from the appointment and removal of the QSBC from office, in addition to provisions for the conditions and term of appointment on which a QSBC holds office. These provisions were not provided in the COVID-19 ER Act.
11. The Bill also extends the role of the Minister in having involvement and oversight of the performance of the QSBC's functions. It does this by allowing the Minister to issue:
 - Ministerial Directions – a direction about a matter relevant to the performance of the QSBC's functions that must be complied with; and
 - Statements of Expectations – a statement about the Minister's expectations for the performance of the QSBC's functions for a stated period.

Dispute Resolution

12. In line with the functions of the QSBC in the Bill, the Bill provides that the QSBC is to provide information and advice about matters relating to small businesses. This broad function reflects that the permanent QSBC will provide information and a referral service for all types of disputes relating to small businesses.
13. The Bill also provides that the QSBC is to assist small businesses reach an informal resolution for small business disputes and provide alternative dispute resolution services (including case management) and administer a mediation process for small business disputes.
14. Small business dispute is a defined term in the Bill and includes both a small business franchise dispute, and a small business lease dispute (other than a retail tenancy dispute). For both of these types of disputes, mediation through the QSBC is a voluntary process and both parties

to the dispute must opt-in to the mediation process. In addition, for a small business franchise dispute, the matter must have been referred to the QSBC by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO). Under the Franchising Code of Conduct, ASBFEO has jurisdiction to mediate franchising disputes, but may also refer matters to an agency of a State or Territory to give assistance.

15. The ability for the QSBC to administer a mediation process for small business franchise disputes is an expansion of the current dispute resolution function of the temporary QSBC, which is limited to lease disputes.
16. The mediation process for small business disputes provides parties to a dispute an alternative pathway to resolving disputes other than through commencing formal legal proceedings but does not limit any existing right of parties who want to resolve disputes in a different way.
17. The Bill also amends parts 8 and 9 of the RSL Act, which provides the dispute resolution process for retail tenancy disputes. The Bill's most significant amendments of these parts is replacing reference to 'chief executive' with 'commissioner'.
18. In practice, this proposed amendment will mean the commissioner will assume the role previously carried out by the chief executive of the department administering the RSL Act in administering the mediation process for retail tenancy disputes in Part 8 of the RSL Act.
19. The amendments will also mean the Commissioner will assume the role of appointing mediators in Part 9 of the RSL Act. Mediators appointed under this part will have jurisdiction to mediate both retail tenancy disputes and small business disputes under the Bill.
20. Unlike the mediation process for small business disputes, mediation is a mandatory component in the process to resolve a retail tenancy dispute, before parties can apply for relief at Queensland Civil and Administrative Tribunal (QCAT) or through the Courts. The Bill does not amend this established process.
21. Under the Bill, mediation agreements reached in mediation for small business disputes can be enforced in a court, or at QCAT for retail tenancy disputes.

Consequential and Transitional Amendments

22. To support the establishment of a permanent QSBC in standalone legislation, the Bill repeals Part 6 of the COVID-19 ER Act, which established the temporary QSBC.
23. Amendments are also proposed to be made to the Leases Regulation to provide, on commencement, that its mediation process only applies to affected lease disputes.
24. The Bill contains several transitional provisions, which broadly:
 - Continue the appointment of the QSBC appointed under the COVID-19 ER Act if, on the commencement of the Bill, a person has not been appointed as the QSBC under the Bill.

- Continue the dispute resolution process for any small business tenancy disputes commenced under the Leases Regulation but which are unresolved at the time the Bill commences.
- Clarifies that the Leases Regulation continues to apply to affected lease disputes, and not this Bill.

Miscellaneous Provisions

25. To support the functions of the QSBC, the Bill provides that the QSBC may enter into information-sharing arrangements with relevant agencies, to support the function of the QSBC or the other agency.
26. The Bill also contains two new offences related to the disclosure of confidential information. The first relates to the disclosure of confidential information obtained by a person performing a function under the Bill and has a maximum penalty of 50 penalty units. The second relates to the disclosure of confidential information obtained by a person in the dispute resolution process. This offence has a maximum penalty of 20 penalty units.
27. The Bill also contains an offence for a person, other than a mediator, who makes an official record of anything said at a mediation conference. The maximum penalty for this offence is 40 penalty units.
28. The Bill also provides that a regulation may be made under the Bill about: the fees payable; the obligations of parties in relation to a small business dispute; and the practices and procedures of the mediation conference.

Consultation

The stakeholders consulted and the outcomes of consultation are outlined on pages 6 to 8 of the Explanatory Note.

Policy Development

29. Initial consultation with other small business commissioners, including in Victoria, New South Wales, South Australia, and Western Australia, as well as with ASBFEO, was undertaken in March and April 2021. Consultation with a range of peak industry bodies occurred from late May to mid-June 2021 and helped to inform the permanent commissioner model.
30. Stakeholders were unanimous in their support for the permanent establishment of the QSBC. Stakeholders were generally supportive of the elements of the proposed approach, noting comments were received about the permanent QSBC functions, whether to include a small business definition in proposed legislation, mediation fees and the scope of disputes for which the permanent QSBC should provide mediation.

Bill Development

31. Consultation was also undertaken with key government agencies and a range of peak industry bodies during the drafting of the Bill. This consultation involved the circulation of the draft Bill for review and feedback by these entities.

32. All feedback was considered and, where appropriate, incorporated into the final Bill.
33. In general, the stakeholders consulted were supportive of the draft Bill, and much of the feedback of a technical nature was incorporated to clarify or improve certain provisions of the Bill. There were additionally two themes that emerged across the feedback received:
- Small business definition – Certain stakeholders suggested the inclusion of a definition of ‘small business’ in the Bill to provide clarity as to the businesses in scope for support by the QSBC. As stated above (outlined in the Explanatory Notes), this issue was also contemplated at the policy development stage. This feedback was not incorporated into the final Bill as it was considered that a restrictive definition could inadvertently exclude some small businesses that are in genuine need of assistance and align with the intent of the role of the QSBC. Victoria, New South Wales and South Australia also do not have a legislated definition for small business in their respective small business commissioner legislation. The Bill does enable the QSBC to have regard to the number of employees and the annual turnover of a business to assist in deciding whether or not a dispute is a small business dispute.
 - Register of disputes – Several stakeholders provided feedback that it was not appropriate for there to be a register of small business disputes that would be publicly accessible. This feedback was incorporated and both the register of disputes in the draft Bill, as well as the existing register of disputes in the RSL Act, were omitted.

Compatibility with the *Human Rights Act 2019*

34. The amendments are considered compatible with the *Human Rights Act 2019*.
35. A consideration of the human rights engaged by the Bill are outlined in the Statement of Compatibility for the Bill.

Fundamental Legislative Principles

36. Potential infringements of Fundamental Legislative Principles (FLPs) raised by the Bill are considered justified. A consideration of the FLPs potentially infringed by the Bill are outlined on pages 5 and 6 of the Explanatory Notes.