



EDUCATION, EMPLOYMENT AND TRAINING COMMITTEE

Members present:

Ms KE Richards MP—Chair
Mr MA Boothman MP
Mr N Dametto MP
Mr J Lister MP
Mr BL O'Rourke MP
Mr JA Sullivan MP

Staff present:

Mr R Hansen—Committee Secretary
Ms R Duncan—Assistant Committee Secretary

PUBLIC BRIEFING—INQUIRY INTO THE SMALL BUSINESS COMMISSIONER BILL 2021

TRANSCRIPT OF PROCEEDINGS

MONDAY, 15 NOVEMBER 2021

Brisbane

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The committee met at 12.52 pm.

ATKINSON, Ms Rebecca, Deputy Director-General, Strategy, Department of Employment, Small Business and Training

BERALDO, Ms Christine, Manager, Strategic Policy, Department of Employment, Small Business and Training

INGRAM, Ms Jackie, Executive Director, Strategic Policy, Department of Employment, Small Business and Training

MIGHELI, Ms Wendy, Director, Strategic Policy, Department of Employment, Small Business and Training

RIVERA, Mr Riccardo, Principal Legal Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

CHAIR: I welcome officers from the Department of Employment, Small Business and Training and the Department of Justice and Attorney-General. Ms Atkinson, would you like to begin by responding to any of the points made by witnesses today?

Ms Atkinson: Thank you, Chair. I would like to begin by acknowledging the traditional owners and custodians of the land on which we meet today and pay my respects to elders past, present and emerging. Thank you for the opportunity to brief the committee regarding the inquiry into the Small Business Commissioner Bill 2021.

As committee members may be aware, a temporary Small Business Commissioner was established in 2020 under the COVID-19 Emergency Response Act 2020 to support small businesses impacted by the COVID-19 pandemic. The establishment of a Small Business Commissioner was only one aspect of the COVID-19 Emergency Response Act which had wider implications for legislation across the Queensland statute book. The bill seeks to establish a permanent Small Business Commissioner in standalone legislation. Clause 3 of the bill provides that the two main objectives of the commissioner are to enhance the operating environment for small businesses in Queensland and reduce the time and costs associated with resolving disputes involving small businesses.

To support the main objectives, the bill provides that the commissioner would have eight main functions—an increase on the three functions of the temporary commissioner model. Clause 6 of the bill outlines these functions to include: to provide a central point of contact in relation to matters affecting small businesses; to provide information and advisory services to the public about matters relating to small businesses; to assist parties in reaching an formal resolution for small business disputes, including by facilitating the exchange of information between the parties; to provide alternative dispute resolution services and administer a mediation process for small business disputes; to advocate on behalf of small businesses; to work collaboratively with the equivalent of the commissioner in other states or the Commonwealth to enhance conditions for small businesses; 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.

The bill provides provisions for the appointment or removal of the commissioner from office in addition to provisions for the conditions and terms of appointment on which the commissioner holds office. The bill also extends the role of the minister and oversight of the performance of the commissioner's functions. It does this by allowing the minister to issue ministerial directions and statements of expectations.

A key function of the commissioner outlined in the bill is its dispute resolution function for small business disputes. The bill provides that the commissioner is to provide information and advice about matters relating to small businesses. This broad function reflects that the commissioner will provide an information and referral service for all types of disputes relating to small businesses. The bill also

provides that the commissioner 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.

There are three types of small business disputes that the commissioner will administer a mediation process for, including retail shop lease disputes under the Retail Shop Leases Act 1994, other small business lease disputes and small business franchise disputes. For small business lease disputes other than a retail tenancy dispute and small business franchise disputes, mediation through the commissioner is a voluntary process and both parties to the dispute must opt into the mediation process. In addition, for a small business franchise dispute, the matter must have been referred to the commissioner by the Australian Small Business and Family Enterprise Ombudsman. The bill also amends parts 8 and 9 of the Retail Shop Leases 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 the commissioner. 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 Retail Shop Leases Act and administering the mandatory mediation process for retail tenancy disputes in part 8 of the Retail Shop Lease Act. The amendments will also mean the commissioner will assume the role of appointing mediators in part 9 of the Retail Shop Leases Act. Mediators appointed under this part will have jurisdiction to mediate both retail tenancy disputes and small business disputes under the bill.

I will now briefly touch on the consultation undertaken in the development of the bill. Initial consultation with other small business commissioners, including in Victoria, New South Wales, South Australia and Western Australia as well as with the Australian small business ombudsman was undertaken in March and April 2021. Consultation with a range of peak industry bodies also occurred from late May to mid-June 2021 and helped inform the permanent commissioner model. In addition, consultation was undertaken with key stakeholders on an exposure draft of the bill in September 2021, with feedback addressed as part of the finalisation of the bill.

Before I conclude, I would like to touch upon some of the issues that were raised by the submissions received on the bill and the comments throughout the hearing today. In total, 13 submissions were received. I note that all submissions generally supported the appointment of a permanent Small Business Commissioner in the bill. Some submissions noted that the bill could be improved by adding a definition of small business. This matter was considered as part of the development of the commissioner model and in the drafting of the bill. Critically, there is no single definition of small business used consistently across government legislation or programs in Australia. On balance, it was considered that not defining small business in the bill allows some flexibility and discretion for the commissioner to support businesses that are small in nature but may sit just outside the definition based on full-time-equivalent employees or maximum turnover.

The Queensland Law Society, in its submission, also made several comments that the mediation process contained in part 3 of the bill was inconsistent with the franchising code and should be amended. The department has considered this feedback and consulted with the Australian small business ombudsman—the agency that obviously administers the dispute process in the franchise code and on the proposed approach in the bill. The department does not consider the bill to be inconsistent with the franchise code because under the code parties to a franchise agreement must agree how to resolve their dispute before disputes proceed under the franchise code dispute resolution process.

Accordingly, the mediation process offered by the commissioner simply provides an alternative form of dispute resolution that parties to a franchise agreement may elect to use to resolve their dispute. There is no requirement for state based dispute resolution processes chosen by the parties to comply with the franchise code. States are not bound to use the code.

However, following the department's further review of this issue, a minor error was identified in relation to the wording of clause 21(2). It is proposed to amend this section to clarify the referral process from the Australian small business ombudsman for franchise disputes. The amendment will remove reference to section 15A of the Australian Small Business and Family Enterprise Ombudsman Act. The amendment will be technical in nature and not change the operational policy intent of the bill.

Some of the other submissions also made a comment that the mediation service offered by the commissioner should be affordable. The bill does not provide any fees for mediation. However, it is proposed that a fee of \$175 per party per session will be prescribed in regulation and applied to

parties who seek mediation through the commissioner. This fee is slightly lower than the existing filing fee of \$358 for retail shop lease disputes and significantly lower than the cost of proceeding with a formal legal process.

Chair, that concludes my opening statement. Thank you all for your time. My colleagues and I are happy to answer any questions you have.

Mr LISTER: Thank you, Ms Atkinson, and your staff for being here today. A lot of what we have discussed today has been of a policy nature. In a technical sense, do you see any impediment to our amendment of the bill by parliament that might alter the powers that the commissioner has in line with perhaps some of the interest groups who have appeared today and made submissions?

Ms Ingram: I do not think so, no. Do you mean just by what they have said today do we think any further amendments are required?

Mr LISTER: Yes. Is there anything about the nomenclature, the description of the role of commissioner and so forth that would limit consideration of amendments that would increase the power of the commissioner?

Ms Ingram: No.

Ms Atkinson: No. We think it is fairly consistent with the submissions received and the response provided to date. There is opportunity for further review but the expansion of the functions on the temporary model I think provide for that expanded scope.

Mr SULLIVAN: Thank you, Ms Atkinson, for your pretty detailed submission. One of the issues that I did put to one of the other parties today was in relation to confidentiality. Can you talk us through practically what is in place to provide confidentiality and what would be at risk for parties participating in mediation? What practical safeguards are there to protect confidentiality of those who, by the very nature of it, would have to go into a lot of detail about their business practice?

Ms Ingram: The bill does contain a number of provisions to ensure that confidential information is not disclosed during the proceedings. We have offence provisions within the bill. The first one of these is clause 31, which prohibits a person other than the mediator from making an official record of anything said during the mediation process. There will be a maximum penalty of 40 penalty units for that offence. That aligns with the equivalent offence and penalty for the same conduct that currently happens under the Retail Shop Leases Act.

There are two other offences—both are contained within clause 38 of the bill. They relate to the disclosure of confidential information. The first one of those is in relation to a person who discloses confidential information obtained in the performance of a function under the act. That will carry a maximum penalty of 50 penalty units. The second one is in relation to a party to a small business dispute or another person who discloses confidential information obtained under or as a result of the act.

Mr SULLIVAN: Have those provisions been utilised regularly under the Retail Shop Leases Act?

Ms Ingram: We do not administer that act.

Mr SULLIVAN: I am looking at DJAG who I think does.

Mr Rivera: I do not have that information at hand.

Mr SULLIVAN: If you could take that on notice, that would be great.

Mr Rivera: Yes.

Mr SULLIVAN: Noting that you said the offences mirror that.

Ms Ingram: Yes. The last offence will carry a maximum penalty of 20 penalty units.

Mr BOOTHMAN: The Small Business Commissioner Bill does not contain the obligation to act in good faith, which exists in the current framework and has been used by mediators previously. I cannot see the obligation to act in good faith anywhere in the bill. Can you explain why that is not in the bill?

Ms Migheli: In relation to acting in good faith, we do not specifically have that in the bill. However, in part 3, which deals with mediation, we do have the requirement for parties who enter into mediation to have attempted to resolve the dispute by seeking the assistance of the Small Business Commissioner. Part of that are those informal mechanisms for engaging around understanding their rights and the process and how that works through.

The broader framework of the mediation process that is established by the bill is really very much that coming together—parties approaching mediation in a shared way, so forms and processes require both parties to agree to proceed to mediation. Parties are required to equally contribute to the cost of a mediation session should it get to that process. We are very much seeing that that provides the framework that people are approaching mediation in that spirit of collaboration and good faith.

Mr BOOTHMAN: There are no powers in the bill to request information from one of the parties. Potentially, if somebody is willing to withhold information, that would make the mediation process very difficult. Shouldn't there be a clause in the bill to force a party to produce all relevant documentation to ensure that a clear and transparent process is undertaken? The lack of such a clause is a concern for me.

Ms Ingram: I think the process which has been established is very much about a conciliatory approach—both people acting in good faith. Forcing people to do things as part of a mediation process is not the core of what this is about. There are other processes throughout the legal system where if people are not going to act in good faith and produce the information required then there are other processes within our legal system that will deal with that. This is very much about a process where people come in attempt to resolve a dispute together before you have to get to that stage. If that is not going to be the case—

Mr BOOTHMAN: You would want to go to mediation because you would want to avoid the costs of going to court which can be quite expensive.

CHAIR: Unfortunately, mediation cannot solve all problems.

Mr O'ROURKE: My question is in regard to how the commissioner will be able to deal with disputes where one of the parties lives outside of Queensland. How does that work?

Ms Ingram: I am not sure how it would work. I would have to take that on notice about processes that the current temporary commissioner uses. I am sure there are processes that do not involve both people having to be at mediation. I would have to take that on notice.

Ms Migheli: I think at least one party would need to be a Queensland based small business. I think that goes to the question of when the commissioner considers a matter for mediation and the things that they may take into consideration in undertaking that. There is no reason why the mediation could not involve a party that was not a Queensland based party. My understanding is that they use telecommunications and those sorts of activities to undertake mediation in the current COVID environment anyway. There are no limitations on that process. We can certainly obtain some further information.

Mr DAMETTO: My question is in regard to the function of the Small Business Commissioner and the work that they have done operating under the existing bill. Could you give us a broad overview of some of the disputes that have been dealt with by the commissioner?

Ms Ingram: I am not privy to the types of disputes—

Mr DAMETTO: I am being very careful not to ask about particular cases. What kind of work has the commissioner done? What kinds of disputes?

Ms Ingram: A lot of her current functions have been predominantly around affected COVID leases. It has had a very strong COVID focus. I can tell you that since opening on 28 May 2020 the QSBC has carried out more than 6,527 activities for small business, commercial tenants and landlords. Those 6,527 activities include 4,912 inquiries, 911 disputes, 490 outreach activities and 214 advocacy activities. The nature of those I would have to take on notice.

Mr DAMETTO: Can you take that on notice?

Ms Ingram: Yes.

CHAIR: While I have the opportunity, I commend the Small Business Commissioner for the Small Business Friendly Councils initiative. I think that is a fantastic advocacy piece for small businesses across Queensland in that very large piece of work. My question goes to the consultation with other jurisdictions. We have heard from a number of submitters today about advocacy versus investigative powers. Could you speak a little bit about your understanding of what small business commissioners in other jurisdictions have the ability to do in that space?

Ms Atkinson: I might pass to Christine, who has been leading the consultation with other jurisdictions. She would probably have a bit more detail than I have.

Ms Beraldo: In terms of advocacy and investigation, there are two separate issues. When you are looking at investigation, it can be either an investigation in terms of a matter that comes to the commissioner—for example, it could be a complaint that is issued or raised with the commissioner
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from a particular small business. The other states do have the power to investigate those matters. In terms of investigation and advocacy—which is to investigate on a broader range of issues such as to conduct an inquiry—my understanding is that the small business commissioners do not have that power. It is really only to investigate an individual matter that comes to the commissioner.

CHAIR: It is a very specific example where you have the need to investigate a mediated matter that is before the Small Business Commissioner, not conduct an inquiry on a very broad topic.

Ms Beraldo: Yes.

Mr LISTER: Alternative dispute resolution must require some degree of compulsion to produce documents that are necessary to facilitate that particular approach. Can you fill me in on how the bill proposes to allow that to a sufficient degree for it to be valuable?

Ms Migheli: The bill provides for a mediation process. Mediators are appointed to conduct the mediation which involves the particular parties to the dispute. The process that they go through in conducting that mediation in terms of the level of information or material that might be required would presumably be particular to the individual circumstances. My understanding is that they work through a process. They are appointed to mediation. They do some time investigating the particular circumstances and familiarise themselves with that particular case. Then they conduct the mediation. During that process, if there is additional information that comes to light, that is possibly where they might extend to a further mediation session where they might feel that there is a need to obtain some further information. It is really conducted by the mediator through that discussion process to try to facilitate an agreed outcome. If that agreement cannot be reached then that is when it would refer to a more legalistic tribunal or court based process.

CHAIR: The Ombudsman noted in his submission the benefits of the power to publish information when two parties do not agree to come together and the importance of maintaining an effective register of disputes. Do you have any thoughts on that? We noted though in his contribution this morning that there is not a published register of disputes available on their website or accessible. I think there have only been two instances to date, but I am keen to hear your thoughts.

Ms Ingram: That was something that we had considered. There were altering views from a number of stakeholders, particularly from the Law Society who did not see that as appropriate. That is why on the balance of it we have removed that public register—very much for the reasons that were probably described by the Law Society around having a carrot as opposed to a stick and the purpose of the mediation process being more about the carrot than the stick.

CHAIR: Thank you. That concludes our questions today. Thank you all very much for your time here today throughout the course of the public hearings. Also, I note that there were three questions taken on notice. One was with regard to leasing referrals with the Department of Justice and Attorney-General. The second was with regard to the opportunities for people outside of Queensland to participate in the mediation process. The third was with regard to the nature of the matters that have been before the Small Business Commissioner. You have given us the statistics, but if you could give us anecdotal responses in terms of what those inquiries look like that would be appreciated. Those responses are required by Wednesday, 17 November 2021. Thank you again for coming before us today.

Mr LISTER: I see that the Small Business Commissioner is with us in the room. Would it be out of order if we invited her to come and address the committee?

CHAIR: It would be out of order. Thank you very much for your time today. That concludes our public briefing.

The committee adjourned at 1.15 pm.