



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 HEARING—INQUIRY INTO THE SMALL BUSINESS COMMISSIONER BILL 2021

TRANSCRIPT OF PROCEEDINGS

MONDAY, 15 NOVEMBER 2021

Brisbane

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The committee met at 10.59 am.

CHAIR: Good morning. I declare open this public hearing for the committee's inquiry into the Small Business Commissioner Bill 2021. My name is Kim Richards. I am the member for Redlands and chair of the Education, Employment and Training Committee. I would like to acknowledge the traditional owners of the land on which we meet and pay my respects to elders past, present and emerging. We are very fortunate in this country to live amongst two of the world's oldest living cultures in Aboriginal and Torres Strait Islander people who have cared for the lands, winds and waters of our beautiful Queensland. With me here today from the committee are: James Lister, the member for Southern Downs and deputy chair; Mark Boothman, the member for Theodore; Nick Dametto, the member for Hinchinbrook; Jimmy Sullivan, the member for Stafford; and Barry O'Rourke, the member for Rockhampton. We also have with us in the audience the Queensland Small Business Commissioner, Ms Maree Adshead. Welcome, Maree.

On Tuesday, 12 October 2021, the Hon. Di Farmer MP, the Minister for Employment and Small Business and Minister for Training and Skills Development, introduced the Small Business Commissioner Bill 2021 into the Queensland parliament. The bill was referred to the committee for detailed consideration and report by 26 November 2021. The submissions to our inquiry, as well as written briefs the committee has received from the Department of Employment, Small Business and Training, are available from the inquiry website, including the department's response to issues raised in the submissions received by the committee. Witnesses will not be required to give evidence under oath, but I remind everyone that intentionally misleading the committee is a serious offence.

BILLSON, Hon. Bruce, Ombudsman, Australian Small Business and Family Enterprise Ombudsman (via teleconference)

HORDERN, Ms Alexandra, Director, Advocacy and Policy, Australian Small Business and Family Enterprise Ombudsman (via teleconference)

LATHAM, Dr Craig, Deputy, Australian Small Business and Family Enterprise Ombudsman (via teleconference)

CHAIR: I now welcome our first witnesses from Canberra. Ombudsman, would you like to make a brief opening statement before we start our questions?

Mr Billson: Thank you for the opportunity to share some thoughts with you today. I have a very brief opening statement. We would like to acknowledge and commend Ms Farmer and the government on this initiative to introduce the legislation to create the Queensland Small Business Commissioner as a permanent position with supporting enabling legislation. I personally would also like to acknowledge the outstanding work of Maree Adshead. She has been a remarkable advocate for small business in the Queensland community—up one end and across the other side of your vast state. I commend her particularly on the work with Small Business Friendly Councils of late. Congratulations to Maree.

We have made a number of suggestions focusing on how to get the initiatives to create the Queensland Small Business Commissioner as a permanent role, to underline its independence, to give it the agency and efficacy as a champion for small business and to support the most effective operation of the dispute resolution and support functions that are envisaged in the legislation. We have suggested some opportunities for improvement. We did engage thoroughly and constructively with the department in the earlier stages of formulating the bill and we welcome that engagement with your state's officials on the legislation.

A couple of our ideas go to reinforcing that independence, also scope to empower the Queensland Small Business Commissioner to engage with a broader range of disputes—not just business-to-business disputes but also business-to-government disputes. We have also made some suggestions around the way in which the role can interact with our particular responsibilities in relation to the franchising code. If you are okay with that, Chair, I am happy to leave it at that and answer any questions you and the committee members may have.

CHAIR: Thank you.

Mr LISTER: Thank you for coming before us and for your submission as well. I turn to your concerns about the independence of the Small Business Commissioner. Apart from the general issues of perception and so forth which reinforce a statutory body's standing if they are known to be independent, can you go through some of the practical benefits of having the role truly independent from ministerial direction and from the government of the day?

Mr Billson: I am happy to. I should disclose that it was actually me in a former life who created the role that I now occupy—not one that I envisaged taking on. In creating it, it was primary in my mind that it needed to be seen to have a degree of independence from government, that it could raise issues perhaps uncomfortable for government and in some cases in carrying out a fearless advocacy role perhaps advocate for point to policy and program opportunities that might not be what government particularly wanted to hear.

It is through that lens that my agency was injecting that perspective into the process you are involved with and the extent to which the bill has both a statement of expectation powers, which is not unfamiliar but is quite common, but also a directions power. I think in the explanation the department has given you that directions power was envisaged to make sure that the commissioner was focused on pressing and emerging issues. I have not found that to be a challenge with any of the commissioners I have worked with and certainly the calibre of someone like Ms Adshead. She is very much alert to where focus and energy should be directed.

Where the directions power becomes more of a concern is where it is used to guide the commissioner not to be involved with something that might be awkward or difficult for government. That is the risk and I suppose it is up to the parliament to decide whether the alleged upside of clarity and focus the directions powers use outweighs the risk of it seeing the commissioner perhaps curtailed from that role, in being guided away from subject matter that the government of the day might not wish to have a focus put on.

Mr LISTER: If I might say with your indulgence, Chair, that I remember when you became the minister I was the aide-de-camp to the Governor-General at the time and I was standing in the corner watching you being sworn in. I do remember that.

Mr Billson: I saw your photo and I thought, 'My goodness, it's the deputy chair from central casting,' but I must have recalled those earlier times.

Mr O'ROURKE: In your submission, you talk about not having a definition for 'small business' and that that provides flexibility. Do you have any suggestions of a definition that might be workable around that?

Mr Billson: That is a good question. The one we operate on is quite inclusive. It talks about a headcount of up to 100 employees and a turnover of around \$5 million being about the zone we operate within. You would know from your own experience that a business feels small whenever it is not as big as another one they are having to deal with, if I could put it that way. You could be a reasonable sized business and still feel like you are getting pushed around and having your economic rights curtailed because the counterparty has more muscle, more resources and at times more technical expertise than you might have readily available.

That was the frame that was brought to the Australian Small Business and Family Enterprise Ombudsman legislation: where is it you would expect a power imbalance might play out and what scale of organisation would you feel is well placed to contend with that? That is where this 100 person headcount and \$5 million came in. We thought that above that you would think the organisation would have sufficient resources and perhaps adequate economic muscle, if I could use that phrase, to be able to contend with disputes, to be able to defend their economic interests and to be able to pursue access to justice for a matter that they were being troubled by or felt on the receiving end of. That was the one we had used. We tend not to apply that super strictly in that there is some flex and scope. Where there is a fluctuation in turnover, that is incorporated in our legislation. That is the rough rule of thumb—100 people and a turnover of around \$5 million.

Mr SULLIVAN: I have a question in relation to your suggestion around publication and the register of disputes. Can you talk us through in practical terms what is its purpose or how you would say it would work? Is it a naming and shaming scenario? How does it work in practice in your view?

Mr Billson: That is a good question. We have some limited powers, and I will use your phrase 'name and shame', as a way of trying to encourage parties to engage constructively in the mediation process. You would appreciate and, Chair, I am sure the committee is well across the sense that
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people with goodwill coming towards a mediation process can get very good outcomes. If you come to that process and you are not engaging in it in good faith, then it can be a waste of everybody's time and quite frustrating.

In terms of the Commonwealth legislation, it is really about trying to encourage and cajole the kind of constructive engagement that supports businesses perhaps of different sizes getting through a matter of grievance or a dispute, getting it sorted and then getting back to business. The eye is on trying to maintain good working relationships and good commercial relationships, getting whatever the dispute is sorted and then letting people get back to business.

If I may, I will throw to my colleague, Dr Latham, because he is familiar with the very limited use of that power for us federally. In the context of your legislation, it is really also about situational awareness for small and family businesses. If there is a frequent flyer, if I could use that term, you might well decide to engage with businesses elsewhere. If there are repeat people who seem to be perpetually engaged or frequently or disproportionately engaged in disputes, the register would highlight that, would surface that. By publication, you would do two things. The first is that you would hope they would change their way and improve their behaviour. The second is that, if you and I were contemplating dealing with them, we would have an extra piece of information that would help us make a good decision about whether we wanted to do that or not. If I may, I will ask Dr Latham to add to my answer.

CHAIR: Certainly.

Dr Latham: The Ombudsman is right. We have very sparingly used this. We have had occasion to use this only twice. We have a third one that might happen shortly, but it is rare for us not to be able to at least get the parties to mediation. Normally, 90 per cent or more will be doing that in good faith in accordance with the mediation certificates as well. Once you are there, the benefit of getting people there is that mediation is a really tried and true way of dispute resolution. It helps with empathy and getting issues clarified and on the table. You get results where you really do not necessarily expect the results going in. Having said that, that ability to cajole to get people to attend mediation, once they are there, there is no requirement to actually resolve the issue, to agree an outcome. All we ask is that the parties come to it with good faith and negotiate accordingly.

Mr Billson: Just to be clear, we do not publish the register of all disputes. That is not what we do. What we have is a power to publicise in whatever means the Ombudsman sees fit a party engaged in a dispute that has not been prepared to supply information and engage. It is at that level, not every matter that comes towards us.

CHAIR: Yes, I am on your website at the moment and I cannot see where there is a published register of disputes per se.

Mr Billson: That is true. We do not publish every dispute. That publication power is very rarely exercised—in fact twice as Dr Latham has pointed out. That is only as it relates to a party involved with a dispute that does not participate through the provision of information and engage in the dispute resolution process.

CHAIR: In those two instances, what does that look like in terms of publication? Is that via your website in a news update?

Mr Billson: The legislation is quite broad, Chair. I must apologise. Because I crafted the legislation—it is wise officers who often point out deficiencies and say, 'Some peanut thought this was a good idea.' That peanut would be me! There is plenty of that that goes on, Chair. In this respect, the peanut thought that it would be a fairly broad publication power, usually within the area or market where the businesses operate. Again, I will throw to Dr Latham, who has actually navigated that in practice.

Dr Latham: Thank you, 'Ombudsman Peanut', for that. As I mentioned only a couple of times, it is very broad, as the Ombudsman says. You can publish in any way that the Ombudsman thinks fit. That will include potentially on our website, but we have also used things like social media or a local journal. Having said that, it is so rare that we go to it because we go to lengths to let the parties know that 'Should you not do this, this is the outcome.' Even those who may not be willing to go in early on will say, once they understand, that you do not have to agree. It is not an arbitration. You are going in there merely to talk about it, hear the other side and see what you can come up with. As I said before, it is surprising that some of those you encourage to go to mediation are some of the ones who do settle and with some brilliant results as well.

CHAIR: That is an interesting lever.

Mr Billson: Yes. I guess that is it, Chair. We try to be quite discerning in the use of it. I have signed a number of items of correspondence saying, 'Do you really want me to consider this? This is really a matter of resolving this and engaging. Let me explain what might happen if you continue on this current posture.' Overwhelmingly, people respond quite positively.

Mr LISTER: I was looking at the Queensland Law Society's submission. They recommend that there be a definition of small business in the bill itself. One of the suggestions they came up with was ASIC's definition of a small proprietary company of 100 employees or less and controlling entities worth \$50 million or less. In your view, is that a useful definition of a small business for the purposes of this bill?

Mr Billson: Yes, Mr Lister, it is good. I think in the briefing note you have from the department they accurately call out the fact that there is any number of definitions of small business. That creates a bit of a challenge trying to do comparisons. The ASIC one is a good definition. We have used part of that—same head count but less of an emphasis on assets under control and more of a focus on turnover being liquid resources perhaps that are available to help navigate a dispute. That is quite useful.

The other ones vary. Obviously workplace relations has one—which is head count. You then have corporate reporting—which is entity size. The ACCC operate on a transaction value. Many grant programs appealing to small business, frankly, are shaped to make sure the likely number of applicants roughly fits within the available funding envelope. Then you will see even more curious definitions of small business.

Where we can, we try to stick with something that already has a life and has legs and that people are comfortable with, being mindful of what the objective is. Here the parliament's objective seems to be to have this resource available to help small business navigate difficult disputes and matters of conflict and contention when they might not otherwise have the full toolkit available to them that a much larger enterprise might have. That would seem to be a reasonable way forward.

Mr BOOTHMAN: When it comes to franchises and potential disputes, how could we better handle this issue when it comes to franchises? In my office we have had a few over the years. It can be very troubling for a small business who is a franchisee of a major franchisor.

Mr Billson: That is spot on, Mr Boothman. Obviously the franchising code is there because there is that inherent risk of a power imbalance between the franchisor and the franchisee and that adult-to-adult relationship which most franchising relationship start as might turn into a parent-child relationship when something goes wrong and then there is some behaviour and process safeguards built into the code. We have had some good discussions with your departmental staff about how the ideas in the bill might operate in reality, bearing in mind my agency cannot get away from our Commonwealth obligations to administer the ADR processes in a franchising code and then some reporting obligations back to parliament about what is going on in this space.

What we envisaged and what we have discussed with your departmental officials is that, if we do get notice of a dispute—and mindful that we always try to encourage disputes to be resolved within the businesses themselves, so within the franchise system, and encourage franchisors particularly to have good mechanisms to achieve that. If that is not possible, there is scope for them to lodge a notice of dispute. There is a 21-day window within which we provide support and advice and encouragement and hope that the parties do sort out the matter. If it gets to a point where they have not then we get involved in facilitating the appointment of a mediator.

In Victoria, for instance, the scope of possible mediators we would draw to the party's attention includes the Victorian Small Business Commissioner. That is appealing for some because of the subsidised nature of their mediation services. We are imagining that that is a good model for how we could operate should this legislation pass in its current form. We would point out that—I think it is \$175 per party—frankly, getting the Queensland Small Business Commissioner involved represents good value for money. If the parties were interested, we could point to your initiative as one avenue or other initiatives where mediation practitioners are available to help with that next step.

We then have to report back, so even if it shoots off and it is handled by your commissioner, at some point we try to track down what actually happened to it—whether it was resolved successfully, whether people are happy with the process. The reason for that is not one of being an overlord or oversight but we have to report back to the parliament, as is the requirement under our code, about what happened with those matters. If I could, through you, Chair, I will ask Dr Latham to add to that answer because this is something we are having to explore.

Also in the event that a matter is not resolved, our toolkit is not limited only to mediation. Where the parties agree, we can facilitate an arbitration process or maybe a blend of things where the dispute, in essence—Chair, an example in your field of endeavour, is in the building industry. People

might agree there is something that is not quite right but then perhaps disagree on what the cost is or what redress is appropriate. That might call in a particular specialist who might arbitrate on that aspect of a dispute, whereas the rest of the dispute might have been able to be mediated. If I could, Chair, I invite Dr Latham to add to my remarks.

Dr Latham: I will just add an overlay of the framework there. We do try, as the Ombudsman said, to deal with it quite flexibly and try to keep the people in an adult-to-adult relationship. It is really good when the parties can agree between themselves on a mediator or the approach to be taken, so it is the first thing to tick off—‘We are on our path to negotiating an outcome here’—rather than us appointing somebody which we have power to do under the code. Again, we do that quite sparingly because normally the first win you can get is to get them to agree on the way forward.

As the Ombudsman also said, at the end of, say, a mediation—the franchising code now blends mediation and conciliation. It can be either/or or both under the code. Then, should the parties agree, it can be arbitration and it could be arbitration for a part of the matter, not even the whole matter. You could mediate/conciliate and get resolution for some parts and then refer off to arbitration those that you cannot, or you could go straight to arbitration as well. That would probably be an unusual case.

Should any or all of that fail, our general legislation as well would give us some powers. Our definition of alternative dispute resolution is quite broad. It includes things like conferencing, mediation and conciliation but also case appraisal and neutral evaluation as well. We will sometimes come back at the end of an unsuccessful mediation and look at something maybe like case appraisal to help the parties if they have isolated certain issues that have been intractable and then team it up with something like conciliation as well. Again, our oversight of disputes does not end at the first failure at mediation, but we do try—through a whole lot of work from our great assistance team—to triage matters, help the parties understand what exactly it is that they are arguing about to give them the best opportunity to resolve it.

CHAIR: In regard to the participation in the dispute process, I think you have mentioned in your submission the Small Business Commissioner requiring that parties participate rather than parties agree to mediation. Could you talk a little bit about that and the experience in our jurisdictions?

Mr Billson: Certainly. Craig, do you want to keep going while you are on a roll? Then I might invite Ms Hordern to add some thoughts.

Dr Latham: This is on the idea that you should maybe be able to force a party to mediate. I am not sure—and I will defer to the Ombudsman on this as well. I would have thought that, because at mediation you do need goodwill and good faith in the mediation and the negotiation that happens there is not something imposed—it is not an arbitration—it is really important to get the parties there with the least amount of hissing. It reminds me of plucking the turkey with the least amount of hissing! You try to get the parties there as seamlessly as possible and directing a party there may put you on the back foot around that. Having said that, we have that power to be able to call out should a party refuse to mediate which, as I mentioned before, is very effective at getting the parties there with the least amount of hissing as well. I will stop there.

Mr Billson: That sums it up from our perspective as well. It is really about what are the best possible settings to encourage the greatest likelihood of getting a resolution. I am mindful that in the federal jurisdiction, if this process does not succeed in finding a resolution or if one party perhaps is well resourced and with time on their side compared to a small business running out of a cash, running out of mojo and finding it all quite traumatising, delays and then threats of going off to the Federal Court, which is the next step in our jurisdiction, is an enormous step to take. Taking steps to try to guard against people weaponising the process, to try to steer it into a court and run it out while people’s cash runs out, is a real challenge federally. At a state level you have constitutionally a few more tools than we have federally under chapter 3 of the Constitution, the court’s power. You have some tribunals and some other options. At times we act as a bit of a concierge in that, if it is not something that we are the nearest, neatest correct entry to helping with, we will very quickly steer them towards an agency or some other process that looks more likely at getting a good outcome for the small business.

Mr DAMETTO: Mr Billson, thank you very much for restoring my faith in that there is still an element of comedy in the Ombudsman’s office. I thank you very much for that.

Mr Billson: Mr Dametto, we take our work seriously but without taking ourselves seriously.

Mr DAMETTO: I would only imagine. Within our roles we do say sometimes if you don’t laugh you’ll cry. That leads into my question. It is a great that Dr Latham ended with that with his answer to the last question. When it comes to the Small Business Commissioner’s function, how successful is it anecdotally in keeping people out of the Federal Court?

Mr Billson: We get 7,000 or 8,000 cases that come to us through our call line alone. The good news is that there are times when providing information is all that is needed. Most people do not go into small business expecting or hoping for disputes. They might find, to use a sporting analogy, that getting involved in a dispute might be more of an ‘away game’ for them than a ‘home game’. It is an unfamiliar place to be; they are not sure how best to conduct themselves or how to advocate for their interest. Our assistance team and the call centre provide early information about being clear on what the dispute is. We have a template of various steps to go through to surface what the matter in dispute is to provide clarity. You could imagine that, if you are locking horns with somebody, the fact they like Aussie Rules over Rugby League might add to the aggression when really it has nothing to do with the essence of the dispute at hand. We offer some guidance about how to be clear on what the problem is and to remind people to understand what a good outcome might look like.

Secondly, for time-poor and stressed small business people, there can be bit of catastrophising going on that, ‘I have got this dispute, they are going to want to take my house and my firstborn,’ when, really, it might be a matter of fixing up a disputed account or having a chat. Sometimes when surfacing what the dispute is, all of a sudden, people think, ‘Hang on, that is not so bad, I can maybe sort that out’. That plays an important role. We do not get into the formal mediation process. Equipping people to engage constructively and respectfully with the other party can sometimes get us there. A number of these wash through to become disputes themselves. I think it is about 1700-1800 a year—please correct me if I am wrong—the outcome rate from that is quite impressive. I will ask Craig to flesh out that number while I busily dig them up.

Mr DAMETTO: More than happy to, as long as the chair is happy.

Mr Billson: While I busily dig them, because I know I have got them here somewhere.

Dr Latham: I will go off my recollection on this figure but it is something like the ombudsman stated. We have noticed variations during COVID given that COVID is a more difficult situation, but traditionally our resolution rates have been up towards 80 per cent at mediation. As I mentioned, you do get resolutions in unlikely places sometimes. The benefit of mediation and the structure of mediation is to get the parties to think outside the square so they can often come up with—even if they do not resolve the dispute they went there to resolve—some way to reset the relationship and create value in that relationship going forward.

Mr Billson: The satisfaction with the process rate is higher than the resolution rate. Even if people have not got the outcome that they were looking for, they still found the process a positive one. In order to connect a few dots, I might invite Ms Hordern to share how we try to learn from that case history and trajectory to highlight areas of policy and program improvement that become part of our advocacy function. Saying, ‘We have seen this, this and this,’ happens quite a lot. Reporting times—payment issues were one example where we championed some change and policy reform in that space. That shows you that connection between the traffic we get through our call centre and dispute cases and how that translates into proactive advocacy. Is it okay if I invite Dr Hordern—Ms Hordern—to touch on that briefly?

CHAIR: Thank you. Ms Hordern?

Ms Hordern: Thank you very much, I got an unexpected elevation there! As the ombudsman said, we rely very heavily in the policy and advocacy function on the excellent work of the assistance team in resolving disputes. When we see a number of similar types of disputes coming through the assistance team, that is the point at which we ask, what are the legislative and regulatory levers we might pull to stop that particular type of dispute occurring? So that real-time case information is absolutely critical to our function.

When we are writing a submission or doing a piece of more in-depth research on a particular issue that we know is affecting small businesses, those case studies that come from the assistance team and the insights that that team can provide us into the practical operation of disputes around particular issues is absolutely invaluable. As the ombudsman pointed to, this is where our advocacy around payment times has come from. A lot of the information that we have been able to gather to illustrate our work on franchising has come through that assistance function. Information about the application of unfair contract term legislation has been incredibly useful coming through that function. The work the assistance team does solidly buttresses the policy and advocacy work.

Mr DAMETTO: I see a lot of value in what you are doing; congratulations on your successes so far. Thank you.

Mr Billson: Thank you.

CHAIR: That brings the time for this public hearing to a close. Thank you ombudsman Billson, Dr Latham and Ms Hordern for your contribution. Your insights have been very useful. This hearing is now adjourned. We will take a short break and resume at 12 noon.

Proceedings suspended from 11.35 am to 12.00 pm.

BOYS, Mr Toby, Chair, Alternative Dispute Resolution Committee, Queensland Law Society

BRODNIK, Ms Kate, Senior Policy Solicitor, Queensland Law Society

THOMSON, Ms Kara, Vice President, Queensland Law Society

CHAIR: I now welcome representatives from the Queensland Law Society. Ms Thomson, would you like to make a brief opening statement before we ask questions?

Ms Thomson: Thank you. Thank you for inviting the Queensland Law Society to appear at the public hearing on the Small Business Commissioner Bill 2021. In opening, I would like to respectfully recognise the traditional owners and custodians of the land on which this meeting is taking place—Meanjin, Brisbane. I recognise the country north and south of the Brisbane River as the home of both the Turrbal and Yuggera nations and pay deep respects to all elders past, present and future.

This bill permanently establishes a Queensland Small Business Commissioner and a supporting office which were measures put in place by the government last year to support businesses impacted by the COVID-19 pandemic. The Queensland Law Society commends the government for these and other measures taken to respond to the effects of the pandemic. The Queensland Law Society has been highly supportive of the role and mission of the Queensland Small Business Commissioner since its inception. We had worked closely with the Small Business Commissioner, Maree Adshead, and her office in the multifaceted role as champion and conduit of information between government and industry. We have witnessed the good work the commissioner has carried out to date in assisting small businesses to resolve disputes and we are pleased this assistance can continue if the bill is passed.

Specifically, we support the objectives of the bill to make the dispute resolution process cost effective for business. I refer to the explanatory notes which provide that mediation services will be administered through the commissioner and a mediation fee will apply equally to users of the mediation services on a cost-per-session basis. It is proposed that the fee be comparable to the mediation fees of other small business commissioners in Australia with the ability for the commissioner to waive the fee in cases of hardship as well as on a broader basis for regions or sectors affected by natural disasters and/or based on economic conditions—for example, the impact of COVID-19. We also note the additional information about the cost effectiveness of assistance provided by the commissioner in the further information from the department provided on 11 November.

Notwithstanding our overall support of the bill, there are provisions which require amendment or further consideration to ensure there are no unintended consequences flowing from the bill. These are detailed in our written submission, but in summary QLS recommends that a definition of small business be included in the bill to clarify who is able to seek assistance from the commissioner. There should also be a discretion for the commissioner to provide assistance in other cases such as in the event of a natural disaster.

The bill should also allow parties to a small business franchise dispute who have not referred the matter to the Australian Small Business and Family Enterprise Ombudsman to appoint an ADR practitioner to apply to the commissioner for mediation of their dispute in addition to dealing with referrals from the ombudsman. The right of a party to be legally represented should not be restricted by the bill. Allowing parties to be legally represented will assist parties and mediators to understand and narrow the issues and procedural aspects of the dispute.

There should not be a civil penalty applying to parties for disclosing confidential information. The society strongly objects to the inclusion of this offence provision as applying to parties. The definition of confidential information does not provide sufficient clarity to parties which is concerning as this is the basis for determining whether someone is in breach of the provision and liable to pay a penalty which is currently \$2,757. Instead, an express provision could be inserted in part 3 of the bill to provide that information obtained in the mediation must be kept confidential. This should apply to parties and other persons attending the mediation.

I am joined today by Toby Boys, the Chair of the QLS Alternative Dispute Resolution Committee, and Kate Brodник, Queensland Law Society Senior Policy Solicitor, and both are more than happy to answer questions you might have.

Mr LISTER: I have no question at this stage, but thank you very much for your appearance and for your vivid insights in your submission.

Mr BOOTHMAN: You were here listening to the previous witnesses from the Australian Small Business and Family Enterprise Ombudsman, and particularly the Hon. Bruce Billson. You were speaking about small businesses. Were you saying that there needs to be some type of definition of small business in the bill? Would you agree with what Mr Billson and members of the committee were saying about the size of small businesses—for instance, less than \$50 million turnover and fewer than 100 staff members? Is that something that the Law Society would be comfortable with?

Ms Brodnik: We do not have a preference for the way you would determine a small business—whatever the turnover is or whatever the number of employees are. There are a few definitions and we have extracted some in our submission. In the ombudsman act referred to there is also a definition. From our perspective, it is more about giving some certainty to applicants for multiple reasons. One is that it is a prerequisite of someone applying for dispute resolution under the act that they first seek informal advice from the commissioner. A party might not even take that first step if they are unsure that they fit the definition. There is also a review process. The commissioner is able to make a determination on the application. Potentially, that's because she or he will not determine that the party applying is a small business. We think that that party would then need some clarity about the definition and how it is applied in order to then seek a review. Consistency with other definitions would be good, but we do not have a preference on how a definition is actually set out.

Mr O'ROURKE: You propose that clause 25 be amended so that small businesses can have legal representation through disputes. The department has looked at that and advised that because they used the term agent it does not describe who that is. Would that resolve your concerns? If it is an agent it could be legal representation?

Ms Brodnik: It goes some way to allaying the concerns insofar as if a mediator is happy for a legal representative to attend as an agent then in that particular case the party can obtain the benefits and, in our submission, everyone in the process can obtain the benefits, but it is not legal representation as of right. You will still need the mediator and another party can potentially make submissions to the mediator about whether they think that person should be able to attend either as an agent or as a legal representative.

The issue, as we have stated in our submission, is that if you have an in-house lawyer or someone who is giving legal advice within the party's structure they would be able to attend but a small business that does not have in-house legal counsel will not automatically be able to have a legal representative attend. There is an imbalance then between the parties. Having some guidance that an agent could include a legal representative is good, but it is not a guarantee in the bill that someone has that right.

Mr O'ROURKE: I would have to agree that there would be an imbalance.

CHAIR: Following on from our previous submitters, the ombudsman spoke about where the commissioner can direct mediation versus requiring both parties to agree to it. Do you have any thoughts on that?

Mr Boys: My thoughts are that it is preferable for parties to agree on mediation. That is the traditional model. That being said, there are a number of instances such as the franchising code where it is mandated. Courts will make referrals to ADR which requires parties to go to ADR. We do not have a strong preference on whether it is compulsory or not, but the traditional model is certainly that the parties would agree to go to mediation.

CHAIR: Touching on the franchising code, could you expand a little where you think the gaps are in the arrangements proposed within the bill?

Mr Boys: Under the franchising code the mediation is mandated and has to be done. If the ombudsman has a franchising dispute that they then refer to the commissioner for the commissioner to establish and organise the mediation, the commissioner's act provides for it to be a non-compulsory process. I think there needs to be some clarification in the bill as to what is the status of franchising mediation which is referred to the commissioner. It may be that there is a carve out for the parties to agree upon the mediation for franchising disputes that are referred to the commissioner.

CHAIR: Thank you for that clarification.

Mr LISTER: In having access to further legal avenues—courts in other jurisdictions—does the Law Society have a view on how that balances against the obvious benefits of keeping disputes at the lowest possible levels in terms of avoiding costs and the protraction of the proceedings?

Ms Brodnik: We certainly support the bill establishing a form of dispute resolution for small business. These disputes might find their way to QCAT if it is a dispute under \$25,000. QCAT has limited resources and a lot of work to do. Disputes that can be resolved without going through a court

process or a tribunal process are always encouraged. We did touch upon this a little in our submission. A party should have the ability to engage in a form of alternative dispute resolution but ultimately retain the right to pursue their matter in a court or tribunal.

The exclusion of jurisdiction clauses in the bill may require a little clarification. At the moment they say that once you apply for a dispute resolution process under this bill you are not able to have your matter heard and determined by a court. That makes sense, but we would also like 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.

Mr O'ROURKE: Earlier we had the Australian Small Business and Family Enterprise Ombudsman appear. They were taking about the fact that the commissioner should have the power to publicise when a party does not follow the recommendations to enter into dispute resolution. What are your thoughts in that area?

CHAIR: That was my exact question, member for Rockhampton.

Ms Brodnik: We did express some concerns about that initially when consulting with the department—somewhat like naming and shaming. ADR processes are normally done on a without prejudice basis and kept confidential, and there are very good reasons for that. Sometimes in a process a mediator needs to sign a certificate or give advice on an outcome and that is under the bill. A register or something else that gives the public access to the results of an ADR process does not really sit too well with us and how we see ADRs working.

CHAIR: I think that possibly might have been referring to publishing whether one party chose not to enter into the mediation process and I think they cited that there had only been two examples of that. There was not necessarily a disputes register on the ombudsman's website, but that there be power for the ombudsman to use that as lever to potentially encourage people to participate in the mediation process. What are your thoughts on that as a lever?

Ms Brodnik: It is hard because the bill provides that both parties need to sign the application and that they can withdraw from the process at any time. You are enabling completely voluntary participation and potentially with no consequence because you are able to withdraw without consent—in fact, the commissioner is the one obliged under the bill to advise the other parties. It is not currently set up that way. We probably would need to give it a bit more consideration as to whether that is something we recommend. Based on how ADR normally works, we do not necessarily see names of people who do not attend being published in any way.

Mr Boys: To add to that, certainly my view is that we should be using carrots rather than sticks to lead people towards mediation. When you sit down with parties and explain to them what the process involves, the benefits of it and why it is in their interest to go through the process—and I used to work as a case officer putting parties through mediation—most of the times the parties will see that as a benefit to themselves. I would have thought that the naming and shaming or publicising of the people who have refused to do so might actually put people off the process in the first place, knowing that that might be the consequence. If they hear the benefits, but ultimately decide, for whatever reason, why they do not want to go through the process—often people do not want to go through the process if they feel deeply aggrieved about things, that they feel that there is power imbalance, that often there are mental health issues involved in these kinds of commercial disputes—for all those reasons, I think it would be better to encourage people rather than potentially have a stick there in that way.

Mr O'ROURKE: For my learning, can you explain to me what the process is when someone lodges for mediation? Can we talk about that and then what happens if they do not go to mediation?

Mr Boys: In the context of the commission, I personally do not have that experience. I have not had matters go through the process and I am not a mediator for small business matters. There are other members. Perhaps it is a matter we could take on notice and share our experience.

Mr O'ROURKE: It would be interesting to unpack that a little bit more.

CHAIR: There being no further questions, I thank you all for attending today and sharing your insights on the bill that is before us. I note that we are going to get some examples from your membership in terms of what that process looks like. We will adjourn briefly before we start the next session.

Proceedings suspended from 12.17 pm to 12.20 pm.

EGAN, Mr Geoff, Communications Advisor, Master Electricians Australia

O'DWYER, Mr Jason, Manager, Policy and Advocacy, Master Electricians Australia

CHAIR: I now welcome representatives from Master Electricians Australia. Thank you both for agreeing to sit a little bit earlier. Mr O'Dwyer, would you like to make a brief opening statement before we begin questioning?

Mr O'Dwyer: Thank you for having us along. We appreciate the opportunity to appear. As the only mainland state in Australia to not have a permanent small business commissioner, Master Electricians Australia believes that the bill is overdue. However, we do believe the bill falls short. Under the proposed bill, the only legislative power the commission will have is helping mediate lease disputes and franchise disputes. Whilst the commission will be able to provide advice on other small business disputes, they will not be able to mediate and investigate these matters.

Interestingly, as stated in the explanatory notes, the commission is there to reduce cost and red tape to small business owners overall. What does reduced red tape and costs mean? To give some practical examples—and this is not about changing legislation or getting rid of legislation; it is making sure that the legislation that is there at the moment operates the way it should and that the government is not adding costs.

You would be well aware of the QBCC's performance over the last little while in the Supreme Court having stopped a business from operating. That is a significant cost to a business. Queensland Health last year—\$105 million in late payments to small businesses when the new invoicing process comes in. These are the red tape issues that small businesses operate in with government departments that cost small businesses. Most businesses try to comply. When they are found to be operating legally by courts, many do not have the funds to fight those fights, so they capitulate.

I know personally, in terms of QBCC again, overstepping the bounds in terms of a matter about a conflict between the QBCC Act and the Electrical Safety Act in regard to installation of a split air conditioning unit. I have QBCC people running around the state saying that you need a QBCC licence to put these in. It is just not true. But that is the cost to our businesses and our members because they then have to ring us or they have to stop what they are doing, and to the point where I know some contractors have been taken off projects because they are not supposed to be doing that work in accordance with QBCC. This is actually wrong. We have had legal advice. The department has had legal advice, from our understanding. These are the costs that we need addressed and these are the costs that the Small Business Commissioner can help us fight without having to go to legal costs for small businesses.

CHAIR: Mr O'Dwyer, I will stop you there for a second. I want to remind you that there are matters before the courts and that you need to consider sub judice in how you are presenting to us today.

Mr O'Dwyer: Thank you. Take South Australia, for example, they have the responsibility in the building construction industry through the Security of Payments Act and offer disputes and resolution options in the industry. In New South Wales, the Small Business Commissioner also has powers in relation to mediation, and these powers would help electrical contractors in Queensland reduce the cost of compliance, but also not to have additional costs added on. They are very simple examples of what is needed in terms of Queensland small businesses.

In terms of the other issues that the department raised in their response to our submission, they have raised a couple of issues that were particularly interesting in that they have said that QCAT and the Office of Fair Trading has the power to deal with these issues. It is an interesting comparison when you look across all other states of Australia where you have a situation where they have an equivalent of QCAT and also have a standardised Fair Trading process, yet those states still have an office of small business commissioner adding to those areas. Again, the bill is not at where we see that will actually add to reducing costs for small businesses. It is imperative that they have the ability to question government departments about these sorts of things. Start an investigation that might rely on only a Queensland issue. There is the question about local governments and what their purchasing processes are and how people are being treated. Other states look at unfair contracts and things like that. The ACCC is looking at that at the moment. All of those things affect Queensland's small businesses and we need a small business commissioner with the powers to address some of these issues upon business advice.

Mr LISTER: In some respects your submission mirrors that of the Small Business and Family Enterprise Ombudsman's in terms of wanting to see more initiative available to the Small Business Commissioner to pursue inquiries and so forth. To what extent do you think the independence of that officer from the government of the day is necessary in order to give the kind of protection that you have been talking about?

Mr O'Dwyer: I think it does need to be independent. You are talking about a bit of a change from being a small business commissioner to an independent statutory authority or an ombudsman. Would I like to see an independent ombudsman in the small business area? Probably, but that is not the bill in front of us at the moment. I am working with the bill that is in front of us at the moment. I would like to see some more powers that I think we could drag out of the federal and other states. Would I support an independent ombudsman? Most likely, but I would have to see how it was set up in the first place.

Mr SULLIVAN: Thank you for your presentation today. In your industry in particular, do you think there is a blurring of the line that sometimes what could be classed as a small business disagreement is a HR or industrial relations issue when it comes to people on sites being directed as opposed to—I think you have referred to—fair contracts and that sort of thing?

Mr O'Dwyer: The actual determining of a licence is not a demarcation dispute in that respect. It is about the interpretation of the legislation itself; it is not a demarcation. From my experience in this particular area, I think all the unions and ourselves are in agreement of where the line is. We seem to be struggling with situations of interpretation that have happened. It has been a long-held interpretation for a long time. There has been a change and it is taking an awfully long time for it to correct itself back. We have agreement that it should correct itself back, but, again, small businesses are still being influenced by wrong interpretations. That is where it has to stop, from our point of view.

CHAIR: You think that that is a matter for a small business commissioner versus industrial relations?

Mr O'Dwyer: Absolutely. It literally is not a demarcation dispute. It is certainly about the Electrical Safety Act and about a particular inspector's view of how they have interpreted a piece of legislation. It is electrical work; it is not an argument about demarcation disputes at all.

Mr SULLIVAN: Thank you, chair. You far more articulately asked the question that I was trying to ask, thank you.

Mr BOOTHMAN: You briefly spoke about other jurisdictions. Are there any examples of how other commissioners work in other jurisdictions where you feel that their powers should be incorporated into Queensland's legislation in respect of streamlining matters, or is there anything that they are doing in other jurisdictions which you feel is something that we should inherit up here?

Mr O'Dwyer: You might have some success in the Security of Payments Act legislation that has been enacted here in Queensland. It is difficult and it is complicated. However, I think where the other states have got an example of an independent mediation process, where two small businesses can—and New South Wales do this where they get a contractor and subcontractor in for mediation—those sorts of conversations can help. Some of the information that came from the Small Business and Family Enterprise Ombudsman this morning certainly showed that those conversations need to occur.

With regard to small businesses, honestly, you have to look at the way some people think about legal situations and the cost to their business as well. The average solicitor charges \$500 to \$600 an hour. Most tradies are charging anywhere from \$90 to \$120 an hour. That is a half day's work for them to be able to afford an hour's worth of legal advice. You can understand the reluctance of them to get into legal stoushes. It is really important for people to have the ability to actually sit down. There is the power imbalance as well. We have pretty big building corporations around with lots of lawyers and big contracts and things like that. Having the ability to actually sit down and have those discussions with a view to resolving a matter rather than throwing lawyers at it is not a bad thing.

CHAIR: I am curious as to your thoughts with regard to a Small Business Commissioner being able to direct mediation versus two parties agreeing to come to the table. What are your thoughts on that?

Mr O'Dwyer: I heard that as I walked in. I really have not turned my mind to it.

CHAIR: If you think about it, from what you have just stated in terms of a big building corporation versus your subbie—

Mr O'Dwyer: I suppose you have the situation at the moment where the Queensland government is trying to do some things with projects over \$100 million with the new purchasing policy, breaches of industrial relations and workplace health and safety. Their behaviour in the industry is then seen and evaluated for future tenders, so that noncompliance of not turning up for those sorts of things might be included in that sort of purchasing policy for large contractors.

CHAIR: That does not go to the question I asked. You were talking about big building corporations versus a subbie—avoiding a \$500 an hour legal bill versus what a subbie might earn—and getting them both to the table. Do you think that the commissioner should have the ability to direct that mediation, or do you think it should still be both parties being willing to come to the table?

Mr O'Dwyer: I think there are other ways to do it within the industry.

CHAIR: So with a direction.

Mr O'Dwyer: Yes, I think that direction. There are other ways to do it, but I do not think the commissioner would have that power.

Mr DAMETTO: My question relates to something you brought up in your opening statement. You indicated there should be a function where the commissioner has more functionality and you mentioned some of the shortfalls of the bill. What would be the benefit of investigation rights and the ability to investigate?

Mr O'Dwyer: I think where that comes in—

Mr DAMETTO: I agree with you. I just wanted to see where you were going with this.

Mr O'Dwyer: I realise that, but the situation for me is that state and local government councils can be very bureaucratic. When there is a spotlight placed on it, the situation is that they can really have a good look at what is going on. I do not think it is intentional, because governments want to make sure they are spending taxpayers' dollars correctly, and I get that. Most of our members get that. The issue for us is where there are unnecessary delays, unexplainable delays and performance measures et cetera, then if they are not meeting those performance measures it is really good to have a person who can ask for an explanation as to why those measures are not being achieved. The best way to do that, I think, is a Small Business Commissioner actually having the power to investigate and do that off their own bat. If they have a flood of complaints about a certain issue then they should be able to deal with it on that basis. I am not saying that building and construction is the only industry where there is going to be an issue. There would be any number of industries that would have these sorts of issues that would be frustrating and costing small business a lot of money.

Mr DAMETTO: I agree with you there. The last thing I want to do is be on this committee going through this bill in two or three years time because we created a toothless tiger.

Mr O'Dwyer: That may be my thought at this stage.

CHAIR: Mr O'Dwyer, in terms of that topic can you speak to your understanding of other jurisdictions in terms of advocacy versus investigative powers?

Mr O'Dwyer: I think the federal jurisdiction particularly does it well.

CHAIR: I am interested more in the other states.

Mr O'Dwyer: Well, again if I go to New South Wales, I have spent a bit of time with the Cross-Border Commissioner. New South Wales actually has Cross-Border Commissioner who looks after cross-border communities. In speaking with him, he has 12 per cent of Australia's population based in cross-border communities, something like 65 different local government areas and things like that. I cannot remember off the top of my head the exact figures. His job is to try and reduce the amount of duplication and increase that sort of process to smooth out and reduce the burden that goes across those cross-border communities.

CHAIR: But that is not the role of the Small Business Commissioner in New South Wales, is it?

Mr O'Dwyer: I actually believe it should be.

CHAIR: But it is not. My question was in terms of the Small Business Commissioner's role in terms of advocacy versus investigative powers in other state and territory jurisdictions.

Mr O'Dwyer: In terms of New South Wales, my understanding is they can also investigate issues as well off their own bat.

CHAIR: Advocate or investigate?

Mr O'Dwyer: Investigate. They can create their own investigations, and certainly federally they can create their own investigations as well.

CHAIR: That concludes our hearing. Thank you very much for your time and your insights into the electrical industry in Queensland.

MERLO, Mr Michael, Policy Adviser, Chamber of Commerce & Industry Queensland

ROHAN, Ms Amanda, General Manager for Policy and Advocacy, Chamber of Commerce & Industry Queensland

CHAIR: Ms Rohan, would you like to make an opening statement?

Ms Rohan: Thank you, Chair and committee, for having us at the hearing today for the inquiry into the Small Business Commissioner Bill. Pursuant to our submission, we touched on some elements in relation to the operation of the commissioner's functions and roles in light of the work that has been undertaken under the transitional powers that have existed under the temporary legislation. We do note that the role of the commissioner has been very well-received and very much needed through COVID. We do acknowledge the work that is being done, particularly in some of the toughest business conditions being felt across Queensland. In that light, we are happy to make any further comments as required.

Mr LISTER: If I could just ask you a question I have asked a number of the other witnesses today. Does CCIQ's vision for this commissioner, including the expansion of the role to include advocacy to government and so forth, require a high, medium or low level of independence from the government of the day and the freedom to exercise functions free from ministerial intervention and guidance?

Mr Rohan: In our submission we were quite clear with regard to the role of the office and the commissioner as being a strong advocate across government. We have seen how that has worked with industry bodies and groups and on behalf of small business through COVID. There will always be that tension in the legislation with regard to the operation of the office given that it is a body that reports to the minister. From a policy and advocacy perspective, there may be some perceived conflicting positions in which you can truly advocate on behalf of business if you are in fact sitting within the remit of a government minister. I do see that how that is operationalised is probably a role or a challenge that may exist within an office.

CHAIR: Do you think that has been the case under the temporary provisions with regard to the Small Business Commissioner? Has that been the perception of your members?

Ms Rohan: I do not think the experience has been that, to be fair, but again I do not know what I do not know. I do know that the commissioner and the office have been strong advocates on raising issues with business and working with industry to date. But if that does arise, then of course that would be an issue to be resolved within the office and the minister who has the ultimate decision-making responsibility.

Mr DAMETTO: I have to make special mention of the Hinchinbrook Chamber of Commerce and the Townsville Chamber of Commerce, which are great advocates for small business in our area. My question is how much interaction have you had with your smaller chambers around Queensland, and have you done any survey work on the Small Business Commissioner and this bill?

Ms Rohan: Leading into the development of our submission, no, we have not specifically done a survey or gathered any qualitative or quantitative research with regard to the operation of the role. However, throughout COVID the commissioner as well as the team have connected with many chambers across Queensland and worked with CCIQ and our chambers. In fact, we meet regularly with the commissioner in her office, and we obviously invite her office and herself to attend many of our chamber meetings. That in operation has worked fantastically. I do know through the work of the small business friendly councils, and again working with councils and chambers in regions, that it is again bringing key stakeholders together through the work to date.

Mr DAMETTO: With regard to the functions of the Small Business Commissioner, from what you have experienced so far would added functions to that role be beneficial to your members or members of the CCIQ?

Ms Rohan: Yes. I do not know what that would be. With regard to what is drafted in the bill, where that clarity is sought is with regard to how that advocacy work is done across government. Coming from a business perspective, multiple industry bodies exist to advocate on behalf of their members. Where our experience lies is that it is difficult to work across government, particularly on big whole-of-government issues, and we see a really nice place for this role to help navigate that challenging environment when there are multiple decision-makers and agencies involved given how the current functions are sitting within the drafting. That is where we would like the focus to sit mostly.

Mr SULLIVAN: Can I go to the issue of confidentiality. You have expressed concerns about confidential information being aired. Is that your reading of the legislation, or has that been your organisation or your members' experience under the temporary arrangements?

Ms Rohan: The intent behind our submission in that regard is just to ensure the clarity and the transparency of any information being shared between the office and other agencies intergovernmentally. We are probably more so seeking that there should be some clarity for business to understand that information could potentially be used if that is what is provided for in the powers.

Mr DAMETTO: Regarding investigative powers for the commissioner, do you see a benefit in the commissioner having that function?

Ms Rohan: Yes. If I can lean on my previous colleagues who were here, I do agree—although we may not have been explicit in our submission—that the office should be provided with the required powers to undertake their functions. Otherwise, I think the term used was 'toothless tiger.' To be effective and to fulfil its functions I think there should be some ability to perform those functions, and if the legislation requires a bit more teeth to get things done, then on behalf of our members that sounds like something that should be considered as part of the legislation.

CHAIR: Are you aware of how that would work or how that is working in other jurisdictions if that indeed exists? Are you aware of that ability for other small business commissioners?

Ms Rohan: Off the top of my head, no. I have not gone into that detail in preparation for today. I can take that on notice.

CHAIR: There being no further questions, thank you both very much for your time today. In terms of that question taken on notice with regard to investigative powers in other jurisdictions, if you could provide a response back to the committee by Wednesday, 17 November.

Ms Rohan: I certainly will.

The committee adjourned at 12.45 pm.