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Office of the President

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Our ref: LP-MC

Committee Secretary
Education, Employment and Training Committee
Parliament House
BRISBANE QLD 4000

By email: EETC@parliament.qld.gov.au

Dear Committee Secretary

Small Business Commissioner Bill 2021

Thank you for the opportunity to make a submission to the inquiry considering the Small Business Commissioner Bill 2021.

The Queensland Law Society (**QLS**) has previously commended the Government's decision to permanently establish the Office of Small Business Commissioner to carry out the functions set out in clause 6 of the Bill. The services provided by the Small Business Commissioner, particularly in respect of disputes arising from the impacts of the pandemic, have been welcomed by our members.

QLS supports the objectives of the legislation, however, we consider there are aspects of the bill that need amending or further consideration to achieve these objectives. Our comments and recommendations are set out below.

Definition of small business

A 'small business dispute' is defined in the Dictionary in Schedule 1 to mean a 'small business tenancy dispute' or 'small business franchise dispute'. These two terms are defined as follows:

1. ***small business franchise dispute*** means a dispute about a franchise agreement to which the Franchising Code of Conduct set out in the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth),* schedule 1 applies, if the franchisee or franchisor under the agreement carries on a small business.

2. ***small business lease dispute*** means a dispute about a small business lease, or about the use or occupation of leased premises under a small business lease, other than a small business franchise dispute.

However, the Dictionary does not define the term "small business".

Clause 23(3) of the bill states that, "(f)or deciding whether or not a dispute is a small business dispute … the commissioner may, for example, have regard to the following—

(a) the number of employees each party employs;
(b) the annual turnover of each party to the dispute."

This clause indicates that an assessment will be made by the commissioner about whether there is a small business involved in the dispute and the potential criteria to be used to make this assessment.

However, without a definition of "small business", there will likely be uncertainty for someone who is deciding whether to:

- seek advice from commissioner;
- apply to participate in the dispute resolution process under this legislation; or
- seek a review of the commissioner's decision in clause 23 to dismiss a dispute notice.

In addition, we note the commissioner's functions under clauses 6(b) and (c) of the bill include:

> (b) to provide information and advisory services to the public about matters relating to small businesses; and
>
> (c) to assist parties in reaching an informal resolution for small business disputes, including by facilitating the exchange of information between the parties;

We also note, pursuant to clause 21(1)(a), the parties to a small business dispute may only apply for mediation of their dispute if they have attempted to resolve the dispute by seeking informal assistance from the commissioner. Given that there is no definition of small business proposed, parties might be discouraged from contacting the commissioner.

We recommend, for the purposes of guidance and certainty, that threshold criteria is set out in the legislation. The criteria should incorporate a discretionary element to allow the commissioner to accept an application where the circumstances warrant. These circumstances could include, for example, disputes arising due to impacts of a natural disaster on a particular area or industry.

The commissioner should also have a clear discretion to accept a dispute where one party is a small business, but the other is not.

We consider the threshold criteria should be in the primary legislation, rather than in a regulation.

We have no firm view on the threshold criteria that should be used in the definition of "small business". It would be useful to use or refer to an existing framework that is well-understood by business and the community.

We note 'small business' is not defined in Queensland legislation save for the definitions in several schedules in the *Rural and Regional Adjustment Regulation 2011*.

The Australian Securities and Investment Commission refers to the Corporations Act's definition of a 'small propriety company'.[1]

The Australian Bureau of Statistics defines a small business as a business employing fewer than 20 people. Categories of small businesses include:

- Non-employing businesses (sole proprietorships and partnerships without employees)
- Micro-businesses (businesses employing between 1 and 4 people including non-employing businesses)

[1] https://asic.gov.au/for-business/small-business/?fbclid=IwAR04zpdmIsNGDJUGF_CDCg0XHu8gLgkTK2sU4BMkyECFxBn9XE5EYRh_KK0#what

- Other small businesses (businesses that employ between 5 and 19 employees).[2]

In addition, the Australian Taxation Office sets out eligibility criteria for small businesses.

One or more of these sources may be useful in developing a definition.

Small business franchise dispute

Definition

We recommend that the definition 'Small business franchise dispute' should include a jurisdictional link between the dispute and Queensland to ensure that the commissioner is only referred disputes connected to Queensland.

Referral of disputes by Australian small business and family enterprise ombudsman

Clause 21(2) of the bill provides that an application may be made by the parties to a small business franchise dispute only if the Australian Small Business and Family Enterprise Ombudsman established under the Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cwlth) (**ASBFEO Act**), section 12 has, under section 15(a) of that Act, referred the dispute to the commissioner.

It will be important to ensure that there are no gaps between the Franchising Code / Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) arrangements and the Queensland framework, including ensuring that the ASBFEO and the parties can comply with the requirements of the Franchising Code if a dispute is referred to the commissioner.

The ASBFEO's primary function under the Franchising Code is a concierge service to help the parties appoint an ADR practitioner to enable them to engage in an ADR process.

The Victorian experience

In Victoria, the SBC runs state dispute resolution services where:

- The process is funded by the Commission and heavily subsidised by mediators on the panel (a mediator is paid $900 for a half day mediation) and the parties each contribute $195 to the VSBC. These amounts are the total mediation costs, which is below what such a process would ordinarily cost. This can be contrasted with the ASBFEO process, where a mediation can easily cost $3,000 for the mediator plus parties' representation costs. This can result in total costs of about $10,000 or more per party;
- The parties cannot request who the mediator is; and
- The VSBC has the discretion to appoint an ADR practitioner to conduct a conciliation or mediation or, if the parties agree, arbitration.

The VSBC model is considered to be a good model to encourage dispute resolution in a cost effective way.

[2] https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1516/quick_guides/data

We understand that the subsidisation arrangements have been generally successful in encouraging parties to mediate disputes in Victoria. In the Queensland context, any subsidisation is a policy decision for the Queensland Government and we expect that it does not necessarily need to be reflected in the legislation.

However, it appears that the intent of the legislation is to introduce a simple and cost-effective mediation option for small business disputes. We suggest that consideration be given to incorporating these concepts in clause 6 Functions [of the commissioner].

Compliance with Franchising Code – ASBFEO must appoint an ADR Practitioner

Further consideration needs to be given to the steps to be undertaken by the ASBFEO before it is referred to the Queensland commissioner.

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

The ASBFEO has an assistance function pursuant to section 15(b) of the ASBFEO Act to make recommendations about how the dispute may be managed, including a recommendation that an ADR process be used to manage the dispute.

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

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

To avoid this inconsistency, either:

- The Franchising Code needs to be amended to allow the ASBFEO to fulfil their obligation under section 40A(5) of the ASBFEO Act by referring the dispute to the Queensland Small Business Commissioner; or
- Clause 23 of the bill should be amended to allow for the ASBFEO to appoint an ADR practitioner (under the Franchising Code) once a dispute has been accepted by the commissioner.

Conciliation under the Franchising Code

The Franchising Code now allows for conciliation or mediation. Older franchise agreements (pre 2 June 2021) which allowed for mediation would also be subject to the conciliation or mediation provisions as clause 60(1) of the Franchising Code makes the process apply to disputes arising on or after 2 June 2021 (including if the agreement was entered into beforehand), so it covers the field.

Given that conciliation is a form of ADR contemplated by the Commonwealth legislation, consideration needs to be given as to whether the ASBFEO's recommendation to use mediation instead of conciliation must be made before a matter is referred to the commissioner, given that the bill does not include a conciliation process. However, this is a decision at the ASBFEO level, rather than for the commissioner.

Process initiated by parties to a franchise agreement

We have been advised that in Victoria, most of the referrals to the small business commissioner relating to franchising disputes come from the parties to an agreement, rather than through a referral from the ombudsman.

We are not aware of the policy rationale for clause 21(2) limiting disputes to those referred by the ombudsman. We consider that it will be in keeping with the objectives of the bill to permit parties to all small business franchise disputes (noting that these must relate to small business carried on by a franchisor or franchisee) to utilise the process under this legislation.

Our recommendation is that a dispute should be able to be referred by the Ombudsman or originate from an application from the parties under clause 22 of the bill. Clause 21(2) should be amended to include this alternative.

Dealing with similar disputes - clause 23 of the bill

Clause 40B of the Franchising Code outlines a process where, if two or more franchisees have similar disputes with the same franchisor, they may agree to resolve their disputes in the same way. We understand that this can involve the disputes being heard together by the same ADR practitioner.

Clause 23 of the bill does not seem to allow for similar disputes to be heard together. While, clause 24 provides a process under which the commissioner may join a person as a party to the mediation, this is not the same as having two or more similar, but separate disputes mediated together.

There may be benefit in adopting the Franchising Code approach.

Clause 21(1)(b)

This clause provides that parties can only apply to the commissioner for mediation of their dispute if it is within a mediator's jurisdiction. We query whether this subclause is necessary given that under clause 23, the commissioner makes a determination about whether or not to accept the application, including consideration about whether the commissioner has jurisdiction under the legislation.

The *Retail Shop Leases Act 1994* (**RLSA**) makes a similar reference to a mediator's jurisdiction, which we presume is where this clause has been taken from; however, under that act, there is no separate decision making process by the commissioner.

We consider including clause 21(b) in this bill adds a layer of confusion for parties to a small business dispute when they are assessing whether or not their dispute will qualify for assistance. It has the appearance of adding another eligibility criteria when clause 23 achieves the same effect.

Clause 25 Limited right of representation

The bill should allow for legal representation for each party as of right.

We recommend that clause 25 be amended:

- In the heading, to remove the word "limited"; and
- To read:

  "At the mediation conference, each party to the small business dispute may be:

  (a) legally represented; and

  (b) represented by an agent approved by the mediator if the mediator is satisfied an agent should be permitted to represent the party."

We note the current drafting of the clause mirrors the RSLA and we understand that many jurisdictions in QCAT operate without the parties being legally represented.

However, the types of disputes covered by this legislation are broader than those currently dealt with under the RSLA and the parties and process will benefit from legal advice and representation.

Legal representatives typically assist mediators and parties to understand (and narrow) issues and procedural aspects relating to the dispute and process.

We also consider there is a fundamental issue of fairness if one party is able to be legally represented and the other is not. For example, under the current clause 25(b)(i), an in-house lawyer for a corporation may be given authority to resolve a dispute for that corporation and therefore they are the appropriate "agent" to attend a mediation. However, in these circumstances, the other party who may not have an in-house lawyer should not be precluded from having a lawyer present (whether or not the party is a corporation).

In the franchising context, we also make the following comments.

Clause 25 of the bill is inconsistent with clause 41A(3) and (4) of the Franchising Code which:

- requires a party to attend the ADR process - which can be by virtual attendance technology; and
- the person attending has the authority to "*enter into an agreement to settle the dispute on behalf of the party*".

Often in-house counsel or employees (as opposed to a director) may be authorised to settle and attend on behalf of the party. The bill is silent about who is required to attend if the party is a corporation or trust or partnership. The Franchising Code provision is clearer.

For disputes under the Code, in our members' experience, lawyers are almost always allowed to attend an ADR process to represent their client. As noted earlier, the right of a party to be legally represented should be entrenched in clause 25 of the bill.

Clause 27 Parties attendance at conference not compellable

In franchising disputes, parties sometimes do not attend a mediation even though under clause 41A(3) of the Franchising Code, each party to a dispute must attend the ADR process.

However, clause 27 of the Bill specifically provides that a party to the dispute cannot be compelled to attend the mediation conference.

This inconsistency should be addressed. One mechanism could be to add a new subsection 27(2), providing:

> "Subsection (1) does not apply to a dispute to which clause 41A of the Franchising Code applies."

Clause 29 Mediation agreement

This clause should be amended to replace all references to "mediation agreement" with "settlement agreement." The phrase "mediation agreement" best describes the agreement between the mediator and the parties to a dispute, whereas the concept referred to in the Bill is a "settlement agreement".

We recommend this change be adopted in the RSLA also.

Clause 34 Exclusion of other jurisdictions

QLS is generally cautious about legislation which purports to oust the jurisdiction of a court or tribunal to hear a dispute. The parties to a dispute should always have access to the relevant court or tribunal for the hearing and determination of their dispute.

Given that the mediation process is intended to be voluntary, we query the need for clause 34 generally.

Confidentiality in mediations

One of the key benefits of mediation is that the parties participate in a full and frank manner and may disclose confidential and/or commercial information on the basis that this information will not be disclosed outside of the mediation process. The full and frank discussions are more likely to lead to a resolution of the dispute. Confidentiality is critical to the success of this process.

At present, there is no express provision for the parties to keep information obtained in the mediation confidential, save for that no official record can be made under clause 31. There is also no obligation on third parties who allowed to attend the mediation to keep information learned, confidential.

Under clause 44A of the Franchising Code there is a statutory obligation for a complainant and respondent to observe confidentiality regarding information disclosed or obtained during an ADR process or arbitration.

There is merit in a specific confidentially clause for parties, and attendees at mediation who are not parties, in Part 3 of the bill, which could be similar to clause 44A of the Franchising Code.

Clause 38 Confidentiality

We query whether clause 38(3) applies to information the parties would obtain, potentially from each other, during a mediation conference or another process under the act. If so, this clause, is not typical of other dispute resolution processes and we are particularly concerned with the imposition of a penalty for disclosure of this information.

QLS objects to the imposition of a penalty (in the form of penalty units) for parties to dispute, particularly when this clause is ambiguous and open to interpretation as to what is 'confidential information'.

Clauses 38(1) and (2) appear to relate to people other than the parties (as parties are specifically dealt with in subclause (3) and follow clause 37, relating to information sharing including between different agencies. It is more common to see penalties for disclosure of information by people involved in the administration of the system or process than it is for persons engaged in the process itself to be captured in this way.

If the intent of clause 38(3) is to ensure parties do not disclose confidential information contained in an application or disclosed in a mediation, the better approach would be to impose a confidentiality obligation on the parties (as discussed above) in Part 3 of the bill.

General comments

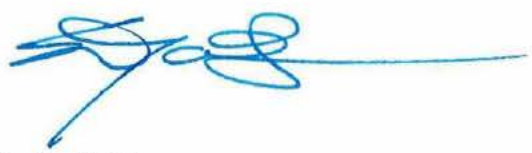
While some parties may have accessed assistance from the Small Business Commissioner as a result of the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020*, for many others, this will be a new process. We also note that there are differences between this bill and the emergency regulation. Clear information should be provided to parties about the dispute resolution process and their obligations.

Moreover, the bill makes substantive amendments to the RLSA, in part, to bring that act in line with this bill. Regular users of that system will also need to be updated on the changes, and information should also be made available through QCAT.

If the bill is passed, we recommend that the Department ensure that the changes are publicised in an appropriate way, so that those who are intended to benefit from these processes are aware of the cost-effective assistance available through the commissioner.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on (07) [redacted].

Yours faithfully



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