

# Small Business Commissioner Bill 2021

## Explanatory Notes

### Short title

The short title of the Bill is the Small Business Commissioner Bill 2021.

### Policy objectives and the reasons for them

#### Policy objectives

The policy objective of the Small Business Commissioner Bill 2021 (the Bill) is to give effect to the Queensland Government's commitments to permanently establish a Queensland Small Business Commissioner (commissioner) and a supporting office. The proposed legislation will provide a statutory basis for the commissioner's dispute resolution functions relating to retail tenancy disputes and enable mediation for commercial leasing and small business franchise disputes on an opt-in basis only.

A further objective of the Bill is to cease the operation of the temporary commissioner on commencement of the permanent commissioner. As part of this, it is intended to transition the temporary commissioner role from its previous arrangements focused primarily on managing and responding to COVID-19 impacts to a role with wider application to support small businesses.

The permanent commissioner and supporting office will improve tailored support and advice to Queensland small businesses and provide timely and affordable access to justice through the permanent commissioner's dispute resolution function. The permanent appointment of the commissioner will effectively end the temporary commissioner role.

#### Background

In April 2020, National Cabinet endorsed the *Mandatory Code of Conduct SME Commercial Leasing Principles during COVID-19* (the National Code), which applied to all tenancies that were suffering financial stress or hardship as a result of the COVID-19 pandemic as defined by their eligibility for the Commonwealth Government's JobKeeper program. As part of Queensland's approach to implementing the National Code, the temporary commissioner was appointed under the *COVID-19 Emergency Response Act 2020* (COVID ER Act).

Specific functions of the temporary commissioner include providing information and advice about small business matters; and dispute resolution support for small business, including the provision of mediation for small business leasing disputes.

The *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Leases Regulation) prescribes the process for the temporary commissioner to administer mediation for eligible lease disputes, being COVID-19 affected lease disputes

and small business tenancy disputes until 30 April 2022. The Leases Regulation was made under section 23 of the COVID ER Act and section 121 of the *Retail Shop Leases Act 1994* (RSL Act). The Leases Regulation implements the fair leasing principles set out in the National Code for ‘affected leases’ in Queensland for small and medium-sized enterprise (SME) tenants with up to \$50 million in annual turnover that were previously eligible for the Commonwealth Government’s JobKeeper scheme.

The temporary commissioner continues to administer mediation for both eligible COVID-19 affected leasing dispute matters (retail shop leases and other commercial leases) and small business tenancy disputes. The percentage of matters received by the temporary commissioner office involving small business tenancy disputes (not ‘affected leases’ disputes) has increased over time and is anticipated to increase further as the economy progressively recovers and the services of the commissioner become more widely known.

### Permanent commissioner objectives

The complexity of the operating environment for small businesses increased considerably in 2020 following the impact of measures to reduce the spread of COVID-19. This has highlighted the significant service gap in Queensland’s support for small businesses as the only mainland state without a permanent small business commissioner. This gap placed Queensland small businesses at a disadvantage to those in other jurisdictions and hampered their ability to easily access advice and support that is relevant to the Queensland legal context and small business environment.

The permanent commissioner (and supporting office) will provide small businesses with engagement and support (including advocacy), and dispute resolution support on a permanent basis, responding to the distinct needs of small businesses. The introduction of permanent commissioner services, including dispute resolution support, provides a clear pathway tailored for Queensland small businesses to obtain the information they need and resolve disputes quicker and easier. The provision of permanent commissioner services aims to reduce costs and red tape to small businesses overall and support the Government in achieving its objective to drive Queensland’s private sector employment.

The main objectives of the Bill are to establish the small business commissioner to enhance the operating environment for small businesses in Queensland; and reduce the time and costs associated with resolving disputes involving small businesses.

### Government commitments

The appointment of a permanent commissioner was an election commitment (GEC 2025), and the permanent establishment of an Office of the Small Business Commissioner was also an election commitment (GEC 2026). The *Big Plans for Small Business Strategy 2021-23* (BPSB Strategy) released on 12 June 2021 also includes an action to establish a permanent commissioner.

## **Achievement of policy objectives**

The Bill will achieve the broad policy objectives by establishing a permanent commissioner in standalone legislation. It will achieve its related objective to cease the operation of the temporary commissioner by omitting the provisions in the COVID ER Act that provide for its establishment. In practice, the temporary commissioner and office will convert to a permanent

position, improving support to Queensland small businesses and providing timely and affordable access to justice.

As part of the establishment of the permanent commissioner, the Bill proposes to broadly:

- provide the power to appoint a commissioner;
- provide the mediation process for the commissioner to mediate disputes relating to retail tenancy disputes, other small business lease disputes and small business franchise disputes;
- provide regulation making powers to, among other objectives, prescribe fees and the practices and procedures of the mediation process the commissioner will administer; and
- provide other miscellaneous provisions to support the operation of the Act.

*Provide for the appointment of a permanent commissioner*

The Bill:

- provides there must be a commissioner and provides the detail of the commissioner appointment process and conditions of appointment;
- provides the Minister authority to appoint an acting commissioner if the office becomes vacant (if the commissioner is absent or unable to perform the role);
- provides for the resignation and removal of the commissioner;
- provides the functions of the commissioner, which are broadly to provide small business engagement and support and dispute resolution support;
- specifies that the Minister can give the commissioner a direction relating to the functions and activities of the commissioner;
- provides that the Minister can issue the commissioner with a written statement of expectations about the Minister's expectations for the commissioner's performance of its functions and activities, for a particular period;
- provides the reporting required of the commissioner, which includes regular reporting to the Minister and the tabling of an annual report to the Legislative Assembly; and
- provides a power for the commissioner to delegate a power of the commissioner to a public service employee who is appropriately qualified to exercise the power.

*Provide for a mediation process*

The Bill:

- provides that the commissioner will administer an alternative dispute resolution service and a mediation process for eligible small business disputes.
- provides the commissioner will also administer the mediation process for retail tenancy disputes under part 8 of the RSL Act;
- provides, for small business lease disputes (a dispute about a small business lease, other than a retail shop lease under the RSL Act), the commissioner will be able to administer mediation on agreement of both parties; and
- provides, for small business franchise disputes (disputes about a franchise agreement to which the Franchising Code of Conduct applies), the commissioner will be able to administer mediation on agreement of both parties, and if referred to the commissioner by the Australian Small Business and Family Enterprise Ombudsman.

*Provide regulation making powers under the Act*

The Bill provides the power for regulations to be made under the Act about:

- the practices and procedures of the mediation process;
- the obligations of parties to a small business dispute before, during and after mediation;

- the fees payable under the Act; and
- provide for a maximum of 20 penalty units for a contravention of the regulation.

### *Miscellaneous provisions*

The Bill provides for a number of miscellaneous matters:

- provides the Act must be reviewed after five years;
- provides a power for the commissioner to enter into an information-sharing arrangement with a relevant agency for the purposes of assisting the functions of the commissioner or the relevant agency;
- provides an offence for the disclosure of private information obtained while performing a function under the Act or during the mediation process; and
- provides for the transitional and savings provisions to, broadly, preserve the rights of dispute resolutions that commenced under the temporary commissioner and which are unresolved by the commencement of the Act; and arrangements to ensure the continuity of the appointment of the temporary commissioner.

## **Alternative ways of achieving policy objectives**

Implementation of the permanent commissioner model through legislation is the only feasible way to achieve the policy objectives. Legislation is required to establish the commissioner role and its functions. Mediation processes relating to retail shop leases are currently contained in the RSL Act, and amendments to this Act are the only way to allow the commissioner to assume the functions of the chief executive in administering the dispute resolution function for retail tenancy disputes. A non-legislative commissioner model is therefore not feasible and would be inconsistent with the approach taken in other jurisdictions, which establish their small businesses commissioners through legislation.

Stakeholder consultation completed in the first half of 2021 has also confirmed that the Government's election commitments around the commissioner have created an expectation among the Queensland small business sector that the temporary commissioner, established in legislation, will continue under a permanent model.

## **Estimated cost for government implementation**

Under the *Big Plans for Small Business Strategy*, the Government committed \$10 million for initiatives to make it easier to do small business in Queensland. The permanent appointment of a commissioner is a key initiative under this commitment. Ongoing funding of \$3.2 million per annum from 2022-23 has been approved to support the operations of the permanent commissioner.

The Bill provides for the appointment of a permanent commissioner and commissioner dispute resolution arrangements, including mediation services. 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/sectors affected by natural disasters and/or based on economic conditions (for example, the impact of COVID-19).

## Consistency with fundamental legislative principles

**Legislation should have sufficient regard to the rights and liberties of individuals – *Legislative Standards Act 1992 (LSA), section 4(2)(a)***

### Right to privacy

Clause 37 of the Bill provides that the commissioner may enter information-sharing arrangements with other relevant government agencies for the purpose of assisting the commissioner or the other agencies to carry out its functions. This power may infringe the fundamental legislative principle (FLP) that legislation have sufficient regard to the rights and liberties of individuals by permitting potentially private information relating to individuals or small businesses to be shared. However, any potential departure from this fundamental legislative principle is justified as the sharing of information is necessary for the commissioner to adequately undertake its core functions, such as providing a central point of contact in relation to matters affecting small businesses. To adequately perform its role, it is necessary for the commissioner to share information with other agencies to engage and represent the interests of small businesses.

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

### New offences

Clause 31 of the Bill provides that it is an offence for a person to make an official record of anything said at a mediation conference. This clause may infringe the FLP that legislation should have sufficient regard to the rights and liberties of individuals by potentially subjecting parties to a mediation to a penalty for making a record. This offence is justified and appropriate as records made by parties may undermine the confidentiality of mediation proceedings and erode confidence in the mediation process. In addition, the maximum penalty of 40 penalty units is proportionate to like offences in other legislation, such as the penalty for the same conduct in section 62 of the RSL Act.

Clause 38 of the Bill provides that it is an offence for a person who obtains confidential information while performing a function under the Act or during mediation from disclosing that information unless the disclosure is permitted or required by law. The imposition of a new offence for this conduct may infringe the FLP that legislation have sufficient regard to the rights and liberties of individuals. Any such infringements on this FLP are justified on the basis that such offences are necessary to uphold public confidence in the commissioner and to ensure small businesses and individuals that engage with the commissioner have their private information protected. This offence also mitigates the FLP concerns regarding privacy that is infringed by the provisions that permit the commissioner to enter into information-sharing arrangements with relevant agencies.

The penalty for committing an offence against this provision has similarly been developed to be proportionate to like offences in other legislation. The maximum penalty of 50 penalty units for the disclosure of confidential information obtained by a person performing a function under the Act is the same as for similar conduct in section 27 of the *Jobs Queensland Act 2015*. Moreover, the maximum penalty of 20 penalty units for disclosure of confidential information obtained during a mediation process is the same as the current penalty for this offence in section 20 of the Leases Regulation.

#### **Legislation should have sufficient regard to the institution of Parliament – LSA, section 4(4)**

Clause 41 of the Bill provides that a regulation may be made under the Act about the fees payable, the obligations of parties to a small business dispute before, during and after mediation and the practices and procedures of the mediation process. In addition, clause 23 provides that a party to a small business dispute must comply with the requirements prescribed in regulation before applying for mediation. Lastly, clause 37 provides that a regulation may prescribe who is a relevant agency for the purpose of permitting the commissioner to enter into an information-sharing arrangement.

These provisions potentially affect the FLP that legislation should have sufficient regard to the institution of Parliament by permitting a regulation to be made about any of the above matters without the same level of Parliamentary scrutiny as a Bill. However, any infringement of this FLP is justified as the matters that may be subject to regulation in the Bill are standard provisions that are subject to delegation elsewhere in the Queensland Statute Book. Moreover, any regulation made under the proposed legislation will still be subject to a potential disallowance motion and scrutiny of the relevant Parliamentary Committee, which will ensure a level of Parliamentary oversight is maintained.

## **Consultation**

Consultation with other small business commissioners, including Victoria, New South Wales, South Australia, and Western Australia, as well as with the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), was undertaken in March and April 2021 to help inform the permanent commissioner model.

Consultation with a range of peak industry bodies occurred from late May to mid-June 2021 and has helped inform the permanent commissioner model. Key industry stakeholders contacted in relation to the proposed role and functions of a permanent commissioner included:

- Chamber of Commerce and Industry Queensland;
- Australian Industry Group;
- Queensland Hotels Association;
- National Retailers Association Limited;
- Franchise Council of Australia;
- Shopping Centre Council of Australia;
- Property Council of Australia;
- Restaurant and Catering Industry Association;
- the Pharmacy Guild of Australia Queensland Branch;
- Master Builders Australia;

- Master Grocers Australia;
- Queensland Social Enterprise Council;
- Queensland Law Society;
- Institute of Public Accountants Limited;
- Australian Retailers Association;
- Chartered Accountants Australia and New Zealand; and
- Certified Practising Accountants Australia.

Key policy issues raised with stakeholders have included the functions and role of the Commissioner, the scope of disputes within the commissioner's remit, mediation fees and the definition of small business. Other issues contemplated during consultation included permanent commissioner's powers and the importance of the permanent commissioner's independence.

Stakeholders were unanimous in their support for the permanent establishment of the commissioner, and were generally supportive of the elements of the proposed approach, noting comments in the following areas:

- **Functions:** Stakeholders were supportive of the continuation of existing functions under the temporary Commissioner through to the permanent Commissioner noting that functions should complement existing government services and avoid duplication.
- **Scope of disputes:** Feedback was varied around the scope of disputes for which the permanent commissioner should provide mediation. All stakeholders have supported the permanent commissioner continuing to administer a mediation process for retail shop leasing disputes. Stakeholders were also supportive of the permanent commissioner administering mediation for franchising and commercial leasing disputes on an opt-in basis.
- **Mediation fees:** Stakeholders were broadly supportive of a mediation fee with the majority suggesting a low fee of 'a couple of hundred of dollars' with the power for the Commissioner to waive fees in instances of financial hardship or where appropriate. Stakeholders have also advised that charging a fee for mediation services is a useful and strategic tool in preventing vexatious claims or disputes that could be resolved through case management.
- **Small Business definition:** Stakeholders provided mixed views on whether or how small business should be defined in this legislation, with views ranging from no small business definition to the inclusion of criteria that may include a maximum turnover or maximum number of Full-Time Equivalents (FTEs). Concern was expressed by some stakeholders that an overly restrictive definition may unnecessarily exclude small businesses.

Targeted consultation with key stakeholders on a confidential exposure draft of the Bill was undertaken in September 2021. Feedback received from stakeholders indicated broad support for the Bill and its objectives.

The Minister for Employment and Small Business and Minister for Training and Skills Development hosted 17 Small Business Roadshows across Queensland in from February to March 2021, and an online survey was conducted to hear from small businesses about the rollout of the Queensland Government's \$140 million Big Plans for Small Business package including the permanent commissioner. Feedback from the Roadshows strongly highlighted the importance of one-to-one advice and support that is simple to access, tailored to their

specific business needs and provided by a trusted source with knowledge of their local operating environment.

These recent consultation processes are further supported by consultation undertaken in September 2020 and November 2019 on a potential commissioner role in Queensland, including dispute resolution services. The stakeholders consulted supported the temporary commissioner and the commitment to appoint a permanent commissioner. The broad range of consultation undertaken has informed the proposed commissioner model as set out in the Bill.

The Office of Best Practice Regulation (OBPR), within Queensland Treasury, was consulted on the establishment a permanent commissioner through a preliminary impact assessment. OBPR provided advice that the proposal to establish the permanent commissioner is unlikely to result in significant adverse impacts, and no further regulatory impact analysis is required under the *Queensland Government Guide to Better Regulation*.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland and is not uniform with or complementary to the legislation of the Commonwealth or another state. However, other jurisdictions, including New South Wales, Victoria, South Australia, and Western Australia have legislation to support the small business sector through similar statutory appointments and bodies.

Legislative approaches taken by other State jurisdictions have been considered, including through consultation with other jurisdictions, in preparing the Bill.

# Notes on provisions

## Part 1 Preliminary

*Clause 1* provides that, when enacted, the short title of the Act will be the *Small Business Commissioner Act 2021* (the Act).

*Clause 2* provides that the Act commences on 1 March 2022.

*Clause 3* provides the main objects of the Act are to establish the office of small business commissioner:

- To enhance the operating environment for small businesses in Queensland; and
- To reduce the time and costs associated with resolving disputes involving small businesses.

*Clause 4* provides that the dictionary in schedule 1 defines particular words used in the Act.

## Part 2 Small business commissioner

### Division 1 Establishment

*Clause 5* provides that there is to be a small business commissioner.

*Clause 6* provides for the functions of the commissioner, which are:

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

*Clause 7* provides that the commissioner has all the powers necessary for performing the commissioner's functions in clause 6 of the Act or conferred on the commissioner under another Act.

*Clause 8* provides the commissioner may delegate their powers under this Act or another Act to an appropriately qualified public service officer.

## **Division 2 Appointment**

*Clause 9* provides the commissioner is to be appointed by the Governor in Council on the recommendation of the Minister. The clause further provides that the Minister may recommend a person only if the person is appropriately qualified to perform the functions of the commissioner.

*Clause 10* provides that the commissioner holds the office for a term of not more than 5 years, as determined by the commissioner's instrument of appointment. It further provides a person can be reappointed as commissioner only once for a further term of not more than 5 years.

*Clause 11* provides the commissioner is to be paid the remuneration, allowances and holds the office on conditions decided by the Governor in Council. It further provides that the commissioner is appointed under this Act and not the *Public Service Act 2008*.

*Clause 12* provides that if a person who is a public service officer is appointed as commissioner, that person keeps all rights accrued or accruing as a public service officer as if their service as commissioner was a continuation of service as a public service officer. The clause also provides that at the end of the person's term as commissioner, their service as commissioner is to be taken to be service of a like nature in the public service for the purpose of deciding the person's rights as a public service officer.

*Clause 13* provides that the office of commissioner becomes vacant if the commissioner resigns or is removed by the Governor in Council.

*Clause 14* provides that a commissioner may resign by giving the Minister a signed letter of resignation. The clause further provides that the resignation takes effect when the Minister receives the letter, or on the day stated in the letter of resignation if a later day.

*Clause 15* provides that the Governor in Council may remove a person from office as commissioner if the person: is guilty of misconduct; is incapable of performing the functions of the commissioner; or has neglected their duties or performed their duties incompetently. This clause further provides that it does not otherwise limit section 25 of the *Acts Interpretation Act 1954*, which, among other provisions, provides that the power to appoint a person includes the power to suspend a person appointed to an office and to reappoint a person.

*Clause 16* provides that the Minister may appoint a person to act as commissioner during a vacancy in the office, or for a period when the commissioner is absent from duty, or cannot, for another reason, perform the functions of office.

## **Division 3 Role of Minister and reporting requirements**

*Clause 17* provides the Minister may give the commissioner a written direction about a matter relevant to the performance of the commissioner's functions. It further provides that the commissioner must comply with a direction given by the Minister and include in its annual report details of directions given during the financial year to which the report relates, and any actions taken by the commissioner as a result of the direction.

*Clause 18* provides that the Minister may give the commissioner a statement of expectations about the Minister's expectations for performance of the commissioner's functions, which the commissioner must have regard to when performing their functions. The clause further provides that the statement of expectations may state a period for which the statement applies and provide for the nature and scope of the commissioner's activities for a particular period.

*Clause 19* provides that the commissioner must keep the Minister reasonably informed about the functions performed and activities carried out by the commissioner. It further provides the commissioner must comply with the Minister's requests to give the Minister stated information about functions or activities carried out by the commissioner.

*Clause 20* provides that the commissioner must prepare and give to the Minister, within three months after the end of each financial year, an annual report on the functions performed, and activities carried out, by the commissioner during that period. The clause also provides that the Minister must table a copy of the report in the Legislative Assembly within 14 days after receiving it.

### **Part 3 Mediation**

*Clause 21* provides that parties to a small business dispute may apply for mediation of the dispute under this part. A small business dispute is defined in the Bill as a small business lease dispute or a small business franchise dispute.

The clause further provides that an application for mediation may only be made under this part if: the parties to the dispute have attempted to resolve the dispute by seeking informal assistance from the commissioner; the dispute is within a mediator's jurisdiction to mediate; any requirements prescribed in regulation have been complied with by the parties to the dispute; all parties agree to mediate the dispute under this part; and, if the matter is a small business franchise dispute, the dispute has been referred to the commissioner by the Australian Small Business and Family Enterprise Ombudsman.

*Clause 22* provides that an application for mediation must be in the approved form, signed by each party to the dispute and accompanied by the fee prescribed by regulation.

*Clause 23* provides that as soon as practicable after the application is made, the commissioner must either accept or dismiss the application.

Subclause (2) provides the commissioner may dismiss the application if: it does not relate to a small business dispute; is frivolous or vexatious; has not been made in good faith; or has not otherwise been properly made.

Subclause (3) provides that in deciding whether or not a dispute is a small business dispute under subclause (2)(a), the commissioner may have regard to the number of employees each party employs and the annual turnover of each party to a dispute.

Subclause (4) provides that if the commissioner decides to dismiss the application, the commissioner must give each party an information notice for the decision. Subclause (7) provides that an information notice is a written notice that states the decision, the reasons for the decision, how the party may apply for review of the decision, and the time limits the review has to be commenced within. Subclause (5) provides that if the commissioner accepts the

application, the commissioner must nominate a mediator and give written notice to the parties to the dispute detailing the mediator nominated to mediate the dispute and the time, date and place of the mediation. Subclause (6) provides that date of the mediation conference must be at least 7 days after the notice is given.

*Clause 24* provides that a party may apply to the commissioner to be joined as a party to a small business dispute by making an application in the approved form and paying the prescribed fee. The commissioner may only join a party with the consent of the other parties to the dispute.

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

*Clause 26* provides that a mediation conference is not open to the public.

*Clause 27* provides that a party to a small business dispute cannot be compelled to attend a mediation conference.

*Clause 28* provides that a mediator may allow a person to take part in the mediation conference if the mediator is satisfied the person has an interest in the resolution of the dispute and each of the other parties to the dispute consents. However, this clause further provides that if the mediator allows a person to take part in the mediation conference, that person does not become a party to the dispute.

*Clause 29* provides that if the parties to a dispute reach an agreement at mediation, the agreement must be in writing and signed by the parties.

*Clause 30* provides that the mediator must, as soon as practicable, give each party to the dispute a copy of any mediation agreement entered into or a notice of the outcome of the mediation. It also provides that the mediator must notify the commissioner of the outcome of the mediation.

*Clause 31* provides that that it is an offence for a person to make an official record of anything said at a mediation conference, with the maximum penalty for committing the offence 40 penalty units. This clause further provides that this offence does not apply to a mediator who makes notes during the mediation conference that the mediator considers appropriate.

*Clause 32* provides that evidence of anything said at a mediation conference for a small business dispute is not admissible before a court or tribunal.

*Clause 33* provides that a party to a small business dispute may, by written notice to the commissioner, withdraw the application any time before or after a mediator has started mediating the dispute. If the commissioner has nominated a mediator at the time the withdrawal is given, the commissioner must advise the mediator and all other parties to the dispute of the withdrawal as soon as practicable after receiving the notice.

*Clause 34* provides that once the application for mediation under clause 22 is given to the commissioner, the dispute must not be referred to arbitration or heard by a court or tribunal.

Subclause (2) provides that subclause (1) does not apply if: the application is withdrawn; a proceeding about the matter was started in a court or tribunal before the application was made;

an application for an injunction about the matter in dispute is made to a court; the mediator refuses to mediate the dispute because the dispute is not within the jurisdiction of the mediator; or the matter was unable to be resolved at mediation and the mediator has given a notice to the parties.

Subclause (3) provides that for subclause (2)(b), a proceeding relating to a lease is taken to have started before a court if the lessee has served the lessee a notice under the *Property Law Act 1974*, section 124; or given the lessee a notice under the *Property Law Act 1974*, section 131.

*Clause 35* provides that a party to a small business dispute who enters into a mediation agreement may apply to a court to enforce the agreement. The clause further provides the court may make any order it considers appropriate in the circumstance relating to enforcing the mediation agreement.

## **Part 4 Miscellaneous**

*Clause 36* provides that this section applies to a party to a small business dispute if they are given an information notice for a decision by the commissioner to dismiss the application in clause 23. The clause further provides that the party may apply to the chief executive for a review of the decision.

Subclause (3) provides that the application must be: made within 28 days of the information notice being given; in writing; and state the grounds on which the review is sought.

Subclause (4) provides that the chief executive must, within 28 days of receiving the application, either confirm the decision or substitute another decision for the commissioner's decision. Subclause (5) provides the chief executive must give a statement of reasons for their decision to each party to the dispute regarding the outcome of their review.

*Clause 37* provide that the commissioner may enter into an information-sharing arrangement with a relevant agency for the purpose of sharing information held or able to be accessed by the commissioner or relevant agency that assists the commissioner or relevant agency perform their functions. The clause further provides that the commissioner and the relevant agency can ask for an receive information and disclose information to the other party. A relevant agency for this clause includes a chief executive of a department, a local government, the equivalent of a commissioner in another State or the Commonwealth, an agency of the Commonwealth or State prescribed by regulation or another entity involved in administering matters relevant to small businesses prescribed by regulation.

*Clause 38* provides two offences for disclosing confidential information obtained under the Act.

Subclause (1) and (2) provide that a person must not disclose confidential information that the person obtains performing a function under the Act, or they will have committed an offence with a maximum penalty of 50 penalty units. These subclauses further provide that this offence does not apply if the disclosure is: made in the performance of a function under this Act; with the consent of the person to whom the confidential information relates; or is required or permitted by law.

Subclause (3) provides that a party to a small business dispute or another person who obtains confidential information under or as a result of this Act (i.e., in mediation), must not disclose the information unless the disclosure is: to a professional advisor or financier who agrees to keep the information confidential; with the consent of the person to whom the confidential information relates; or the disclosure is required or permitted by law. A maximum penalty of 20 penalty units is provided.

Subclause (4) provides these offences do not relate to mediators, who are subject to a separate offence for disclosing confidential information under section 113 of the RSL Act.

Subclause (5) provides the definition of confidential information for this offence and includes any information that could identify an individual, information about a person's current financial position or financial background or information that would be likely to damage the commercial activities of a person to whom the information relates.

*Clause 39* provides that the Minister must review the Act as soon as practicable after the day that is 5 years from the day the Act commenced and must table a report of the review in the Legislative Assembly.

*Clause 40* provides that the commissioner may approve forms for use under this Act.

*Clause 41* provides that the Governor in Council may make regulations under this Act about any of the following:

- the fees payable under this Act; and
- the obligations of parties to a small business dispute in relation to the mediation process; and
- the practices and procedures of the mediation process; and
- provide for a maximum penalty of not more than 20 penalty units for a contravention of the regulation.

## **Part 5 Transitional provisions**

*Clause 42* provides a transitional provision to continue the appointment of the existing small business commissioner (temporary commissioner) appointed under part 6 of the COVID-19 ER Act if, on commencement of this Act, a commissioner has not been appointed under part 2, division 2 of this Act.

Subclause (3) provides that the temporary commissioner is to be paid the remuneration and allowances and continues to be appointed on the same conditions of appointment that applied in relation to the person's appointment before the repeal of part 6 of the COVID-19 ER Act.

Subclause (4) provides that if the temporary commissioner's appointment is continued under this provision, their appointment ends at the start of the term of the commissioner first appointed under this Act after commencement.

Subclause (5) provides that if the temporary commissioner's appointment is continued under this section, it is to be considered their previous appointment for the purpose of determining how many times their reappointment in clause 10.

*Clause 43* provides that if a small business lease dispute is an affected lease dispute under the Leases Regulation (defined in section 5 of the Lease Regulation), the Leases Regulation applies in relation to that dispute and not this Act. This ensures that the National Code principles in part 2 of the Leases Regulation will continue to apply to the dispute resolution process of an affected lease dispute undertaken in part 3 of the Leases Regulation.

*Clause 44* provides that if a party to a small business tenancy dispute other than an affected lease dispute had given a dispute notice to the temporary small business commissioner, the Leases Regulation will continue to apply to that dispute if on commencement: the parties have not entered into a settlement agreement for the dispute; for a proceeding in QCAT relating to the dispute had not been withdrawn, dismissed, struck out or otherwise disposed of by QCAT; or for a proceeding in a court relating to the dispute, the proceeding had not been withdrawn, dismissed, struck out or disposed of by the court. The definitions for the purpose of this clause are contained in subclause (3).

## **Part 6 Amendment of Acts**

### **Division 1 Amendment of this Act**

*Clause 45* provides that this division amends this Act.

*Clause 46* amends the long title of this Act.

### **Division 2 Amendment of the COVID-19 Emergency Response Act 2020**

*Clause 47* provides that this division amends the COVID-19 ER Act.

*Clause 48* omits part 6 of the COVID-19 ER Act.

*Clause 49* inserts a new part 9, division 3 into the COVID-19 ER Act. This division contains a new section 27 of the COVID-19 ER Act, which provides on commencement, the commissioner under this Act has the function of administering the dispute resolution process prescribed by regulation under section 23(1)(g) in relation to a small business tenancy dispute.

*Clause 50* amends schedule 1 (Dictionary) of the COVID-19 ER Act to omit the definition of commissioner.

### **Division 3 Amendment of the Retail Shop Leases Act 1994**

*Clause 51* provides that this division amends the RSL Act.

*Clause 52* amends section 3 of the RSL Act (Object of Act) to replace the words ‘The object’ with the ‘The main object’. This change is necessary to reflect that the RSL Act is broadened by clause 65, to extend the jurisdiction of mediators appointed under the RSL Act to allow them to mediate small business disputes under this Act.

*Clause 53* amends section 4 of the RSL Act (How object is to be achieved) to replace references to ‘object’ to ‘main object’ to reflect the broadening of the RSL Act by clause 65.

*Clause 54* amends section 55 of the RSL Act (Lodgement of retail tenancy disputes) to replace references to ‘chief executive’ with ‘commissioner’. The equivalent amendments to other sections of the RSL Act in further clauses of this Act reflects that the commissioner will assume

all of the chief executive's functions and powers in the administration of part 8 and part 9 of the RSL Act in relation to the mediation process for retail tenancy disputes.

Clause 55 amends section 56 of the RSL Act (Chief executive to act on dispute notice) to replace references to 'chief executive' with 'commissioner'.

Clause 56 inserts a new section 56A into the RSL Act. Section 56A provides that a party may apply to the commissioner to be joined as a party to retail tenancy dispute by making an application in the approved form and paying the prescribed fee. The commissioner may only join a party with the consent of the other parties to the dispute.

Clause 57 amends section 60 of the RSL Act (Mediator may allow interested person to take part in mediation conference) to provide that a mediator may allow a person to take part in the mediation conference if the mediator is satisfied the person has an interest in the resolution of the retail tenancy dispute and each of the other parties to the dispute consents.

Clause 58 amends section 61 of the RSL Act (Mediation agreements) to omit section 61(3) which provided that the mediator must give a copy of the signed mediation agreement to the chief executive.

Clause 59 inserts a new section 61A into the RSL Act, which provides that the mediator must, as soon as practicable, give each party to the dispute a copy of any mediation agreement or a notice of the outcome of the mediation. It further provides the mediator must notify the commissioner of the outcome of the mediation.

Clause 60 amends section 63 of the RSL Act (Reference of dispute – by mediator) to replace the reference to 'chief executive' with 'commissioner'.

Clause 61 amends section 91 of the RSL Act (Withdrawal of disputes) to replace the reference to 'chief executive' with 'commissioner'.

Subclause (2) further amends section 91(3) of the RSL Act to provide that as soon as practical after receiving the notice of withdrawal of a dispute, the commissioner must notify the mediator and all other parties to the dispute of the withdrawal.

Clause 62 amends section 94(2)(e) of the RSL Act (Exclusion of other jurisdictions) to provide that the general requirement that the matter not be referred to a court or tribunal once a dispute notice is lodged does not apply if the matter was unable to be resolved at mediation.

Clause 63 amends section 95 of the RSL Act (Mediators) to replace reference to 'chief executive' with 'commissioner'. This reflects that the appointment of mediators under part 9 will be a function of the commissioner on commencement.

Clause 64 amends section 96 of the RSL Act (Mediators' function) to extend a mediator's function from resolve to resolve, by mediation under this Act or the *Small Business Commissioner Act 2021*, a retail tenancy dispute or a small business dispute.

Clause 65 amends section 97 of the RSL Act (Mediators' jurisdiction) to provide that a mediator appointed under the RSL Act has jurisdiction to mediate small business disputes.

*Clause 66* amends section 98 of the RSL Act (Resignation) to replace reference to ‘chief executive’ with ‘commissioner’. This change reflects that on commencement, a mediator will resign by giving notice to the commissioner and not the chief executive.

*Clause 67* amends section 100 of the RSL Act (Removal from office) to replace reference to ‘chief executive’ with ‘commissioner’.

*Clause 68* amends section 101 of the RSL Act (Annual Reports) to replace reference to ‘chief executive’ with ‘commissioner’.

*Clause 69* amends section 113 of the RSL Act (Mediators and former tribunal members to maintain secrecy) to define that ‘dispute resolution process’ includes a mediation process under the *Small Business Commissioner Act 2021*.

*Clause 70* amends section 114 of the RSL Act (Ordinary protection and immunity allowed) to include ‘small business dispute’. This amendment provides that mediators have immunity from prosecution in performing their function as a mediator in the mediation process for small business disputes.

*Clause 71* omits part 9, division 4 of the RSL Act. This omission specifically omits section 119 of the RSL Act (Chief executive’s responsibility). The omission of this clause is necessary as these functions will be assumed by the commissioner. This clause also results in the omission of section 116 (the register of disputes).

*Clause 72* relocates the power to delegate the Minister’s powers that was formerly in section 117 of the RSL Act to Part 10 of the Act as a new section 118. This clause also relocates the power for the chief executive to approve forms that was formerly in section 118 of the Act to Part 10 as a new section 119.

This clause also extends the form approval power to permit the commissioner to approve forms for use under part 8 of the RSL Act.

*Clause 73* inserts a new part 12, division 6 into the RSL Act. New division 6 inserts section 156 into the RSL Act and provides that if a mediator is appointed under section 95 of the RSL Act immediately before the commencement of this Act, on commencement, that person is taken to have been appointed by the commissioner under section 95 of the RSL Act and continues to hold office on the same terms and conditions that applied in relation to the person before the commencement of this Act. Division 6 also inserts a new section 157 into the RSL Act, which provides that part 8 of the RSL Act applies to a retail tenancy dispute lodged under section 55 prior to commencement. This provision is necessary to account for a small number of retail tenancy disputes that are not eligible lease disputes under the Leases Regulation.

*Clause 74* amends the Schedule (Dictionary) of the RSL Act to extend the definitions of certain defined terms in the Act to include a reference to ‘a lease the subject of a small business dispute’. It also inserts definitions of ‘commissioner’ and ‘small business dispute’. These amendments are necessary to reflect that mediators appointed under the RSL Act are mediators of the purpose of this Act. These amendments are also necessary as the commissioner is assuming the majority of the functions previously performed by the chief executive in parts 8 and 9 of the RSL Act.

## **Schedule 1 Dictionary**

Schedule 1 is the dictionary and sets out the definitions for words used in the Bill.

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