

Small Business Commissioner Regulation 2022

Explanatory notes for SL 2022 No. 46

made under the

COVID-19 Emergency Response Act 2020

Retail Shop Leases Act 1994

Small Business Commissioner Act 2022

General Outline

Short title

Small Business Commissioner Regulation 2022

Authorising law

Section 23 of the *COVID-19 Emergency Response Act 2020*

Sections 55 and 121 of the *Retail Shop Leases Act 1994*

Sections 22 and 41 of the *Small Business Commissioner Act 2022*

Policy objectives and the reasons for them

The *Small Business Commissioner Act 2022* (SBC Act) was assented to on 8 April 2022 and is to commence on 3 May 2022 and will establish a permanent Small Business Commissioner (Commissioner) in standalone legislation. The SBC Act has two main objectives; to enhance the operating environment for small businesses in Queensland; and, to reduce the time and costs associated with resolving disputes involving small businesses.

In line with this second objective, Part 3 of the SBC Act will establish a voluntary mediation process for small business lease disputes and small business franchise disputes (small business disputes) that will be administered by the Commissioner. The SBC Act will amend the mediation process in Part 8 of the *Retail Shop Leases Act 1994* (RSL Act) to provide that the Commissioner will administer the mediation process for retail tenancy disputes.

Both the SBC Act and RSL Act provide regulation-making powers that enable a regulation to be made about the fees payable for applying for mediation and the practices and procedures of the mediation process.

The primary policy objective of the *Small Business Commissioner Regulation 2022* (the subordinate legislation) is to prescribe a fee for applying for mediation under the respective provisions of the SBC Act and the RSL Act. A related objective of the subordinate legislation is to prescribe the circumstances when this fee can be waived by the Commissioner. A further

objective of the subordinate legislation is to prescribe certain practices and procedures that will apply to the mediation. This includes the process by which a party to a dispute may request to change the time and date of their mediation conference, the ability to use technology to conduct mediations if agreed to by the parties and the mediator, and for the mediation of related disputes to be mediated together on application by the parties.

A secondary objective of the subordinate legislation is to amend the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Leases Regulation) to sever its mediation process for most small business disputes, other than affected lease disputes, on commencement of the SBC Act. This amendment is necessary as presently, small business tenancy disputes, which includes retail tenancy disputes under the RSL Act and other small business lease disputes, are mediated through the process in Part 3 of the Leases Regulation. However, on commencement of the SBC Act, the mediation process for small business lease disputes and retail tenancy disputes will be dealt with through the respective mediation processes in the SBC Act and RSL Act. Without this amendment, duplicative mediations processes would exist.

Achievement of policy objectives

The subordinate legislation achieves its primary objective by establishing the *Small Business Commissioner Regulation 2022* (the SBC Regulation) and amending the *Retail Shop Leases Regulation 2016* (RSL Regulation). The subordinate legislation prescribes the following provisions in both the SBC Regulation and RSL Regulation, which will apply to the respective mediation processes for small business disputes and retail tenancy disputes:

- the process by which a party to a dispute may ask the mediator to change the time and date of the mediation conference;
- a power to allow mediators to mediate related disputes on application by the parties;
- the use of technology to conduct mediations if agreed to by the parties and the mediator;
- a fee of 350 fee units, to be paid in equal shares by the parties, for an application for mediation;
- the ability for the Commissioner to waive all or part of the mediation fee payable by a party if the Commissioner is satisfied the payment of the fee would cause, or would be likely to cause, the party financial hardship; and
- the ability for the Commissioner to waive all of part of the mediation fee for a class of parties, such as parties from an industry sector or geographical region, if the Commissioner is satisfied the waiver will promote access to mediation by the parties during the period. This may be necessary to respond to the effects of, for example, a natural disaster that affects a particular industry or region.

The subordinate legislation achieves its secondary objective, in part, by amending section 21 in the Leases Regulation. The amended section 21 prescribes that on and from the commencement of the SBC Act, the Leases Regulation no longer provides the mediation process for small business disputes for which an application may be made under the SBC Act, part 3, or retail tenancy disputes under the RSL Act. It also achieves this secondary objective by omitting section 24 of the Leases Regulation. The mediation process for affected lease disputes will continue to be contained in the Leases Regulation and administered by the Commissioner.

Consistency with policy objectives of authorising law

The subordinate legislation is consistent with the policy objectives of the authorising law.

Inconsistency with policy objectives of other legislation

The subordinate legislation is not inconsistent with the policy objective of other legislation.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives. Without prescribing the mediation fee and the practices and procedures of the mediation conferences contained in regulation, the mediation process would be limited to the process set out in the respective Acts. Accordingly, there would be no fee prescribed for mediations and no flexibility to, for example, to allow parties to request a change of date to their mediation conference.

Benefits and costs of implementation

The subordinate legislation benefits parties who apply for mediation through the Commissioner by prescribing certain practices and procedures of the mediation conference, which increases the flexibility and efficacy of mediations. In particular, permitting applicants to change the date and time of their mediation conference and permitting mediations to be held electronically ensures that parties will be able to attend mediations in circumstances they otherwise would not be able to. Moreover, allowing related disputes to be mediated at the same mediation conference ensures that the mediations have increased scope to informally resolve disputes.

The subordinate legislation will prescribe a fee of 350 fee units per mediation conference, which will be an impost for those who seek mediation through the Commissioner. However, this fee is less than the actual cost of providing the service and is slightly less than the current filing fee of the Queensland Civil and Administrative Tribunal (QCAT) for retail tenancy disputes. Should a retail tenancy dispute remain unresolved following the Commissioner's informal case management and mediation, the parties may proceed to a tribunal hearing through QCAT. A QCAT filing fee, currently \$358 to the lodging party, is still applicable. However, it is anticipated the majority of disputes will be resolved by the Commissioner and therefore not require a QCAT hearing and not incur this fee. Feedback from other Small Business Commissioners noted that a significant proportion of disputes (between 75 to 90 per cent) are resolved through case management or mediation. In addition, by providing small business with access to a low-cost mediation service, it is anticipated that small businesses will have a net benefit by avoiding the time and cost associated with commencing formal legal proceedings.

The subordinate legislation will also prescribe a power for the Commissioner to waive this fee for certain applicants in the case of financial hardship, which will ensure that this fee does not preclude parties who are unable to pay the fee from seeking mediation.

Consistency with fundamental legislative principles

Subordinate legislation should have sufficient regard to the institution of Parliament, including by only allowing the subdelegation of a power in appropriate cases and to appropriate persons and if authorised by an Act –section 4(5)(e) *Legislative Standards Act 1992*

The subordinate legislation provides the ability for the Commissioner to waive the mediation fees payable by the parties of small business disputes and retail tenancy disputes in particular circumstances, including if the applicant is suffering financial hardship. This power engages the fundamental legislative principle that subordinate legislation should have sufficient regard to the institution of Parliament by allowing the Commissioner to waive fees without oversight by Parliament.

However, any engagement of this fundamental legislative principle is justified as the waiving of fees can only be performed by the Commissioner, who is an appropriate person that must have been appointed under the SBC Act and holds office in accordance with the provisions of the SBC Act. Moreover, the subdelegation is consistent with one of the main objects of the SBC Act, which is to reduce the time and costs associated with resolving disputes involving small businesses.

Consultation

Significant consultation occurred during the development of the permanent Commissioner model, which informed both the SBC Act and the subordinate legislation.

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.

In June 2021, the Office of Best Practice Regulation (OBPR), within Queensland Treasury, was consulted on legislation to establish a permanent Commissioner model through a Preliminary Impact Assessment (PIA). The PIA included reference to the proposed fee of 350 fee units per mediation conference. OBPR advised the proposal was unlikely to result in significant adverse impacts and that no further regulatory impact analysis was required under the *Queensland Government Guide to Better Regulation*.

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