Small Business Commissioner Act 2013 No 22

[2013-22]

New South Wales

Status Information

Currency of version

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Responsible Minister

- Minister for Small Business

For full details of Ministerial responsibilities, see the Administrative Arrangements (Minns Ministry—Administration of Acts) Order 2023.

Authorisation

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New South Wales

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Small Business Commissioner Act 2013 No 22

New South Wales

An Act to create the office of Small Business Commissioner and to provide for the objectives and functions of that office; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Small Business Commissioner Act 2013*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

Commissioner means the Small Business Commissioner appointed under this Act.

function includes a power, authority or duty, and ***exercise*** a function includes perform a duty.

government agency means:

(a) a public authority constituted by or under an Act, or

(b) a NSW Government agency, or

(c) a Public Service agency within the meaning of the *Government Sector Employment Act 2013*, or

(d) a council (within the meaning of the *Local Government Act 1993*) or other local authority, or

(e) a State owned corporation.

(2) Notes included in this Act do not form part of this Act.

Part 2 Small Business Commissioner

Division 1 Appointment of Small Business Commissioner

4 Appointment of Small Business Commissioner

(1) The Governor may, on the recommendation of the Minister, appoint a Small Business Commissioner.

(2) The office of Commissioner is a statutory office and the provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to that office.

5 The Minister

The Commissioner is subject to the control and direction of the Minister in the exercise of the Commissioner's functions, except in relation to the following matters:

(a) the investigation of complaints by small businesses,

(b) the provision of advice to the Minister,

(c) referrals under section 20,

(d) the contents of any report by the Commissioner.

6 Term of office and basis on which it is held

(1) The Commissioner holds office for such term, not exceeding 5 years, as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.

(2) A person is not eligible to be appointed for more than 2 terms of office as Commissioner (whether or not consecutive terms).

(3) The office of Commissioner is a full-time office and the holder of the office is required to hold it on that basis, except to the extent permitted by the Minister.

7 Remuneration

The Commissioner is entitled to be paid:

(a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and

(b) such travelling and subsistence allowances as the Minister may from time to time determine.

8 Vacancy in office

The office of Commissioner becomes vacant if the holder:

(a) dies, or

(b) completes a term of office and is not re-appointed, or

(c) resigns the office by instrument in writing addressed to the Governor, or

(d) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or

(e) becomes a mentally incapacitated person, or

(f) is convicted in New South Wales of an offence that is punishable by imprisonment or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or

(g) is removed from office under section 9.

9 Removal from office

The Governor may, on the recommendation of the Minister, remove the Commissioner from office, but only for incompetence, incapacity or misbehaviour.

10 Filling of vacancy

If the office of Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.

11 Appointment of acting Commissioner

(1) The Minister may, from time to time, appoint a person to act in the office of the Commissioner during the illness or absence of the Commissioner or during a vacancy in the office of the Commissioner. The person, while so acting, has all the functions of the Commissioner and is taken to be the Commissioner.

(2) The Minister may, at any time, remove a person from office as acting Commissioner.

(3) An acting Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.

12 Staff

Persons may be employed in the Public Service under the *Government Sector Employment Act 2013* to enable the Commissioner to exercise his or her functions.

Note—

Section 59 of the *Government Sector Employment Act 2013* provides that the persons so employed (or whose services the Commissioner makes use of) may be referred to as officers or employees, or members of staff, of the Commissioner. Section 47A of the *Constitution Act 1902* precludes the Commissioner from employing staff.

Division 2 Objectives and functions of Commissioner

13 Objectives of Commissioner

The objectives of the Commissioner are as follows:

(a) to deal with issues concerning the small business sector in a neutral and independent manner,

(b) to provide a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and about their dealings with government agencies,

(c) to encourage government agencies and larger businesses to enter into productive working relationships with small businesses,

(d) to facilitate the resolution of disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution,

(e) to facilitate and encourage the fair treatment of small businesses,

(f) to promote a fair operating environment in which small businesses can flourish,

(g) to identify and support measures to reduce the administrative burden for small businesses.

14 General functions of Commissioner

(1) The Commissioner has, for the purposes of giving effect to the Commissioner's objectives, the following functions:

(a) to receive and deal with, subject to section 15, complaints made by or on behalf of small businesses (either on an individual or collective basis) regarding their dealings with other businesses and government agencies,

(b) to investigate complaints that are dealt with by the Commissioner or to refer any such complaint to such other person or body as the Commissioner considers appropriate,

(c) to provide low cost alternative dispute resolution services for small businesses,

(d) to make representations or take any action on behalf of small businesses (including making applications to be joined as a party in proceedings involving a small business) either at the Commissioner's own initiative or at the request of a small business,

(e) to conduct investigations into the way in which small businesses are treated by other businesses or government agencies,

(f) to facilitate the development of codes of practice by industry that deal with issues concerning the small business sector,

(g) to advise the Minister, either at the Commissioner's own initiative or at the request of the Minister, on any matter affecting small businesses or that is relevant to the Commissioner's objectives or functions.

(2) Without limiting subsection (1), the Commissioner may do any other act or thing that is necessary or convenient for giving effect to the Commissioner's objectives.

(3) The Commissioner has such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.

15 Decision to deal with complaint

(1) The Commissioner may deal with a complaint made by or on behalf of a small business only if the Commissioner is satisfied that:

(a) the subject-matter of the complaint relates to the unfair treatment of, or an unfair practice involving, the small business, or

(b) the complaint relates to an unfair contract to which the small business is a party, or

(c) it is in the public interest to deal with the complaint.

(2) Without limiting subsection (1), the Commissioner may decline to deal with a complaint if the Commissioner is of the opinion that the complaint is vexatious or trivial.

(3) The Commissioner may make preliminary inquiries for the purposes of deciding how to deal with a complaint and may request further information from the complainant.

(4) The Commissioner must give notice to the complainant of the Commissioner's decision on whether to deal with the complaint and (if the Commissioner decides to deal with the complaint) how the complaint is to be dealt with.

16 Requirement to provide information

(1) The Commissioner may, by notice in writing, require any person or government agency to provide such information relating to the person's or agency's dealings with small businesses as the Commissioner reasonably requires for the purposes of any investigation by the Commissioner under this Act.

(2) Any such notice may specify the time within which the information is required to be provided.

(3) A requirement under this section to provide information relating to a person's or agency's dealings with small businesses may include a requirement to answer questions relating to those dealings.

(4) A government agency is not required to provide any information under this section if there is an overriding public interest against the disclosure of the information for the purposes of the *Government Information (Public Access) Act 2009* or if access to the information would otherwise be denied under that Act.

17 Alternative dispute resolution required before proceedings can be taken

(1) If an application is made to the Commissioner for assistance in resolving a complaint or other dispute involving a small business and the Commissioner decides to deal with the complaint or dispute, the matter to which the complaint relates or the dispute may not be the subject of any proceedings before any court unless and until the Commissioner has certified in writing that alternative dispute resolution services provided by the Commissioner under this Act have failed to resolve the matter or dispute.

(2) The Commissioner is to certify that alternative dispute resolution services have failed to resolve a complaint or other dispute involving a small business if the Commissioner is satisfied that any one or more of the parties involved in the matter or dispute has refused to take part in, or has withdrawn from, alternative dispute resolution services provided by the Commissioner.

(3) This section does not apply to or in respect of the following:

(a) proceedings before a court for an order in the nature of an injunction,

(b) proceedings for an offence,

(c) proceedings in relation to an industrial matter before the Industrial Relations Commission,

(d) a retail tenancy dispute within the meaning of the *Retail Leases Act 1994*.

(4) This section does not operate to affect the validity of any decision made by a court.

18 Compulsory attendance at mediation and production of documents

(1) For the purposes of mediating a complaint or other dispute involving a small business, the Commissioner may, by notice in writing, require any person:

(a) to attend a meeting at a time and place specified in the notice, or

(b) to produce, at a time and place specified in the notice, to the Commissioner any document or thing described in the notice that is in the custody or under the control of the person and that, in the opinion of the Commissioner, would benefit

the resolution of the complaint or dispute.

(2) A person must not:

(a) without reasonable excuse, refuse or fail to do anything required of the person by a notice under subsection (1), or

(b) in response to such a notice, make a statement that the person knows is false or misleading, or

(c) alter, suppress or destroy any document or thing that the person is required by such a notice to produce.

Maximum penalty on summary conviction: 100 penalty units in the case of a corporation or 50 penalty units in the case of an individual.

(3) A government agency is not required to produce any document under this section if there is an overriding public interest against the disclosure of the document for the purposes of the *Government Information (Public Access) Act 2009* or if access to the document would otherwise be denied under that Act.

19 Commissioner may certify outcome of dispute resolution assistance

(1) The Commissioner may certify in writing the outcome of any application made to the Commissioner for assistance in resolving a complaint or other dispute involving a small business.

(2) Any such certificate is admissible as evidence in any civil proceedings of the outcome of the application.

(3) Any statement or admission made in connection with any alternative dispute resolution services provided by the Commissioner under this Act is not admissible in any legal proceedings.

(4) A reference in this section:

(a) to a complaint or other dispute involving a small business does not include a reference to a retail tenancy dispute within the meaning of the *Retail Leases Act 1994*, or

(b) to the outcome of an application for assistance in resolving a complaint or other dispute involving a small business is a reference to whether or not the application was resolved and to whether any agreement was reached by the parties.

20 Referral of certain findings

The Commissioner may refer to the Secretary of the Department of Finance, Services and Innovation any finding by the Commissioner that a person or body has persistently engaged in anti-competitive practices that are in contravention of any law and that

adversely affect the small business sector.

21 Exchange of information

(1) The Commissioner may enter into an arrangement (an ***information sharing arrangement***) with a relevant agency for the purposes of sharing or exchanging any information that is held by the Commissioner or the agency.

(2) The information to which an information sharing arrangement may relate is limited to information that assists in the exercise of the functions of the Commissioner or of the relevant agency concerned.

(3) Under an information sharing arrangement, the Commissioner and the relevant agency are, despite any other Act or law, authorised:

(a) to request and receive information that is held by the other party to the arrangement, and

(b) to disclose that information to the other party.

(4) In this section:

relevant agency means any of the following:

(a) a government agency,

(b) the holder of a statutory office,

(c) any other person or body prescribed by the regulations.

22 General procedures of Commissioner

The Commissioner:

(a) is to act in an informal manner (including by avoiding conducting formal hearings) as far as possible, and

(b) is to act according to the substantial merits of the case without undue regard to technicalities, and

(c) may determine the procedures to be followed in exercising the Commissioner's functions under this Act, including the procedures to be followed in any investigation conducted by the Commissioner.

23 Expert assistance

For the purposes of the exercise of any of the Commissioner's functions, the Commissioner may engage the services of any person for the purpose of getting expert assistance.

24 Delegation

The Commissioner may delegate the exercise of any function of the Commissioner (other than this power of delegation) to:

(a) any member of staff of the Commissioner, or

(b) any person, or any class of persons, authorised for the purposes of this section by the regulations.

Division 3 Reports by Commissioner

25 Annual report to Parliament on Commissioner's work and activities

The Commissioner is, as soon as practicable after 31 December in each year, required to prepare a report on the Commissioner's work and activities for the 12 months ending on that 31 December and provide a copy of the report to the Presiding Officer of each House of Parliament.

26 Special reports to Parliament

(1) The Commissioner may, at any time, make a special report on any matter relating to the functions of the Commissioner and provide a copy of the report to the Presiding Officer of each House of Parliament.

(2) A report under this section may, without limitation, include recommendations in relation to such matters as the Commissioner considers relevant to the small business sector.

(3) The Commissioner may include in a report under this section a recommendation that the report be made public immediately.

27 Furnishing of draft reports to Minister and others

(1) The Commissioner must:

(a) provide the Minister with a draft of each report that is to be provided to the Presiding Officers under this Division, and

(b) give the Minister a reasonable opportunity to make submissions, either orally or in writing, in relation to the draft report.

(2) The Commissioner must not make a report to the Presiding Officers under this Division that contains any matter that is, either expressly or impliedly, critical of a government agency or any person unless the Commissioner has given the agency or person concerned the opportunity to make submissions, either orally or in writing, in relation to the matter.

(3) The Commissioner is not required to amend a report in light of any submissions made

by the Minister, a government agency or other person but must, before finalising a report, consider any such submissions before the report is provided to the Presiding Officers.

(4) If a report contains matter that is critical of a government agency or person and the agency or person concerned has made objections in relation to that matter, the report must indicate that any such objection has been made.

28 Provisions relating to reports to Parliament

(1) A copy of a report provided to the Presiding Officer of a House of Parliament under this Division must be laid before that House on the next sitting day of that House after it is received by the Presiding Officer.

(2) If a report includes a recommendation by the Commissioner that the report be made public immediately, the Presiding Officer of a House of Parliament may make it public whether or not that House is in session and whether or not the report has been laid before that House.

(3) A report that is made public by the Presiding Officer of a House of Parliament before it is laid before that House attracts the same privileges and immunities as it would if it had been laid before that House.

(4) A Presiding Officer need not inquire whether all or any conditions precedent have been satisfied as regards a report purporting to have been made or furnished in accordance with this Division.

(5) In this Division, a reference to a Presiding Officer of a House of Parliament is a reference to the President of the Legislative Council or the Speaker of the Legislative Assembly. If there is a vacancy in the office of President, the reference to the President is taken to be a reference to the Clerk of the Legislative Council and, if there is a vacancy in the office of Speaker, the reference to the Speaker is taken to be a reference to the Clerk of the Legislative Assembly.

Part 3 Miscellaneous

29 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

30 Injunctions relating to investigations by Commissioner

(1) The Supreme Court may, on application by the Commissioner, grant an injunction in such terms as the Court determines to be appropriate if satisfied that a person has engaged, or is proposing to engage, in conduct that constituted, is constituting, or would constitute interfering with an investigation conducted by the Commissioner.

(2) An injunction may be granted under this section as an interim injunction (without an undertaking being required as to damages or costs) or as a permanent injunction.

31 Personal liability of Commissioner and others

A matter or thing done (or omitted to be done) by the Commissioner, a member of staff of the Commissioner or a person acting under the direction of the Commissioner does not, if the matter or thing was done (or omitted to be done) in good faith for the purpose of exercising a function under this or any other Act, subject the Commissioner, the member of staff or the person so acting personally to any action, liability, claim or demand.

32 Regulations

(1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In particular, the regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.

(3) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(4) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

33

34 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 (Repealed)