



New South Wales

Small Business Commissioner Bill 2012

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to create the office of Small Business Commissioner and to specify the objectives and functions of that office. Among the Commissioner's objectives will be to deal with issues concerning the small business sector in a neutral and independent manner and to provide a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and their dealings with government agencies. The Commissioner's functions include the following:

- (a) investigating complaints made by or on behalf of small businesses,
- (b) providing low cost alternative dispute resolution services,
- (c) making representations or taking action on behalf of small businesses,
- (d) requiring any person or government agency to provide such information (or answers to questions) relating to the person's or agency's dealings with small businesses as the Commissioner reasonably requires for the purposes of an investigation under the proposed Act.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 defines certain words and expressions used in the proposed Act.

Part 2 Small Business Commissioner

Division 1 Appointment of Small Business Commissioner

Clause 4 provides for the appointment of a Small Business Commissioner by the Governor on the recommendation of the Minister.

Clause 5 provides that the Commissioner is subject to the control and direction of the Minister in the exercise of the Commissioner's functions, except in relation to certain matters (including the Commissioner's reporting functions).

Clause 6 specifies the maximum term of office of the Commissioner (5 years) and provides that the office is a full-time one.

Clause 7 provides for the remuneration of the Commissioner.

Clause 8 specifies when the office of Commissioner becomes vacant.

Clause 9 provides that the Governor may, on the recommendation of the Minister, remove the Commissioner from office for incompetence, incapacity or misbehaviour.

Clause 10 provides for the filling of any vacancy in the office of Commissioner.

Clause 11 provides for the appointment of an acting Commissioner.

Clause 12 provides for the appointment of staff of the Commissioner.

Division 2 Objectives and functions of Commissioner

Clause 13 specifies the objectives of the Commissioner, which include dealing with issues concerning the small business sector in a neutral and independent manner, providing a central point of contact for small businesses to make certain complaints, encouraging government agencies and larger businesses to enter into productive working relationships with small businesses, facilitating the resolution of disputes involving small businesses, facilitating and encouraging the fair treatment of small businesses, promoting a fair operating environment in which small businesses can flourish and identifying and supporting measures to reduce the administrative burden for small businesses.

Clause 14 specifies the general functions of the Commissioner, which include receiving and dealing with complaints made by or on behalf of small businesses,

investigating complaints, providing low cost alternative dispute resolution services for small businesses and making representations or taking action on behalf of small businesses, whether at the Commissioner's own initiative or at the request of a small business.

Clause 15 provides that the Commissioner may only deal with a complaint made by or on behalf of a small business if satisfied that the subject-matter of the complaint relates to the unfair treatment of, or an unfair practice involving, the small business or that it is in the public interest to deal with the complaint.

Clause 16 authorises the Commissioner to require any person or government agency to provide information relating to the person's or agency's dealings with small businesses that the Commissioner reasonably requires for the purposes of any investigation by the Commissioner under the proposed Act.

Clause 17 provides for the Commissioner to certify the outcome of any application made to the Commissioner for assistance in resolving a complaint or other dispute involving a small business.

Clause 18 provides that, if the Commissioner makes a finding 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, the Commissioner may refer the finding to the Director-General of the Department of Finance and Services.

Clause 19 provides for the Commissioner to enter into information sharing arrangements with government agencies, holders of statutory offices or certain other persons or bodies for the purposes of sharing or exchanging any information that is held by the Commissioner or the agency, office holder or other person or body.

Clause 20 provides that the Commissioner is to act in an informal manner as far as possible and according to the substantial merits of the case without undue regard to technicalities. The Commissioner may determine the procedures to be followed in exercising the Commissioner's functions under the proposed Act.

Clause 21 provides that the Commissioner may engage the services of any person for the purpose of getting expert assistance.

Clause 22 provides for the Commissioner to delegate the exercise of any function of the Commissioner to any member of staff of the Commissioner or any person authorised by the regulations.

Division 3 Reports by Commissioner

Clause 23 requires the Commissioner to prepare an annual report to Parliament on the Commissioner's work and activities.

Clause 24 provides for the preparation of a special report to Parliament on any matter relating to the functions of the Commissioner.

Clause 25 requires the Commissioner, before furnishing a report to Parliament, to provide a draft report to the Minister and any government agency or person criticised in the report and to consider any submissions that are made by the Minister or the government agency or person concerned.

Clause 26 specifies the procedure for reports to Parliament.

Part 3 Miscellaneous

Clause 27 provides for the proposed Act to bind the Crown.

Clause 28 provides for the grant of injunctions to stop interference with any investigation conducted by the Commissioner.

Clause 29 provides that the Commissioner, a member of the Commissioner's staff or a person acting under the direction of the Commissioner is not personally liable for acts done in good faith for the purpose of exercising a function under the proposed Act or any other Act.

Clause 30 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 31 repeals the *Small Business Development Corporation Act 1984*.

Clause 32 provides for the review of the proposed Act in 5 years from the date of assent to the proposed Act.

Schedule 1 Amendment of Acts

Schedule 1.1 provides for information relating to complaint handling, dispute resolution or the investigative and reporting functions of the office of Small Business Commissioner to be excluded information for the purposes of the *Government Information (Public Access) Act 2009*.

Schedule 1.2 includes the Small Business Commissioner in the list of public offices to which the *Statutory and Other Offices Remuneration Act 1975* applies.



New South Wales

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New South Wales

Small Business Commissioner Bill 2012

No. , 2012

A Bill for

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.

The Legislature of New South Wales enacts: 1

Part 1 Preliminary 2

1 Name of Act 3

This Act is the *Small Business Commissioner Act 2012*. 4

2 Commencement 5

This Act commences on a day or days to be appointed by proclamation. 6

3 Definitions 7

(1) In this Act: 8

Commissioner means the Small Business Commissioner appointed under this Act. 9
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function includes a power, authority or duty, and **exercise** a function includes perform a duty. 11
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government agency means: 13

(a) a public authority constituted by or under an Act, or 14

(b) a NSW Government agency, or 15

(c) a Division of the Government Service, or 16

(d) a council (within the meaning of the *Local Government Act 1993*) or other local authority, or 17
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(e) a State owned corporation. 19

(2) Notes included in this Act do not form part of this Act. 20

Part 2	Small Business Commissioner	1
Division 1	Appointment of Small Business Commissioner	2
4	Appointment of Small Business Commissioner	3
(1)	The Governor may, on the recommendation of the Minister, appoint a Small Business Commissioner.	4 5
(2)	Chapter 1A of the <i>Public Sector Employment and Management Act 2002</i> does not apply to or in respect of the appointment of the Commissioner.	6 7 8
5	The Minister	9
	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:	10 11 12
(a)	the investigation of complaints by small businesses,	13
(b)	the provision of advice to the Minister,	14
(c)	referrals under section 18,	15
(d)	the contents of any report by the Commissioner.	16
6	Term of office and basis on which it is held	17
(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.	18 19 20
(2)	A person is not eligible to be appointed for more than 2 terms of office as Commissioner (whether or not consecutive terms).	21 22
(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.	23 24 25
7	Remuneration	26
	The Commissioner is entitled to be paid:	27
(a)	remuneration in accordance with the <i>Statutory and Other Offices Remuneration Act 1975</i> , and	28 29
(b)	such travelling and subsistence allowances as the Minister may from time to time determine.	30 31

8 Vacancy in office	1
The office of Commissioner becomes vacant if the holder:	2
(a) dies, or	3
(b) completes a term of office and is not re-appointed, or	4
(c) resigns the office by instrument in writing addressed to the Governor, or	5 6
(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	7 8 9 10
(e) becomes a mentally incapacitated person, or	11
(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	12 13 14 15
(g) is removed from office under section 9.	16
9 Removal from office	17
The Governor may, on the recommendation of the Minister, remove the Commissioner from office, but only for incompetence, incapacity or misbehaviour.	18 19 20
10 Filling of vacancy	21
If the office of Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.	22 23
11 Appointment of acting Commissioner	24
(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.	25 26 27 28 29
(2) The Minister may, at any time, remove a person from office as acting Commissioner.	30 31
(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.	32 33 34

12	Staff of Commissioner	1
	The staff of the Commissioner are to be employed under Chapter 1A of the <i>Public Sector Employment and Management Act 2002</i> .	2 3
Division 2	Objectives and functions of Commissioner	4
13	Objectives of Commissioner	5
	The objectives of the Commissioner are as follows:	6
	(a) to deal with issues concerning the small business sector in a neutral and independent manner,	7 8
	(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,	9 10 11
	(c) to encourage government agencies and larger businesses to enter into productive working relationships with small businesses,	12 13
	(d) to facilitate the resolution of disputes involving small businesses through mediation and other appropriate forms of alternative dispute resolution,	14 15 16
	(e) to facilitate and encourage the fair treatment of small businesses,	17
	(f) to promote a fair operating environment in which small businesses can flourish,	18 19
	(g) to identify and support measures to reduce the administrative burden for small businesses.	20 21
14	General functions of Commissioner	22
	(1) The Commissioner has, for the purposes of giving effect to the Commissioner's objectives, the following functions:	23 24
	(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,	25 26 27 28
	(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,	29 30 31
	(c) to provide low cost alternative dispute resolution services for small businesses,	32 33
	(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,	34 35 36 37 38

(e)	to conduct investigations into the way in which small businesses are treated by other businesses or government agencies,	1 2
(f)	to facilitate the development of codes of practice by industry that deal with issues concerning the small business sector,	3 4
(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.	5 6 7 8
(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.	9 10 11
(3)	The Commissioner has such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.	12 13
15	Decision to deal with complaint	14
(1)	The Commissioner may deal with a complaint made by or on behalf of a small business only if the Commissioner is satisfied that:	15 16
(a)	the subject-matter of the complaint relates to the unfair treatment of, or an unfair practice involving, the small business, or	17 18
(b)	it is in the public interest to deal with the complaint.	19
(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.	20 21 22
(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.	23 24 25
(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.	26 27 28 29
16	Requirement to provide information	30
(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.	31 32 33 34 35
(2)	Any such notice may specify the time within which the information is required to be provided.	36 37

(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.	1 2 3
(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 <i>Government Information (Public Access) Act 2009</i> or if access to the information would otherwise be denied under that Act.	4 5 6 7 8
17	Commissioner may certify outcome of dispute resolution assistance	9
(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.	10 11 12
(2)	Any such certificate is admissible as evidence in any civil proceedings of the outcome of the application.	13 14
(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.	15 16 17
(4)	A reference in this section:	18
(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 <i>Retail Leases Act 1994</i> , or	19 20 21
(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.	22 23 24 25
18	Referral of certain findings	26
	The Commissioner may refer to the Director-General of the Department of Finance and Services 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.	27 28 29 30 31
19	Exchange of information	32
(1)	The Commissioner may enter into an arrangement (an <i>information sharing arrangement</i>) with a relevant agency for the purposes of sharing or exchanging any information that is held by the Commissioner or the agency.	33 34 35 36

(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.	1 2 3
(3)	Under an information sharing arrangement, the Commissioner and the relevant agency are, despite any other Act or law, authorised:	4 5
(a)	to request and receive information that is held by the other party to the arrangement, and	6 7
(b)	to disclose that information to the other party.	8
(4)	In this section:	9
	<i>relevant agency</i> means any of the following:	10
(a)	a government agency,	11
(b)	the holder of a statutory office,	12
(c)	any other person or body prescribed by the regulations.	13
20	General procedures of Commissioner	14
	The Commissioner:	15
(a)	is to act in an informal manner (including by avoiding conducting formal hearings) as far as possible, and	16 17
(b)	is to act according to the substantial merits of the case without undue regard to technicalities, and	18 19
(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.	20 21 22 23
21	Expert assistance	24
	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.	25 26 27
22	Delegation	28
	The Commissioner may delegate the exercise of any function of the Commissioner (other than this power of delegation) to:	29 30
(a)	any member of staff of the Commissioner, or	31
(b)	any person, or any class of persons, authorised for the purposes of this section by the regulations.	32 33

Division 3	Reports by Commissioner	1
23	Annual report to Parliament on Commissioner's work and activities	2
	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.	3 4 5 6
24	Special reports to Parliament	7
(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.	8 9 10
(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.	11 12 13
(3)	The Commissioner may include in a report under this section a recommendation that the report be made public immediately.	14 15
25	Furnishing of draft reports to Minister and others	16
(1)	The Commissioner must:	17
(a)	provide the Minister with a draft of each report that is to be provided to the Presiding Officers under this Division, and	18 19
(b)	give the Minister a reasonable opportunity to make submissions, either orally or in writing, in relation to the draft report.	20 21
(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.	22 23 24 25 26 27
(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.	28 29 30 31
(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.	32 33 34 35

26	Provisions relating to reports to Parliament	1
(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 3 4 5
(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.	6 7 8 9
(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.	10 11 12 13
(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.	14 15 16
(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.	17 18 19 20 21 22 23

Part 3	Miscellaneous	1
27	Act to bind Crown	2
	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.	3 4 5
28	Injunctions relating to investigations by Commissioner	6
	(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.	7 8 9 10 11
	(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.	12 13 14
29	Personal liability of Commissioner and others	15
	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.	16 17 18 19 20 21 22
30	Regulations	23
	(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.	24 25 26 27
	(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.	28 29 30
	(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.	31 32
	(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:	33 34 35
	(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	36 37 38

Clause 31 Small Business Commissioner Bill 2012

Part 3 Miscellaneous

(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. 1
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31 Repeal of Small Business Development Corporation Act 1984 No 119 4

The Small Business Development Corporation Act 1984 is repealed. 5

32 Review of Act 6

(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. 7
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(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. 10
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(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. 12
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Schedule 1	Amendment of Acts	1
1.1	Government Information (Public Access) Act 2009 No 52	2
	Schedule 2 Excluded information of particular agencies	3
	Insert at the end of clause 2:	4
	The office of Small Business Commissioner—complaint handling, dispute resolution, investigative and reporting functions.	5 6 7
1.2	Statutory and Other Offices Remuneration Act 1975 (1976 No 4)	8 9
	Schedule 2 Public offices	10
	Insert at the end of Part 1 of the Schedule:	11
	Small Business Commissioner	12