



Government of Western Australia
Small Business Development Corporation

EXPLANATORY MEMORANDUM

Small Business and Retail Shop Legislation Amendment Bill 2011

SMALL BUSINESS AND RETAIL SHOP LEGISLATION AMENDMENT BILL 2011

Overview of Bill

The purpose of the Small Business and Retail Shop Legislation Amendment Bill 2011 is to establish a Small Business Commissioner ('Commissioner') in Western Australia in order to enhance a competitive and fair operating environment for small businesses in the State and provide alternative dispute resolution services in respect of small business disputes.

The Commissioner will assist small business operators to resolve complaints and disputes related to retail tenancies, the unfair market practices of other businesses generally, and the commercial activities of government bodies. Central to this role is the provision of a low-cost, non-litigious means of resolving small business disputes through access to a subsidised mediation service. The Commissioner will also provide information, education, guidance and initial assistance to small business operators to minimise disputes.

The intent of this legislation is to:

- Encourage the fair treatment of small businesses in their commercial dealings with other businesses and government bodies;
- Provide support for small businesses during the transition to a more deregulated retail trading environment;
- Reduce the vulnerability of small businesses to unfair market practices; and
- Reduce the frequency and cost of disputes involving small businesses.

Principally, this legislation amends the *Small Business Development Corporation Act 1983* ('SBDC Act') to establish the Commissioner within the Small Business Development Corporation ('SBDC'), an independent statutory authority of the Western Australian Government that encourages, promotes, facilitates and assists the establishment, development and carrying on of small business in the State.

The Commissioner replaces the position of Managing Director of the SBDC, and assumes new powers and functions to receive, investigate and attempt to resolve small business complaints about retail tenancies and unfair market practices.

In addition to establishing the Commissioner's dispute resolution functions, this legislation further amends the SBDC Act to incorporate additional functions that will assist the Corporation to improve the operating environment for small businesses in this State. Other amendments reflecting current drafting conventions and those of a "housekeeping" nature have also been made to the SBDC Act.

This legislation also amends the *Commercial Tenancy (Retail Shops) Agreements Act 1985* ('CTA Act') to provide a role for the Commissioner in assisting the resolution of retail tenancy disputes. The Commissioner has an important alternative dispute resolution function in relation to a retail tenancy dispute, but does not have the power to make a determination. This power will continue to be vested in the State Administrative Tribunal ('SAT').

The amendments to the CTA Act enshrine the role of the Commissioner in retail tenancy disputes so that a party in dispute cannot make an application to the SAT for a decision without first receiving a written certificate from the Commissioner. This certificate can include details about the conduct of parties in relation to the Commissioner's dispute resolution processes. The intent of this is to encourage disputing parties to participate in these processes.

A summary of each clause follows.

PART 1 - PRELIMINARY

- Clause 1 Sets out the name of this Act.
- Clause 2 Provides for commencement:
- sections 1 and 2 – on the day on which this Act receives the Royal Assent; and
 - the rest of this Act – on a day fixed by proclamation, and different days may be fixed for different provisions.

PART 2 – SMALL BUSINESS DEVELOPMENT CORPORATION ACT 1983 AMENDED

- Clause 3 Provides that this Act will amend the *Small Business Development Corporation Act 1983* ('SBDC Act').
- Clause 4 Amends the long title of the SBDC Act to include the establishment of a Small Business Commissioner to enhance a competitive and fair operating environment for small business in the State and provide alternative dispute resolution services in respect of small business disputes.
- Clause 5 Inserts a new heading "Part 1 – Preliminary".
- Clause 6 Amends section 3(1) of the SBDC Act, which sets out the definitions used. This includes inserting for clarity definitions of "board" and "public sector body", and replacing the definition of "Managing Director" with a definition of "Commissioner", as the role of the Commissioner will replace that of the Managing Director. The provision also replaces the definition of "Chairman" with a definition of "chairperson" to reflect current drafting conventions.
- Clause 7 Inserts a new heading "Part 2 – Small Business Development Corporation".
- Clause 8 Inserts section 5A to enable the Corporation to use and operate under one or more trading names, should this be considered appropriate by the Minister.
- Clause 9 Replaces the heading at section 5 "Composition of Corporation" with "Board of Management".
- Amends section 5(1) to enable the chairperson of the Board, where the chairperson is from a regional area, to be included as one of the two board members to represent regional Western Australia. Inserts section 5(2A) to make it clear that the board governs the Corporation.
- Clause 10 Amends section 6 to replace all instances of the word "Chairman" with "chairperson" and "Managing Director" with "Commissioner".
- Clause 11 Replaces the heading at section 8 "Proceedings of the Corporation" with "Proceedings of board".
- Amends section 8 to replace all instances of the word "Corporation" with "board" and "Chairman" with "chairperson".
- Clause 12 Amends section 9 to replace the word "Corporation" with "board".
- Clause 13 Deletes section 10. Liability of members is now provided for in section 18A at clause 22 of this Act.

Clause 14 Amends section 11 to add to the general functions of the Corporation several functions that will assist the Corporation to improve the operating environment for small business in this State. Functions specifically related to the resolution of individual small business disputes are provided for in section 14A at clause 16 of this Act and conferred directly on the Commissioner. The new functions in section 11 will enable the Corporation to:

- investigate and report to the Minister on the small business impact of legislation and government policy;
- investigate and report to the Minister on the actions of public sector bodies that affect the commercial activities of small businesses;
- assist public sector bodies to:
 - develop legislation, policies and procedures that take into account small business interests;
 - improve the compliance capacity of small businesses; and
 - minimise small business compliance requirements;
- facilitate and encourage the fair treatment of small businesses by other businesses;
- investigate and report to the Minister on emerging market practice trends that adversely impact small businesses; and
- promote informed decision making by small businesses and assist them to minimise disputes.

Deletes section 11(2)(e) and inserts a new section 11(2)(e) to allow for the Corporation to provide operational funding, grants and financial assistance to non-government organisations working with small business.

Deletes paragraphs 11(2)(l) and (m) as these functions were identified in the last independent review of the SBDC Act in 2002 as no longer being relevant to the services provided by the Corporation.

Deletes section 11(3)(c) as the bank account for the Corporation is now provided for in section 19 at clause 24 of this Act.

Deletes section 11(4), which deals with the Minister giving directions to the Corporation with respect to its functions, powers and duties. A reordering of the SBDC Act for readability has resulted in section 11(4) being provided for in section 18B at clause 22 of this Act.

Inserts a new section 11(4) to provide that the Corporation is to develop guidelines for the provision of operational funding, grants and financial assistance to non-government organisations.

Clause 15 Amends section 11A(2) to apply the delegation provisions of the SBDC Act to the Commissioner.

Clause 16 Deletes section 11B. Ministerial directions have now been provided for in section 18B at clause 22 of this Act.

Deletes section 11C. Ministerial access to information has now been provided for in section 18C at clause 22 of this Act.

Inserts a new heading “Part 3 – Small Business Commissioner” and inserts a new sub-heading “Division 1 – Small Business Commissioner”.

Deletes section 13 and inserts a new section 13 to provide that the Commissioner is the chief executive officer of the Corporation.

Inserts section 14A to add the new functions of the Commissioner, which will enable the Commissioner to administer the Corporation and to:

- receive, investigate and attempt to resolve complaints about unfair market practices affecting small business;
- receive and investigate complaints about the actions of public sector bodies that affect the commercial activities of small business;
- provide dispute resolution services for small businesses;
- make representations to other persons or bodies on behalf of a small business;
- perform functions conferred on the Commissioner under any other Act, including the *Commercial Tenancy (Retail Shops) Agreements Act 1985* ('CTA Act'); and
- advise the Minister on any of these functions.

Inserts section 14B to provide the Commissioner with all the necessary powers to perform his or her functions under the SBDC Act and any other Act. It also allows the Commissioner to raise fees or charges.

Inserts section 14C to allow the Commissioner to delegate his or her powers and duties under the SBDC Act and any other Act, and describes the manner in which the delegation will occur.

Deletes section 14 as this provision is no longer consistent with the *Public Sector Management Act 1994*, following recent amendments to the way acting chief executive officers are appointed.

Inserts a new section 14 to make it clear that any services performed by the Commissioner are conducted on behalf of the Corporation in line with the *Financial Management Act 2006*.

Inserts section 15A to provide definitions for "alternative dispute resolution", "facilitator" and "small business dispute". A small business dispute includes disputes involving a small business and another business or disputes involving a small business and a public sector body.

Inserts section 15B to enable any business to request the Commissioner to provide assistance for a small business dispute.

Inserts section 15C to make it clear that requests for assistance can be made under the SBDC Act or any other Act. It also allows for the Commissioner to determine the appropriate level of assistance to provide to the disputing parties.

Inserts section 15D to enable any business to request the Commissioner to provide alternative dispute resolution in regard to a small business dispute.

Inserts section 15E to make it clear that requests for alternative dispute resolution can be made under the SBDC Act or any other Act. It also makes it clear that the Commissioner is to determine how the alternative dispute resolution will proceed, if at all. The provision further provides that the Commissioner may appoint a person with appropriate skills to conduct such a proceeding.

Inserts section 15F to provide that the Commissioner may join parties to a dispute if they have an interest in the matter, providing the parties give their consent.

Inserts section 15G to make it clear that the Commissioner is to determine the costs of an alternative dispute resolution proceeding and that these costs are to be shared equally by the parties or otherwise, as approved by the Commissioner. It also enables the Commissioner to recover any debts from the

parties.

Inserts section 15H to outline who can represent parties at alternative dispute resolution proceedings. It also makes it clear that the facilitator of a proceeding can meet with parties without their legal representatives and invite persons that may be able to assist in a proceeding to attend.

Inserts section 15I to make it clear that the Commissioner's alternative dispute resolution proceedings are conducted confidentially and, unless the parties to the dispute agree, information obtained during the course of the proceeding will not be admissible as evidence in a court or tribunal.

- Clause 17 Inserts a new heading "Part 4 – Staff".
- Clause 18 Replaces the heading at section 15 "Employees of the Corporation" with "Staff and contractors".
- Amends section 15 to provide that the Corporation can employ staff and engage contractors to perform its functions and those of the Commissioner. It also makes it clear that persons can be engaged under a contract for services or employed on a casual basis.
- Clause 19 Deletes sections 15A and 16 and inserts a new section 16 "Staff of Corporation who are members of Senior Executive Service". It provides that with respect to any person employed by the Corporation who is a member of the Senior Executive Service, the provisions of the *Public Sector Management Act 1994* prevail over the SBDC Act.
- Clause 20 Amends section 17 to set out that the Corporation, with the Minister's consent, can utilise the staff, services and facilities of a public sector body.
- Clause 21 Inserts a new heading "Part 5 – Accountability and financial provisions".
- Clause 22 Inserts section 18A in place of section 10 to ensure that appropriate protections from liability are afforded to the Commissioner, in addition to the staff of the Corporation.
- Inserts section 18B in place of section 11B to enable the Minister to give written directions to the Commissioner, in addition to the Corporation. It also makes it clear that the Minister is not able to direct the Corporation or Commissioner in regards to a particular person or application, complaint or proceeding.
- Inserts section 18C in place of section 11C to ensure that the Minister can have access to information that relates to the functions of the Commissioner, in addition to the functions of the Corporation. It also makes it clear that the Minister is not able to access information that discloses or could disclose the identity of a person involved in a particular application, complaint or proceeding, without the consent of that person.
- Clause 23 Amends section 18(2) to apply the confidentiality provisions of the SBDC Act to the Commissioner.
- Clause 24 Replaces the heading at section 19 "Funds" with "Small Business Development Corporation Account".
- Amends section 19 to provide for the continuation of the Small Business Development Corporation Account to which the Corporation's moneys are credited. It enables the Account to also be credited with money received by, made available to, or payable to the Commissioner in the performance of his or her functions. The provision makes it clear that both the Corporation's and

Commissioner's functions can be funded through the Account.

- Clause 25 Deletes section 20 "Power to invest" as this power is no longer considered appropriate for the activities of the Corporation.
- Clause 26 Inserts a new heading "Part 6 – Regulations".
- Clause 27 Deletes section 25 as this provision has had its effect.
- Clause 28 Inserts a new heading "Part 7 – Transitional provisions relating to *Small Business and Retail Shop Legislation Amendment Act 2011*".
- Inserts sections 25 to 27 to enable existing members of the Corporation to continue as members of the board of the Corporation on the same terms and conditions as their appointment, following the commencement of the board of management provisions. It also makes clear that the confidentiality provisions of the SBDC Act continue to apply to any person who was an appointed member or Managing Director of the Corporation prior to the board of management provisions commencing.

PART 3 – COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985 AMENDED

- Clause 29 Provides that this Act will amend the *Commercial Tenancy (Retail Shops) Agreements Act 1985* ('CTA Act').
- Clause 30 Amends section 3(1) to insert a definition of "Small Business Commissioner" in the CTA Act.
- Clause 31 Inserts a provision into section 11(3) of the CTA Act to provide that, if the landlord and tenant agree, they may request the Commissioner to nominate a licensed valuer to resolve a matter relating to a review of the rent payable.
- Clause 32 Inserts section 25A to allow parties to a retail shop lease that are entitled to take a matter to the State Administrative Tribunal to request the Commissioner to provide assistance or alternative dispute resolution in relation to the matter.
- Inserts section 25B to allow a licensed valuer with confidential information obtained in relation to a rent review under section 11(3) of the CTA Act to disclose the information to the Commissioner, if required in relation to a request for assistance or alternative dispute resolution.
- Inserts section 25C to provide that, when requested by a person who may make an application, referral or submission to the State Administrative Tribunal, the Commissioner is to issue a certificate to that person if satisfied that either alternative dispute resolution is unlikely to resolve the matter, would not be reasonable or has failed. It also provides the ability for the Commissioner to approve the form of the certificate and include information in the certificate about the conduct of the parties during any dispute resolution provided by the Commissioner.
- Inserts section 25D to provide that a matter cannot be brought before the State Administrative Tribunal for a determination unless the Commissioner has issued a certificate under section 25C in relation to that matter. Subsection (2) allows for certain types of matters to be excluded from this requirement by regulation. Any matters that are prescribed for the purposes of this section will be able to proceed to the State Administrative Tribunal without the need for certification. It is anticipated that matters requiring approval or otherwise of an administrative nature, and proceedings for an order in the nature of an injunction, will be

prescribed for the purposes of this subsection.

Inserts section 25E to provide an ability for the Commissioner to intervene in relation to a proceeding at the State Administrative Tribunal.

- Clause 33 Inserts section 26(2) to allow the State Administrative Tribunal the discretion to consider a certificate provided by the Commissioner (that may contain information about the conduct of the parties during dispute resolution) when awarding costs in relation to a dispute under section 87(2) of the *State Administrative Tribunal Act 2004*.
- Clause 34 Inserts section 30A to outline the functions the Commissioner is to perform under the CTA Act.