

South Australia

Small Business Commissioner Act 2011

An Act to establish the office of the Small Business Commissioner; to provide for the powers and functions of the Commissioner; and for other purposes.

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Legislative history

The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Small Business Commissioner Act 2011*.

3—Interpretation

In this Act, unless the contrary intention appears—

Commissioner means the person holding or acting in the office of the Small Business Commissioner;

Deputy means the Deputy Small Business Commissioner;

industry code has the same meaning as in Part 3A of the *Fair Trading Act 1987* and includes a code whether or not prescribed for the purposes of that Act or any other Act of the State or the Commonwealth.

4—Small Business Commissioner

- (1) There will be a Small Business Commissioner.
- (2) The Commissioner will be appointed by the Governor and is an agency of the Crown.

5—Functions

- (1) The functions of the Commissioner are—
 - (a) to receive and investigate complaints by or on behalf of small businesses regarding their commercial dealings with other businesses and to facilitate resolution of such complaints through measures considered appropriate by the Commissioner such as mediation or making representations on behalf of small businesses; and
 - (b) to assist small businesses on request in their dealings with State and local government bodies; and
 - (c) to disseminate information to small businesses to assist them in making decisions relevant to their commercial dealings with other businesses and their dealings with State and local government bodies; and
 - (d) to administer Part 3A (Industry codes) of the *Fair Trading Act 1987* and the *Australian Consumer Law (SA)* to the extent that responsibility for that administration is assigned to the Commissioner under the *Fair Trading Act 1987*; and
 - (da) to administer Part 3B (Regulation of motor vehicle insurers and repairers) of the *Fair Trading Act 1987* to the extent that responsibility for that administration is assigned to the Commissioner under that Act; and
 - (e) to monitor, investigate and advise the Minister about—
 - (i) non-compliance with industry codes that may adversely affect small businesses; and
 - (ia) non-compliance with an applicable industry code of conduct declared under section 28I of the *Fair Trading Act 1987* that may adversely affect small businesses; and
 - (ii) market practices that may adversely affect small businesses; and
 - (f) to report to the Minister on matters affecting small businesses at the request of the Minister; and
 - (g) to report to the Minister on any aspect of the Commissioner's functions at the request of the Minister or on the Commissioner's own initiative; and
 - (h) to take any other action considered appropriate by the Commissioner for the purpose of facilitating and encouraging the fair treatment of small businesses in their commercial dealings with other businesses or assisting small businesses in their dealings with State or local government bodies; and
 - (i) any other functions conferred on the Commissioner by or under this or any other Act.

- (2) The Commissioner is to perform the functions with a view to the development and maintenance in South Australia of relationships between small businesses and other businesses, and small businesses and State and local government bodies, that are based on dealings conducted fairly and in good faith.

6—Ministerial direction

- (1) Subject to this section, the Minister may give directions to the Commissioner.
- (2) The Minister—
 - (a) may not give a direction in relation to the investigation, mediation or resolution of a particular complaint or dispute; and
 - (b) must consult with the Commissioner before giving a direction.
- (3) A Ministerial direction to the Commissioner—
 - (a) must be communicated to the Commissioner in writing; and
 - (b) must be included in the annual report of the Commissioner under the *Public Sector Act 2009*.

7—Terms and conditions of appointment

- (1) The Commissioner will be appointed for a term not exceeding 5 years and on conditions determined by the Governor and, at the end of a term of appointment, will be eligible for reappointment.
- (2) The appointment of the Commissioner may be terminated by the Governor on the ground that the Commissioner—
 - (a) has been guilty of misconduct; or
 - (b) has been convicted of an offence punishable by imprisonment; or
 - (c) has become bankrupt or has applied to take the benefit of a law for the relief of insolvent debtors; or
 - (d) has been disqualified from managing corporations under Chapter 2D Part 2D.6 of the *Corporations Act 2001* of the Commonwealth; or
 - (e) has, because of mental or physical incapacity, failed to carry out duties of the position satisfactorily; or
 - (f) is incompetent or has neglected the duties of the position.
- (3) The appointment of the Commissioner is terminated if the Commissioner—
 - (a) becomes a member, or a candidate for election as a member, of the Parliament of a State or the Commonwealth or a Legislative Assembly of a Territory of the Commonwealth; or
 - (b) is sentenced to imprisonment for an offence.
- (4) The Commissioner may resign by notice in writing to the Minister of not less than 3 months (or such shorter period as is accepted by the Minister).

8—Deputy and Acting Commissioner

- (1) The Minister may appoint a person (who may be a Public Service employee) to be the Deputy Small Business Commissioner.

- (2) The Deputy may—
 - (a) act as the Commissioner during any period for which—
 - (i) no person is for the time being appointed as the Commissioner; or
 - (ii) the Commissioner is absent from, or unable to discharge, official duties; and
 - (b) when not so acting, perform functions or exercise powers of the Commissioner by delegation from the Commissioner.
- (3) The Minister may appoint a person (who may be a Public Service employee) to act as the Commissioner during any period for which—
 - (a) no person is for the time being appointed as the Commissioner or the Commissioner is absent from, or unable to discharge, official duties; and
 - (b) no person is for the time being appointed as the Deputy or the Deputy is absent from, or unable to discharge, official duties.
- (4) The terms and conditions of appointment of the Deputy or other person appointed to act as the Commissioner will be determined by the Minister.

9—Honesty and accountability

The Commissioner, the Deputy and any other person appointed to act as the Commissioner are senior officials for the purposes of the *Public Sector (Honesty and Accountability) Act 1995*.

10—Staff etc

- (1) The Commissioner's staff consists of—
 - (a) Public Service employees assigned to assist the Commissioner; and
 - (b) persons employed by the Commissioner, with the consent of the Minister and on terms and conditions determined by the Minister, to assist the Commissioner.
- (2) The Commissioner may, under an arrangement established by the Minister administering an administrative unit of the Public Service, make use of the services or staff of that administrative unit.

11—Delegation

- (1) The Commissioner may delegate to a person (including a person for the time being performing particular duties or holding or acting in a particular position) a function or power under this or any other Act (except a prescribed function or power).
- (2) A function or power may only be delegated to a person who is not a Public Service employee with the consent of the Minister.
- (3) A delegation—
 - (a) must be by instrument in writing; and
 - (b) may be absolute or conditional; and
 - (c) does not derogate from the power of the delegator to act in a matter; and
 - (d) is revocable at will.

- (4) A delegated function or power may, if the instrument of delegation so provides, be further delegated in accordance with that instrument.

12—Power to require information

- (1) The Commissioner may, by written notice served personally or by post, require a person to give the Commissioner, within a reasonable time specified in the notice, information in the person's possession that the Commissioner requires for the performance of the Commissioner's functions under this Act.
- (2) A person required to give information under this section must provide the information within the time stated in the notice.
Maximum penalty: \$20 000.
- (3) A person cannot be compelled to give information under this section if the information might tend to incriminate the person of an offence or is privileged on the ground of legal professional privilege.

13—Confidentiality

- (1) A person must not divulge or communicate personal information, information relating to trade secrets or business processes or financial information acquired by reason of being, or having been, employed or engaged in, or in connection with, the administration of this Act, except—
- (a) with the consent of the person to whom the information relates; or
 - (b) as authorised by the Commissioner or the person's employer; or
 - (c) in connection with the administration of this Act; or
 - (d) to a police officer or a member of the police force of another State, a Territory of the Commonwealth or the Commonwealth; or
 - (e) to a person concerned in the administration of another law of the State, or a law of another State, a Territory of the Commonwealth or the Commonwealth, relating to trade or commercial practices or the protection of consumers; or
 - (f) for the purposes of legal proceedings.

Maximum penalty: \$20 000.

- (2) Information that has been disclosed under this section for a particular purpose must not be used for any other purpose by—
- (a) the person to whom the information was disclosed; or
 - (b) any other person who gains access to the information (whether properly or improperly and whether directly or indirectly) as a result of that disclosure.

Maximum penalty: \$20 000.

14—Regulations

- (1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

- (2) Without limiting the generality of subsection (1), the regulations may fix fees in respect of measures designed to resolve a complaint taken by the Commissioner and provide for their payment, recovery or waiver.

Schedule 1—Transitional provisions

Part 4—Transitional provisions

37—Provisions relating to Fair Trading Act

- (1) A person holding office as an authorised officer under section 7 of the *Fair Trading Act 1987* immediately before the commencement of this clause will continue to hold office as an authorised officer as if the person had been appointed by the Minister responsible for the administration of that Act under section 76 of that Act as amended by this Act.
- (2) A code of practice prescribed by the regulations under the *Fair Trading Act 1987* as in force immediately before the commencement of this clause will be taken to have been prescribed as an industry code under Part 3A of that Act as amended by this Act and the Commissioner for Consumer Affairs will be taken to have been declared to be responsible for the administration of the code.

Legislative history

Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or www.legislation.sa.gov.au.

Legislation amended by principal Act

The *Small Business Commissioner Act 2011* amended the following:

Fair Trading Act 1987

Retail and Commercial Leases Act 1995

Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2011	41	<i>Small Business Commissioner Act 2011</i>	10.11.2011	22.3.2012 (<i>Gazette 15.3.2012 p992</i>)
2021	50	<i>Fair Trading (Motor Vehicle Insurers and Repairers) Amendment Act 2021</i>	9.12.2021	Sch 1 (cl 1)—28.2.2023 (<i>Gazette 23.2.2023 p405</i>)

Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended under <i>Legislation Revision and Publication Act 2002</i>	28.2.2023
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	28.2.2023
s 5		
s 5(1)	amended by 50/2021 Sch 1 cl 1(1), (2)	28.2.2023
Sch 1		
<i>Pts 1—3</i>	<i>omitted under Legislation Revision and Publication Act 2002</i>	28.2.2023