

Western Australia

**Small Business and Retail Shop Legislation  
Amendment Act 2011**

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No. 20 of 2011

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# Small Business and Retail Shop Legislation Amendment Act 2011

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Western Australia

## **Small Business and Retail Shop Legislation Amendment Act 2011**

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**No. 20 of 2011**

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***An Act to amend the *Small Business Development Corporation Act 1983* and the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.***

*[Assented to 11 July 2011]*

The Parliament of Western Australia enacts as follows:

## **Part 1 — Preliminary**

**1. Short title**

This is the *Small Business and Retail Shop Legislation Amendment Act 2011*.

**2. Commencement**

This Act comes into operation as follows —

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the 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**

**3. Act amended**

This Part amends the *Small Business Development Corporation Act 1983*.

**4. Long title replaced**

Delete the long title and insert:

**An Act to provide for the following —**

- **the establishment of a Small Business Development Corporation and Small Business Commissioner;**
- **to encourage, promote, facilitate and assist the establishment, development and carrying on of small business in the State;**
- **to enhance a competitive and fair operating environment for small business in the State;**
- **to provide alternative dispute resolution services in respect of small business disputes and disputes referred under any other Act;**
- **related matters.**

**5. Part 1 heading inserted**

Before section 1 insert:

**Part 1 — Preliminary**

**6. Section 3 amended**

- (1) In section 3(1) delete the definitions of:  
*appointed member*

***Chairman***

***Managing Director***

- (2) In section 3(1) insert in alphabetical order:

***appointed member*** means a person appointed under section 5(2B)(a) as a member of the board;

***board*** means the board of management provided for under section 5;

***chairperson*** means the person appointed under section 5(2B)(b) to be the chairperson of the board;

***Commissioner*** means the Small Business Commissioner referred to in section 13;

***public sector body*** has the meaning given in the *Public Sector Management Act 1994* section 3(1);

- (3) In section 3(1) in the definition of ***member*** delete “Corporation” and insert:

board

**7. Part 2 heading inserted**

Before section 4 insert:

**Part 2 — Small Business Development  
Corporation**

**8. Section 5A inserted**

After section 4 insert:

**5A. Use of trading names for Corporation**

- (1) The Corporation may use and operate under one or more trading names approved by the Minister.
- (2) The use of a trading name does not prevent or affect any proceedings being taken by or against the Corporation in its corporate name.

**9. Section 5 amended**

- (1) Delete section 5(1) and (1a) and insert:

(1A) In this section —

*metropolitan region* has the meaning given in the *Planning and Development Act 2005* section 4(1).

- (1) The Corporation is to have a board of management consisting of —
  - (a) 2 members who represent small business in the areas of the State outside the metropolitan region;

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- (b) 5 members who represent small business in the metropolitan region;
    - (c) the Commissioner ex officio.
  - (2A) The board is the governing body of the Corporation and, in the name of the Corporation, is to perform the functions of the Corporation.
  - (2B) The Minister is to —
    - (a) appoint the members of the board referred to in subsection (1)(a) and (b); and
    - (b) appoint one of those members to be the chairperson of the board.
- (2) In section 5(5)(c) delete “Corporation” and insert:

board

Note: The heading to amended section 5 is to read:

**Board of management**

**10. Section 6 amended**

- (1) In section 6(2):
- (a) delete “Chairman” (each occurrence) and insert:  
  
chairperson
  - (b) delete “Chairman.” and insert:  
  
chairperson.
- (2) Delete section 6(3) and insert:

(3) The Commissioner may nominate a person employed or engaged by the Corporation to represent the Commissioner at any meeting of the board that the Commissioner is unable to attend, and while nominated the person has the functions, powers and duties as a member, of the Commissioner.

(4A) The nomination must be in writing delivered to the chairperson.

(3) In section 6(4):

(a) delete “Chairman,” and insert:

chairperson,

(b) delete “Managing Director,” and insert:

Commissioner,

**11. Section 8 amended**

(1) In section 8(1) and (2) delete “Corporation” (each occurrence) and insert:

board

(2) In section 8(3):

(a) delete “Corporation the Chairman,” and insert:

board the chairperson,

(b) delete “Chairman,” (second occurrence) and insert:

chairperson,

(c) delete “corporation” and insert:

board

(3) In section 8(4) delete “Corporation —” and insert:

board —

(4) In section 8(5) and (6) delete “Corporation” and insert:

board

Note: The heading to amended section 8 is to read:

**Proceedings of board**

**12. Section 9 amended**

In section 9 delete “Corporation” and insert:

board

**13. Section 10 deleted**

Delete section 10.

**14. Section 11 amended**

(1) In section 11(1) delete “the administer” and insert:

administer

- (2) In section 11(2):
- (a) delete “functions of the Corporation are —” and insert:  
  
Corporation has the following functions —
  - (b) in paragraph (b) delete “business;” and insert:  
  
business or the operation of this Act;
  - (c) delete paragraph (e) and insert:
    - (e) to provide operational funding, grants and financial assistance to non-government organisations working with, or on behalf of, small business in accordance with the guidelines referred to in subsection (4);
    - (fa) to investigate, and report to the Minister on, the impact on small business of legislation and government policy of this jurisdiction, the Commonwealth or any other State or Territory;
    - (fb) to investigate, and report to the Minister on, the actions of public sector bodies that affect the commercial activities of small businesses;
    - (fc) to assist public sector bodies —
      - (i) to develop legislation, policies and administrative procedures that take into account the interests of small business; and
      - (ii) to improve the capacity of small business to comply with legislative and other requirements; and

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- (iii) to simplify and minimise small business compliance requirements;
    - (fd) to facilitate and encourage the fair treatment of small businesses in their commercial dealings with other businesses in the marketplace;
    - (fe) to investigate, and report to the Minister on, emerging trends in market practice that have an adverse effect on small business;
  - (d) after paragraph (g) insert:
    - (ha) to promote informed decision making by small businesses;
    - (hb) to assist small businesses to operate in ways that minimise disputes with other businesses;
  - (e) delete paragraphs (l) and (m).
- (3) In section 11(3):
  - (a) in paragraph (b) delete “facilities; and” and insert:

facilities.
  - (b) delete paragraph (c);
  - (c) after paragraph (a) insert:

and
- (4) Delete section 11(4) and insert:
  - (4) The Corporation must develop guidelines with respect to the provision of operational funding, grants and financial assistance to non-government organisations.



**15. Section 11A amended**

In section 11A(2):

(a) delete paragraph (a) and insert:

(a) the Commissioner; or

(b) delete paragraphs (c) and (d) and insert:

(c) a person employed or engaged by the Corporation; or

(c) after paragraph (b) insert:

or

**16. Sections 11B, 11C, 13 and 14 deleted and Part 3 inserted**

Delete sections 11B, 11C, 13 and 14 and insert:

**Part 3 — Small Business Commissioner**

**Division 1 — Small Business Commissioner**

**13. Small Business Commissioner**

The chief executive officer of the Corporation appointed under the *Public Sector Management Act 1994* Part 3 is the Small Business Commissioner.

**14A. Functions**

The Commissioner has the following functions —

- (a) to administer the day-to-day operations of the Corporation;
- (b) to receive and investigate complaints about unfair market practices affecting small business and provide assistance to attempt to resolve those complaints;
- (c) to receive and investigate complaints by small businesses about the actions of public sector bodies that affect the commercial activities of small business;
- (d) to provide alternative dispute resolution services for small businesses;
- (e) to make representations to another person or body on behalf of a small business that has made a complaint;
- (f) to perform functions conferred on the Commissioner under any other Act;
- (g) to advise the Minister on any matter related to the functions of the Commissioner referred to in paragraphs (b) to (f).

**14B. Powers**

The Commissioner has all the powers the Commissioner needs to perform the functions of the Commissioner under this Act or any other Act including the power to raise fees or charges with respect to the provision of services or the performance of any work by, or on behalf of, the Commissioner.

**14C. Delegation**

- (1) The Commissioner may delegate any power or duty of the Commissioner under another provision of this Act or under any other Act to a person employed or engaged by the Corporation.

- (2) The delegation must be in writing signed by the Commissioner.
- (3) A person to whom a power or duty is delegated under this section cannot delegate that power or duty.
- (4) A person exercising or performing a power or duty that has been delegated to the person under this section is to be taken to do so in accordance with the terms of the delegation unless the contrary is shown.
- (5) Nothing in this section limits the ability of the Commissioner to perform a function through an agent.

**14. Accountability under this Part**

Any acts or things done under this Part are to be regarded as —

- (a) services under the control of the Corporation for the purposes of the *Financial Management Act 2006* section 52; and
- (b) operations of the Corporation for the purposes of Part 5 of that Act.

**Division 2 — Dispute resolution**

**Subdivision 1 — Preliminary**

**15A. Terms used**

In this Division —

*alternative dispute resolution* means —

- (a) conciliation; or
- (b) mediation; or
- (c) another form of dispute resolution that, in the opinion of the Commissioner, is appropriate to assist in the resolution of a dispute;

*facilitator* means a person appointed under section 15E(3) to conduct an alternative dispute resolution proceeding;

*small business dispute* means a dispute about —

- (a) an unfair market practice that affects a small business; or
- (b) the actions of a public sector body that affects the commercial activities of a small business.

**Subdivision 2 — Requests to provide assistance**

**15B. Request to provide assistance in dispute affecting small business**

An owner or operator of a business may request the Commissioner to provide assistance in respect of a small business dispute.

**15C. Providing assistance**

- (1) In this section —

*request to provide assistance* means —

- (a) a request made under section 15B; or
  - (b) a request for the Commissioner to provide assistance in respect of a dispute or matter made under any other Act.
- (2) On a request to provide assistance the Commissioner may provide such assistance to attempt to resolve the dispute or matter as the Commissioner considers is appropriate.

**Subdivision 3 — Alternative dispute resolution**

**15D. Request to undertake alternative dispute resolution in small business dispute**

The parties to a small business dispute may request the Commissioner to undertake alternative dispute resolution in respect of the dispute.

**15E. Undertaking alternative dispute resolution**

(1) In this section —

*request to undertake alternative dispute resolution*  
means —

- (a) a request made under section 15D; or
- (b) a request for the Commissioner to undertake alternative dispute resolution made under any other Act.

(2) On a request to undertake alternative dispute resolution in respect of a dispute the Commissioner must decide whether, and to what extent —

- (a) the parties should seek further advice or assistance before an alternative dispute resolution proceeding in respect of the dispute is commenced; or
- (b) to commence an alternative dispute resolution proceeding in respect of the dispute; or
- (c) to refuse to undertake alternative dispute resolution.

(3) If the Commissioner decides to commence an alternative dispute resolution proceeding under subsection (2)(b), the Commissioner may appoint a person with appropriate skills and experience to conduct the proceeding.

**15F. Joining parties to alternative dispute resolution proceeding**

The Commissioner may join a person as a party to an alternative dispute resolution proceeding if —

- (a) the Commissioner considers that the person has an interest in the matter that is the subject of the proceeding; and
- (b) the person consents to being joined.

**15G. Costs of alternative dispute resolution proceeding**

- (1) The costs of an alternative dispute resolution proceeding, including the fees and expenses of the facilitator, are to be determined by the Commissioner.
- (2) The costs of an alternative dispute resolution proceeding are to be paid by the parties in equal shares or, with the approval of the Commissioner, as otherwise agreed by the parties.
- (3) Any costs payable by the parties under this section are recoverable by the Commissioner in a court of competent jurisdiction as a debt due to the Commissioner.

**15H. Representation at alternative dispute resolution proceeding**

- (1) A party may be represented by a lawyer during an alternative dispute resolution proceeding but the facilitator may, if the facilitator considers it appropriate to do so, meet with the party, either alone or with another party, without the party's legal representative being present.
- (2) A party who is not a natural person may be represented during an alternative dispute resolution proceeding by an officer, employee or agent of that party.

- (3) A facilitator may request the attendance of another person during an alternative dispute resolution proceeding if, in the opinion of the facilitator, the attendance of that person may help in the alternative dispute resolution proceeding.

**15I. Evidence of certain things inadmissible**

- (1) Evidence of anything lawfully said or done in the course of an alternative dispute resolution proceeding is not admissible before a court or tribunal or body unless subsection (2) applies.
- (2) Evidence referred to in subsection (1) is admissible in a proceeding if the parties to the alternative dispute resolution proceeding consent to the admission of the evidence.

**17. Part 4 heading inserted**

Before section 15 insert:

**Part 4 — Staff**

**18. Section 15 amended**

- (1) Delete section 15(1) and insert:
  - (1) Subject to this Act, the Corporation may employ persons as staff of the Corporation —
    - (a) to enable the Corporation to carry out its functions; and
    - (b) to assist the Commissioner to carry out his or her functions.
- (2) In section 15(3) delete “its employees.” and insert:

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persons employed under subsection (1).

- (3) In section 15(4) delete “an employee of the Corporation.” and insert:

a person employed under subsection (1).

- (4) After section 15(4) insert:

- (5) Subsection (1) does not affect the power of the Corporation to engage a person under a contract for services or appoint a person on a casual employment basis under the *Public Sector Management Act 1994* section 100.

Note: The heading to amended section 15 is to read:

**Staff and contractors**

**19. Sections 15A and 16 replaced**

Delete sections 15A and 16 and insert:

**16. Staff of Corporation who are members of Senior Executive Service**

The provisions of the *Public Sector Management Act 1994* prevail over the provisions of this Act to the extent of any inconsistency in respect of a person who is employed under section 15 and who is a member of the Senior Executive Service as defined in the *Public Sector Management Act 1994* section 3(1).



**20. Section 17 amended**

Delete section 17(a) and (b) and insert:

- (a) the services of any officer or employee of a public sector body; or
- (b) any facilities of a public sector body.

**21. Part 5 heading inserted**

After section 17 insert:

**Part 5 — Accountability and financial provisions**

**22. Sections 18A to 18C inserted**

Before section 18 insert:

**18A. Protection from liability**

- (1) No action or claim for damages lies against a person for anything that the person has done, in good faith, in the performance or purported performance of a function under this Act.
- (2) The protection given by subsection (1) applies even though the thing done as described in that subsection may have been capable of being done whether or not this Act had been enacted.
- (3) Despite subsection (1), the State is not relieved of any liability that it might have for another person having done something as described in that subsection.

- (4) In this section, a reference to the doing of any thing includes a reference to the omission to do any thing.

**18B. Directions by Minister**

- (1) Subject to subsection (3), the Minister may give written directions to the Corporation with respect to the performance of its functions, either generally or in relation to a particular matter, and the Corporation is to give effect to any such direction.
- (2) Subject to subsection (3), the Minister may give written directions to the Commissioner with respect to the performance of his or her functions, either generally or in relation to a particular matter, and the Commissioner is to give effect to any such direction.
- (3) The Minister must not under subsection (1) or (2) direct the Corporation or Commissioner with respect to the performance of its or his or her functions in respect of —
- (a) a particular person; or
  - (b) a particular application, complaint or proceeding.
- (4) The text of a direction given under subsection (1) or (2) is to be —
- (a) laid before each House of Parliament within 14 sitting days of that House after the direction is given; and
  - (b) included in the annual report submitted by the accountable authority of the Corporation under the *Financial Management Act 2006* Part 5.

**18C. Minister to have access to information**

- (1) In this section —

**document** includes any tape, disk or other device or medium on which information is recorded or stored;

**information** means information specified, or of a description specified, by the Minister.

- (2) The Minister is entitled —
  - (a) to have information in the possession of the Corporation that relates to the functions of the Corporation; and
  - (b) to have information in the possession of the Commissioner that relates to the functions of the Commissioner referred to in section 14A(b) to (g); and
  - (c) if the information referred to in paragraph (a) or (b) is in or on a document, to have, and make and retain copies of, that document.
- (3) For the purposes of subsection (2) the Minister may —
  - (a) request the Corporation or the Commissioner, as the case requires, to furnish information to the Minister; and
  - (b) request the Corporation or the Commissioner, as the case requires, to give the Minister access to information; and
  - (c) for the purposes of paragraph (b) make use of the services of staff employed or engaged by the Corporation to obtain the information and furnish it to the Minister.
- (4) The Corporation or the Commissioner is to comply with a request under subsection (3) and the Corporation is to arrange for its staff and facilities to be available to the Minister for the purposes of subsection (3)(c).
- (5) The Minister is not entitled to have information under this section in a form that —

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- (a) discloses the identity of a person involved in a particular application, complaint or proceeding;  
or
- (b) might enable the identity of any such person to be ascertained,

unless that person has consented to the disclosure.

**23. Section 18 amended**

In section 18(2):

- (a) delete paragraph (a) and insert:
  - (a) the Commissioner; or
- (b) delete paragraphs (c) and (d) and insert:
  - (c) employed or engaged by the Corporation; or
- (c) after paragraph (b) insert:
  - or

**24. Section 19 replaced**

Delete section 19 and insert:

**19. Small Business Development Corporation Account**

- (1) There continues to be an account called the Small Business Development Corporation Account which is an agency special purpose account under the *Financial Management Act 2006* section 16.

- (2) The Small Business Development Corporation Account must be credited with the following —
- (a) money received by, made available to, or payable to, the Corporation in the performance of functions under this or any other Act;
  - (b) money received by, made available to, or payable to, the Commissioner in the performance of functions under this or any other Act;
  - (c) money appropriated by Parliament to, or otherwise lawfully received for, the Small Business Development Corporation.
- (3) Money held in the Small Business Development Corporation Account may be applied for the following —
- (a) in payment of the costs of the administration of this Act;
  - (b) to fund the services and facilities provided by the Corporation under this or any other Act;
  - (c) in payment of the costs and expenses incurred in the performance of the functions of the Commissioner under this or any other Act.

**25. Section 20 deleted**

Delete section 20.

**26. Part 6 heading inserted**

Before section 24 insert:

## **Part 6 — Regulations**

**27. Section 25 deleted**

Delete section 25.

**28. Part 7 inserted**

At the end of the Act insert:

**Part 7 — Transitional provisions relating to  
Small Business and Retail Shop Legislation  
Amendment Act 2011**

**25. Term used: commencement day**

In this Part —

*commencement day* means the day on which the *Small Business and Retail Shop Legislation Amendment Act 2011* section 9 comes into operation.

**26. Appointed members**

A person who was an appointed member of the Corporation immediately before commencement day is, on and from commencement day, an appointed member of the board subject to the terms and conditions on which the person was appointed as a member of the Corporation.

**27. Application of section 18 to certain persons**

Section 18 applies in respect of a person who, before commencement day, was —

- (a) an appointed member of the Corporation; or
- (b) the Managing Director of the Corporation.

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**Part 3 — Commercial Tenancy (Retail Shops)  
Agreements Act 1985 amended**

**29. Act amended**

This Part amends the *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

**30. Section 3 amended**

In section 3(1) insert in alphabetical order:

*Small Business Commissioner* means the  
Commissioner as defined in the *Small Business  
Development Corporation Act 1983* section 3(1);

**31. Section 11 amended**

(1) In section 11(3):

(a) delete “either —” and insert:

any of the following —

(b) after paragraph (a) insert:

(ba) a person licensed under that Act and  
nominated, at the request of each of the parties,  
by the Small Business Commissioner;

(c) after paragraph (a) delete “or”.

(2) In section 11(4) delete “(a) or (b)”.

(3) In section 11(5)(b) delete “(a) or (b)”.

**32. Sections 25A to 25E inserted**

After section 24 insert:

**25A. Request to Small Business Commissioner**

A person who may, under this Act, make an application, referral or submission to the Tribunal may request the Small Business Commissioner —

- (a) to provide assistance to attempt to resolve the matter under the *Small Business Development Corporation Act 1983* section 15C; or
- (b) to undertake alternative dispute resolution in respect of the matter under the *Small Business Development Corporation Act 1983* section 15E.

**25B. Disclosure of information**

- (1) In this section —

*confidential information*, in relation to a matter, means information given to a person who acts under section 11(3) in the matter.

- (2) A person who has confidential information in relation to a matter that is the subject of a request under section 25A may disclose the information if the Small Business Commissioner so requires.

**25C. Small Business Commissioner to issue certificate in respect of request**

- (1) The Small Business Commissioner must, on the request of a person who may, under this Act, make an application, referral or submission to the Tribunal, issue a certificate to the person if the Commissioner is satisfied that —
  - (a) the matter is unlikely to be resolved with the assistance of alternative dispute resolution; or



- (b) it would not be reasonable in the circumstances to commence an alternative dispute resolution proceeding in respect of the matter; or
  - (c) alternative dispute resolution has failed to resolve the matter.
- (2) The certificate is to be in a form approved by the Small Business Commissioner and may include any information about the conduct of the parties that the Commissioner considers appropriate in the circumstances.

**25D. Application to Tribunal restricted in certain circumstances**

- (1) An application, referral or submission in respect of a matter may not be made to the Tribunal under this Act unless the Small Business Commissioner has issued a certificate in respect of the matter under section 25C.
- (2) Subsection (1) does not apply in respect of a matter prescribed by the regulations for the purposes of this section.
- (3) Nothing in this section prevents a person from making a request to the Small Business Commissioner under section 25A.

**25E. Small Business Commissioner may intervene in proceeding of Tribunal**

The Small Business Commissioner may intervene at any time in a proceeding of the Tribunal in relation to a matter.

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**33. Section 26 amended**

After section 26(1aa) insert:

- (2) In considering whether to make an order under the *State Administrative Tribunal Act 2004* section 87(2) in a proceeding, the Tribunal may have regard to a certificate issued under section 25C that relates to the proceeding.

**34. Section 30A inserted**

Before section 30 insert:

**30A. Small Business Commissioner to perform certain functions**

The Small Business Commissioner has the following functions under this Act —

- (a) to provide assistance to attempt to resolve disputes that arise in respect of retail shop leases;
- (b) to provide information and guidance in respect of retail shop leases or the provisions of this Act.

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