

# Mediation and Fees Policy

The *Small Business Commissioner Act 2022* has established the Queensland Small Business Commissioner (QSBC) to enhance the operating environment for small businesses in Queensland and reduce the time and costs associated with resolving disputes involving small businesses.

The QSBC is a passionate supporter of small businesses across Queensland. This policy sets out the QSBC's expectations for parties to a relevant dispute, the mediation services provided and the arrangements in relation to mediation fees.

## Mediation service

A party to a small business lease or retail shop lease (the lessee/tenant or lessor/landlord) may apply to the QSBC for mediation of a small business dispute under the *Small Business Commissioner Act 2022* (the SBCA) or a retail shop lease dispute under the *Retail Shop Leases Act 1994* (the RSLA); however, the parties to a small business dispute must first have attempted to resolve the dispute by seeking informal assistance from the commissioner before applying for mediation.

Attendance at a mediation conference provided by the QSBC under the SCBA or RSLA cannot be compelled, is confidential and anything said in a mediation conference for a small business dispute or retail shop lease dispute is not admissible in a proceeding before a court or tribunal.

If the application or lodgement requirements are met, the commissioner will nominate a mediator from the QSBC Mediator Panel. All mediators are independent professionals with relevant experience and are accredited under the National Mediator Accreditation Standards (NMAS).

By agreeing to participate in a mediation conference provided by the QSBC, you are bound by the provisions of the relevant legislation and by the requirements set out in this policy. You also agree that the mediator will not be held liable by a party for any act or omission in the performance of their functions unless the act or omission is fraudulent.

NB. Due to the requirements of the national Franchise Code, all franchise disputes are referred to the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).

## Expectation to act in good faith

The QSBC expects all parties to a small business dispute or retail shop lease dispute to act in good faith in all actions associated with the dispute including any attempts to informally resolve the dispute and in the mediation conference.

The obligation to act in good faith is established under common law. Good faith requires the parties to an agreement to act honestly, contribute to the contractual benefits, uphold the agreement, and to act reasonably and with fair consideration of the other party's interests.

Australian courts have found business dealings are not in good faith when one party acts dishonestly, acts arbitrarily, fails to consider the interests of the other party, acts for an ulterior motive, or acts in a way that undermines or denies the other party the benefits of the contract.

All parties have a common law obligation to act in good faith in all matters arising in a contractual relationship. This obligation extends to all aspects of the relationship, including pre-contractual negotiations, performance of the contract, dispute resolution and the end, including termination, of an agreement.

Each party's obligation to act in good faith cannot be excluded or limited, including by a clause in a contract or other agreement, and may continue even after the agreement has ended. While good faith requires you to consider the rights and interests of the other party, it does not require you to act in the interests of the other party or against your own legitimate commercial interests.

## **Mediation conference**

The mediation conference will be held in private and will be conducted in accordance with the NMAS practice standards and is confidential.

The mediator will help the parties to explore the issues, discuss options, and, if possible, reach a settlement agreement. The mediator may ask the parties to share information, may meet with the parties together or separately, and may communicate orally or in writing.

A party at a mediation conference must conduct their own case; however, the mediator may approve an agent to represent a party if the party is a corporation or the mediator is satisfied an agent should be permitted to represent the party. The QSBC may join a person as a party, if the other parties agree, and if the person pays the mediation fee.

If the mediation is successful and the parties reach an agreement about the dispute, the mediator will set out the agreement (the mediation agreement) in writing and both parties must sign the mediation agreement. A party to a mediation agreement may apply to a court for an order enforcing the terms of the agreement.

If a mediation agreement cannot be reached, each party may seek their own independent legal and financial advice about their further options. This may include an application to the Queensland Civil and Administrative Tribunal (QCAT) or an application to a relevant court. A mediator must refer a retail tenancy dispute to QCAT in particular circumstances under the RSLA.

## Mediation fee

The mediation fee is set in the *Small Business Commissioner Regulation 2022* and *Retail Shop Leases Regulation 2016* and is payable in equal shares by both parties to the dispute.

Fees increase on 1 July each year in line with the Queensland Government indexation policy. From 1 July 2023, the mediation fee to accompany an application for a mediation conference with the QSBC will increase to \$371.00 – paid in equal shares (of \$185.50 by each party to the dispute, for two party disputes).

## Fee waiver for financial hardship

The commissioner may waive all or part of the fee payable by a party if the commissioner is satisfied the payment of the fee would cause, or would be likely to cause, the party financial hardship.

To apply for a waiver based on financial hardship, the party must meet the below eligibility criteria:

- Be currently receiving support from the Small Business Financial Counselling Service and request (and have) the counsellor email the QSBC officer directly stating that you are receiving financial counselling and that the payment of the fee would cause, or would be likely to cause, the party financial hardship.
- OR**
- Have an independent certified practising accountant or certified bookkeeper provide a signed letter (including their full name, contact information and certification) stating that they have no conflict of interest, are aware of your current financial position and that the payment of the fee would cause, or would be likely to cause, you financial hardship.

The email or signed letter must be received by the QSBC officer assisting with your dispute before the due date for your share of the mediation fee.

If your application is properly made, the commissioner or authorised officer will then consider your application against the above eligibility criteria. A decision will be made within 2 business days of your application, and you will be advised of the outcome by email.

## Fee waiver for a class of parties

The commissioner may also waive all or part of the fee payable for a class of parties for a particular period if the commissioner is satisfied the waiver will promote access to mediation by the parties during the period.

If the commissioner is satisfied that an unforeseeable business disruption has occurred which is reasonably preventing either of the parties from fulfilling their obligations under a small business lease or retail shop lease, the commissioner may

publish a waiver of all or part of the mediation fee on the QSBC website.

The waiver will state the class of parties to which it applies and the period for which the waiver exists. The waiver will be automatically applied to relevant parties; however, the parties will be asked to confirm by email that they wish to apply for and participate in a mediation conference.

## Further Information

You can find out more on the QSBC website: <https://qsbq.qld.gov.au/>

## Definitions

- **Authorised officer** means the QSBC Director, Assistance or Director, Advocacy who are both authorised to make certain decisions for the commissioner.
- **Commissioner** means the Small Business Commissioner.
- **Mediator** means an independent professional accredited under the National Mediator Accreditation Standards (NMAS) and appointed by the commissioner to the QSBC Mediator Panel.
- **Officer** means the QSBC team member assigned to assist the parties to a small business dispute or retail shop lease dispute.
- **Queensland Small Business Commissioner (QSBC)** means the Small Business Commissioner and supporting office.
- **Small business** means a Queensland business that identifies as small in size and which a person would reasonably consider to be small.

## Review

This document is to be reviewed annually, within one year from the effective date.

## Document history

| Date            | Version | Action   | Description                             |
|-----------------|---------|--|---|
| 3 May 2022      | 1       | First issue  | Approved by Small Business Commissioner |
| 22 June 2022    | 2       | Amend title from 'mediation services policy' to 'Mediation and fees policy'              | Approved by Small Business Commissioner |
| 4 July 2022     | 3       | Amend fee waiver section to remove need for waiver to be received 7 days before due date | Approved by Small Business Commissioner |
| 25 October 2022 | 4       | Removed reference that the fee must be paid for mediation to proceed. Updated footer.    | Approved by Small Business Commissioner |
| 2 June 2023     | 5       | Updated document in line with style guide, updated website address                       | Approved by Small Business Commissioner |
| 30 June 2023    | 6       | Updated cost of mediation in line with Queensland Government indexation policy           | Approved by Small Business Commissioner |