

SMALL BUSINESS DEVELOPMENT CORPORATION AMENDMENT BILL 2019

Second Reading

Resumed from 20 August 2019.

HON DONNA FARAGHER (East Metropolitan) [5.40 pm]: I rise as the lead speaker for the opposition on the Small Business Development Corporation Amendment Bill 2019. Can I indicate straight up that the opposition will be supporting this bill. This bill is in an amended form after the government agreed to a number of opposition amendments in the other place. As I understand it, that was dealt with in a fairly bipartisan manner, so we are dealing with a bill that has been somewhat amended from the one that was originally introduced in the other place. I recognise that the government is seeking to progress this legislation to provide greater support and assistance to small business, which is something that we support. I note that this bill, unlike some of the others, has been sitting on the notice paper since last year. I have received a briefing about this, but I am sure that in her reply the minister may well go through some of the key elements that the government feels are related to COVID-19. I accept and understand what they are, but for the benefit of the house, that would be useful. In a general sense, as a member of the Liberal Party and part of the Liberal opposition, I say very clearly that we absolutely support small business, subcontractors, sole traders and everyone involved in this vital sector. We supported this bill when it was first introduced last year and we continue to support it.

When this bill was first introduced, small business was already doing it very tough indeed. Now, with the COVID-19 pandemic, we are seeing small businesses in absolute crisis. It is creating enormous stress and anxiety for everyone who is impacted. Government, at both the federal and state level, is responding with significant stimulus measures—most recently, the massive \$130 billion package that was announced yesterday by the Prime Minister, the federal Treasurer and the federal Minister for Finance. I have not had the opportunity to see the full package, but I also acknowledge that earlier today the Premier and the Treasurer of our state also announced further measures from a state perspective.

Daily, we are seeing businesses shut their doors and go into hibernation as result of their turnover being significantly reduced, or because they are now required to effectively shut their doors. It appears that every minute of the day, Australians are losing their jobs, so these stimulus packages are absolutely critical. The package announced yesterday by the Prime Minister—the JobKeeper payment—includes direct financial assistance for eligible businesses through the provision of a wage subsidy. As I understand it, it is expected to support around six million workers, which cannot be underestimated.

I do not need to tell members in this place, but it is quite distressing that no small business is immune from this pandemic, whether it is the local travel agent, the local restaurant, the local lunch bar, our hairdressers or our subcontractors—I could go on. Everyone has been impacted and it is devastating. Any help that we can give them during this very challenging and difficult time should receive our support.

I will come to the bill before us. I thank the minister's office and representatives from the Small Business Development Corporation for briefing me on the bill, both last year and again over the last couple of days. I have had a number of conversations with Jenni from the minister's office to work through some of the issues and I want to thank her for that. Essentially, this bill is designed to enhance the Small Business Commissioner's general investigative and reporting functions. The former Liberal–National government established the office of the commissioner through legislation that was introduced in 2011. That legislation was introduced by a former Minister for Small Business, Hon Simon O'Brien, as a way of enhancing the small business operating environment and providing a better means of resolving business-to-business disputes through a voluntary alternative dispute resolution service. Although the current act already identifies a number of functions for the commissioner, including the ability to receive and investigate complaints, which is set out in part 3, section 14A, this bill will enable those functions, particularly those reflected in paragraphs (b) and (c), to be expanded. They are identified at clause 5 of the bill. As was noted in my briefing, one of the initial key roles of the commissioner centred around poor behaviour in the retail and commercial sector, but this bill seeks to broaden the scope. Although it is not intended to change the voluntary alternative dispute resolution service, which I understand has proved largely successful in mediating outcomes, the bill essentially allows for additional tools to be at the disposal of the commissioner. For example, under the current act, the commissioner has to receive a complaint in order for an investigation to be considered. Through this legislation, that will be expanded to allow the commissioner to initiate an investigation of his or her own volition and to increase reporting and information sharing. A specific complaint will no longer be required to be made. Equally, it should be noted that the bill provides for the complainant's identity, if a complaint is made, to be protected. I think that is an important measure.

I understand the reasons for the proposed new ability for the commissioner to report on an investigation to the minister or any government entity. However, I flag that it is important that clear parameters are set for the information

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

that can be disclosed. As I understand from the briefings that were provided to me last year, it is intended that a non-disclosure agreement will be signed in certain circumstances, and this would be most relevant to entities that are not covered by existing state or federal legislation relating to disclosure. In this regard, although the advisers have confirmed that this will be a clear requirement, it is not specifically addressed in the bill. I indicate that I was thinking about an amendment to that effect, but I have reconsidered that based on some further advice that was provided to me. Notwithstanding that, I understand that the commission has prepared a non-disclosure policy relating to recipients of the commissioner's reports. I flag with the minister that it would be really helpful for her, either during debate on clause 1 or in her summing-up, to provide and table a copy of that policy. I gave the minister's office some notice about that because that would certainly be appreciated.

Another area of the commissioner's functions that is intended to be expanded is set out in clause 6—that is, the ability for the commissioner to request “documents, things and information”. There were amendments to this clause in the other place; however, the minister would be well aware that over the years we have spent a great deal of time in this chamber dealing with other bills discussing what “things” might include. I indicate that I will be seeking some clarity during the Committee of the Whole House stage about what would fall within the category of “things”.

Hon Sue Ellery: I was just getting a copy of the non-disclosure. What is it that you were wanting in addition?

Hon DONNA FARAGHER: It is at clause 6 and refers to the commissioner being able to request documents, things and information. I am particularly interested in “things”.

Hon Sue Ellery: We have debated “things” before, as I recall!

Hon DONNA FARAGHER: As I have indicated, we have discussed this on previous occasions, but we will have to do it again.

I also indicate that my colleague Hon Nick Goiran will comment on the notion of compelling information, documents and the like. As I have indicated to the minister's office, these new powers will allow the commissioner to investigate not only public entities, but also the private sector—that is, private citizens. Therefore, we need to ensure that the powers in this bill are utilised appropriately both now and in the future. One of the questions that is certainly relevant is: what oversight mechanisms will be employed to determine whether the commissioner is exercising these new functions appropriately? In considering this and to enable the further passage of this bill, I note that in clause 14 there is a review mechanism that was added during debate on the bill in the Legislative Assembly. Given some concerns that have been raised about the scope of powers outlined in proposed section 14BA, which is again at clause 6, I foreshadow that I will propose a slight amendment to the review provision, which I have discussed with the government. To assist members, the amendment does not seek to limit the review, but will require a particular focus on proposed section 14BA. To aid explanation, obviously, when we are dealing with matters of giving powers to another, it would probably normally be subject to longer scrutiny in this house or through a parliamentary committee process. Given that this has been deemed a COVID-19 bill and to assist its passage, I think at the very least it is important to reflect that that proposed section, notwithstanding all of the others, should be a focus of the review. I expect it would be in any event, but nonetheless I think it is important.

More generally, I understand that the bill does not provide the commissioner with decision-making powers or right of entry. I understand that some concerns have previously been raised about whether the latter is included. I am confident after reading the bill that it is not, but I think it would be useful for the minister to confirm it in her reply to the second reading debate. There are other matters. There are some other amendments on the supplementary notice paper, but to assist debate, I indicate that I will ask some questions in the Committee of the Whole House stage, but other than that the opposition will support the bill.

HON DIANE EVERS (South West) [5.52 pm]: As lead speaker for the Greens, I rise today to speak on the Small Business Development Corporation Amendment Bill. This bill aims to address some of the problems experienced by small businesses when they deal with big businesses arising from a power imbalance between the two parties. Some of these problems include late payment, extended payment times and unfair contract terms. I understand that in the current situation of COVID-19, we are already seeing some of these issues arise such as price gouging and late payment that could lead to non-payment. A lot of things coming up really need consideration. Most of these problems have been identified for a long time. The issue of late payment or non-payment to subcontractors in the construction industry in particular has been the subject of previous reports and inquiries, but the problem of unfair behaviour by big business to small business also arises in other contexts such as for franchisees and retail tenancies. Again, there will be continuing conversations about retail tenancies to make sure that small businesses are somehow supported, looked after and not taken advantage of during this crisis. It is not acceptable for small business to be treated as a piggybank by big business, as has occurred with some of the larger companies that delay payments. In fact, even government has been known to do it in the past, but I am really pleased to see the government tries its best not to do that. Still now though, sometimes when government pays contractors on

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

time, subcontractors do not get the funds. That is something we really need to be aware of and should not allow to happen. This bill aims to address some of the aspects of this problem.

Another bill that will be introduced by the Attorney General in the future intends to address payment security by a cascading trust. There are so many things to look at, but I am really pleased that this bill is coming to address the areas that it can.

A big change in this bill is the investigative functions of the Small Business Commissioner. Currently, the functions of the Small Business Commissioner include things such as administering the day-to-day operation of the Small Business Development Corporation, and receiving, investigating and helping to resolve complaints about unfair market practices affecting small businesses. The commissioner also receives and investigates complaints by small businesses about public sector bodies, provides alternative dispute resolution services for small businesses, makes representations to other persons or bodies on behalf of small businesses that have made a complaint, performs other functions as conferred on the commissioner by other legislation and advises the minister on matters relating to the commissioner's functions. This bill changes and expands the commissioner's investigative functions. Under this legislation the commissioner will be able to investigate any matter affecting small businesses' commercial activities, including investigating any person in relation to them. This includes WA public sector agencies, ministerial offices, non-senior executive service organisations and local government, but not commonwealth government agencies. Investigations may be as a result of a complaint received by the commissioner; and, if so, the commissioner can assist to try to resolve the complaint, but the investigation does not have to be as a result of the complaint. Under this legislation, the commissioner will be able to launch an investigation on their own initiative. This has many benefits, because sometimes the complaint is not from an individual, but maybe from a group of individuals or somebody who is afraid to come forward because of the damage that could be done to them if it becomes known they have made the complaint. It allows the commissioner the scope to take on other initiatives when they can see that there may be some disadvantage occurring or problems happening. The commissioner may investigate matters collectively when appropriate—for example, reviewing a trend in contractual conditions with small businesses to ensure that they are fair. The ability of the commissioner to launch an investigation apart from upon receipt of a complaint helps to address the concern that small businesses that make a complaint may jeopardise their future work prospects because the pool of contractors is small and the same people work on projects throughout WA. The commissioner's power of investigation is discretionary. The commissioner does not have to investigate if they consider it inappropriate to do so, and that decision is not reviewable. This allows the commissioner to avoid vexatious complaints or other things when it is not really appropriate that an investigation occurs.

Unlike the Victorian version of this legislation, the bill does not provide any guidance about when the commissioner would refuse to investigate; however, the explanatory memorandum does. It says that the commissioner will be able to refuse to investigate when there is lack of merit or when an investigation would not be in the public interest. This enables the commissioner to allocate resources for investigation to matters for which they are most needed according to priority. Another difference between the bill and the Victorian legislation is that there is no statutory requirement that the commissioner give written notice of a decision not to investigate. I understand from the briefing that I received that this is because it is already the commissioner's ordinary practice always to provide a written notice, including reasons for refusal. I ask the minister to please confirm for the record that the commissioner will give written notice of decision not to investigate. The minister cannot direct the commissioner in relation to their investigatory functions, and this allows the commissioner to look into issues that the minister might be involved in.

Hon Sue Ellery: What you want me to confirm is that the commissioner will give written reasons about why he or she is not —

Hon DIANE EVERS: Why they are not going through with an investigation—that is correct. Will the commissioner give a written notice with the reason for it?

I turn to the powers of the Small Business Commissioner in relation to investigations. The act currently provides that the commissioner has all the powers needed to perform their functions, including the power to charge fees for services provided. I was assured at the briefing that those powers did not include any powers of entry, because they are unnecessary to the performance of the commissioner's functions. Again, I ask the minister to confirm for the record that the powers do not include powers of entry.

This bill provides that the commissioner will have the power to require a person to produce within a certain time a document or thing or provide information that commissioner considers relates to the investigation. A breach is an offence unless the person has a reasonable excuse, and it attracts a maximum penalty of a \$20 000 fine. Again, there is no guidance in this bill as to what a reasonable excuse for a breach would be. The bill does not say that the privilege against self-incrimination or legal professional privilege is abrogated; therefore, my strong understanding is that both of these could constitute a reasonable excuse, and I again ask the minister to confirm for the record that the privilege against self-incrimination or legal professional privilege is not abrogated and they are still considered

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

as a reasonable excuse. I would also understand a reasonable excuse to include other circumstances—for example, the person was not advised that noncompliance is an offence, insufficient time given to comply or there is no reasonable ground to believe that the requested information would materially exist.

Sitting suspended from 6.00 to 7.30 pm

Hon DIANE EVERS: To pick up where I left off, I was asking the minister to confirm a few things. The last one was with regard to the detail that people are asked to provide to the commissioner. We understand that a reasonable excuse will include other circumstances, such as when the person was not advised that noncompliance is an offence or were given insufficient time to comply or when there was no reasonable ground to believe that the requested information would materially exist. I ask for that to be on the record as well. The commissioner may require the person to verify the information, document or thing by statutory declaration. It is an offence with a maximum penalty of a \$20 000 fine if the person knowingly provides information or a document or thing that is false or misleading in a material particular. That penalty will also apply if a person omits something that they know makes the information, document or thing false or misleading in a material particular, or if they alter, suppress or destroy the document or thing.

The minister is entitled to access any and all information in the commissioner's possession, including making copies, but unless the person consents, the minister is not entitled to it in a form whereby one of the people involved can be identified. That is an important point to make about whether everyone will be identified in these reports. If the commissioner carries out an investigation, the commissioner can give a report on it to the minister or to any government entity. A government entity is defined as a department of the public service, a local government, the WA Ombudsman, the Commonwealth Ombudsman, a public purpose body or office, the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the commonwealth Commissioner of Taxation or any other prescribed person or office. If the report's contents would, if published, adversely affect the person's interests, the commissioner must give the person a reasonable opportunity to make a written submission and provide that together with the report. Wherever there is some sort of a negative or an adverse position in the report, people do get a chance to at least respond to that. This is entirely reasonable and we strongly support this. However, we do have concerns that unlike the New South Wales version, this bill does not require the commissioner to amend the report to show that a submission has been received. This is worrying because if the two documents ever became separated, there would be nothing in the report to alert the reader to the submission's existence. Therefore, I will move an amendment in Committee of the Whole to require the report to be amended to show that a submission was made, if one was. This has been discussed with the government. I do not think I need to read in that amendment now, or is that something that I need to do at the end?

Hon Sue Ellery: You can move it when we get into committee.

The PRESIDENT: When you are in committee, member. You obviously can flag that you intend to do it and talk about why you want to do.

Hon DIANE EVERS: Thank you. That way, even if the report and the submission become separated in the future, the reader of the report is made aware of the existence of the submission, so the two documents can be reunited and read together.

In regard to disclosure, as I said, the minister is entitled to a copy of the report, and the report given to the minister can disclose the person's identity. However, the commissioner is not required to disclose to anyone and, indeed, can actively refuse to disclose the identity of a person who has made a complaint or disclosed information that caused the commissioner to decide to launch an investigation on the commissioner's own initiative. As I said, it could present problems for such a person if it were known within their industry that they were the one who made the complaint in the first place. Section 18 of the act prohibits any person who is or has been the commissioner, an appointed member of the corporation, employed or engaged by the corporation or a minister-approved delegate of the corporation from disclosing or making use of any information obtained in the course of duty except for the purposes of performing functions under the act as allowed by law, with the consent of the person to whom the information relates or in prescribed circumstances. Examples of disclosure that will continue to be allowed by law include disclosure under freedom of information laws and under section 4 of the Parliamentary Privileges Act 1891. I ask the minister to please confirm that this is correct—that disclosure will continue to be allowed by law, including under freedom of information laws and section 4 of the Parliamentary Privileges Act.

Regarding the uses to which the commissioner's reports and recommendations can be put, I understand from the briefing that the guiding principle is to resolve problems without, so far as possible, damaging individual businesses or business confidence generally. The idea of the commissioner and the development corporation is to have better practices in our businesses and industry and to call out those who are doing the wrong thing. For example, the commissioner's reports and recommendations might be used by the government to identify head contractors that use best practice towards subcontractors and then prefer those head contractors for government contracts. Rather

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

than being a punitive measure, through these processes we could find out the head contractors that are actually doing the right thing and are treating their subcontractors well. In a worst-case scenario, they could be used by government to identify head contractors that treat subcontractors unfairly and possibly ban those head contractors from government contracts for a set period. There are uses for these reports. It could also support referral of the matter to a body such as the ACCC or recommend changes in law and policy. From this, we can come up with better ideas to improve business and industry models so that people end up in a much better situation. With that, I flag that I will be moving an amendment to the bill during Committee of the Whole. The Greens support this bill.

HON AARON STONEHOUSE (South Metropolitan) [7.39 pm]: The Small Business Development Corporation Amendment Bill 2019 seeks to expand the Small Business Commissioner's general investigative and reporting functions. The bill seeks to expand those powers and functions by expanding the scope of matters that the commissioner can investigate to include any matter that affects the commercial activities of small businesses; by clarifying that the commissioner can investigate the actions of the private sector, local government and state government insofar as they affect the commercial activities of small business; by enabling the commissioner to investigate a matter without the need for a formal complaint by a small business; by enabling the commissioner to investigate a matter on the basis of anonymous complaints; by enabling the commissioner to compel a person to produce a document or provide information in relation to an investigation; and by clarifying that the commissioner can report investigation findings to ministers of the Crown, local government, state government and special commonwealth government bodies and regulators.

I have a few issues with this bill. The first one I would like to point to is the broadness with which that first expansion is couched. Expanding the scope of matters that the commissioner can investigate to include any matter that affects the commercial activities of small business is an incredibly broad expansion of the commissioner's power. A matter that affects the commercial activities of a small business could really be any matter. It could be a price set by someone in its supply chain or it could be the terms of a contract someone has entered into. It could relate to any commercial activity in the state. It enables the commissioner, along with the expansion of his power, to investigate a matter without the need for a formal complaint from a small business and to essentially go on a fishing expedition. The Small Business Commissioner could, at random, if he so chooses to, select a business, compel that business to provide information and documents, and go looking for misconduct when a complaint does not exist. The ability to compel people to provide information is also equally troubling. That is a rather extraordinary power. Normally, in a criminal matter, for instance, an investigator would have to apply to a court for a warrant to seize documents or to search for information. In this instance, when no crime has been alleged, the Small Business Commissioner can compel people to provide information and documents. This, coupled with the ability to initiate his own investigations, means we now have a super-investigator who, off his own bat, can go rifling through people's documents. These are rather extraordinary powers normally reserved for the most serious crimes. These are the kinds of powers normally reserved for the Corruption and Crime Commission, yet this bill seeks to expand those powers to the Small Business Commissioner.

I understand that there are some concerns about slow or withheld payments to contractors. I share those concerns; they are matters that we should be investigating and prosecuting whenever possible. But the broadness of these powers that will be granted to the Small Business Commissioner really opens the door to abuse and injustice.

It is doubly concerning to me that this bill has been brought on now, as we are supposedly dealing with urgent coronavirus legislation. I was trying to figure out what could be so urgent, whilst battling a viral pandemic, about the expansion of the Small Business Commissioner's investigatory powers.

A briefing document was provided to me with some notes from the minister's office that outline some of the reasons that this is urgent legislation and needs to be dealt with during the COVID-19 crisis. The notes state —

Unfortunately, some businesses and individuals will exploit the COVID-19 crisis to their own benefit.

That is quite a prediction. I wonder whether there are any examples of that that can be given now. It continues —

We have already seen this in the form of price gouging of high demand products and claims that insurance companies are denying claims or excluding coverage for COVID related death from their policies.

If it is not covered in their policy, I am not so sure what the Small Business Commissioner intends to do about it. But on that first matter, we have already seen this in the form of price gouging for high-demand products. What does that actually mean? How does the minister define "price gouging"? Is that a high price? Because I have news for the minister: when demand outstrips supply, prices go up—that is economics 101. The note goes on to outline that there might be some concerns about payments being withheld from or excessively delayed to subcontractors and suppliers. That is a genuine concern.

That this price gouging issue is the first example given of businesses and individuals exploiting COVID-19 for their own benefit really concerns me. It makes me wonder what kind of investigations the minister expects the Small Business Commissioner to conduct with these new, urgent, emergency powers that are to be granted to the

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

commissioner. Will he investigate high prices? That would certainly fit the definition of “any matter that affects the commercial activities of small business”.

To get a better grasp on what might be meant by price gouging, I thought it might be useful to consult Dr Thomas Sowell’s fifth edition of *Basic Economics* in which he has a bit to say about price gouging. The minister might be confused about what price gouging is and I always welcome the opportunity to talk about economics in my contribution to parliamentary debates. In *Basic Economics*, Dr Thomas Sowell states —

When a local area is devastated by a hurricane or some other natural disaster, many people consider it unconscionable if businesses in that area suddenly raise the prices of such things as bottled water, flashlights or gasoline—or if local hotels double or triple the prices of their rooms when there are many ... people suddenly made homeless who are seeking temporary shelter. Often price controls are regarded as a necessary quick fix in this situation.

The political response has often been to pass laws against “price gouging” to stop such unpopular practices. Yet the role of prices in allocating scarce resources is even more urgently needed when local resources have suddenly become more scarce than usual, relative to the increased demand from people suddenly deprived of the resources normally available to them, as a result of the destruction created by storms or wildfires or some other natural disaster.

Where homes have been destroyed, for example, the demand for local hotel rooms may rise suddenly, while the supply of hotel rooms at best remains the same, assuming that none of these hotels has been damaged or destroyed. When the local population wants more hotel rooms than there are available locally, these rooms will have to be rationed; one way or another, whether by prices or in some other way.

If the prices of hotel rooms remain what they have been in normal times, those who happen to arrive at the hotels first will take all the rooms, and those who arrive later will either have to sleep outdoors, or in damaged homes that may offer little protection from the weather; or else leave the local area and thus leave their homes vulnerable to looters. But, if hotel prices rise sharply, people will have incentives to ration themselves. A couple with children, who might rent one hotel room for themselves and another for their children, when the prices are kept down to their normal level, will have incentives to rent just one room for the whole family when the rents are abnormally high—that is, when there is “price gouging.”

Similar principles apply when there are local shortages of other things suddenly in higher demand in the local area. If electric power has been knocked out locally, the demand for flashlights may greatly exceed the supply. If the prices of flashlights remain the same as before, those who arrive first at stores selling flashlights may quickly exhaust the local supply, so that those who arrive later are unable to find any more flashlights available. However, if the prices of flashlights skyrocket, a family that might otherwise buy multiple flashlights for its members is more likely to make do with just one of the unusually expensive flashlights—which means that there will be more flashlights left for others.

If there is an increased demand for gasoline, whether for electric generators or to drive automobiles to other areas to shop for things in short supply locally, or to move out of the stricken local area entirely, this can create a shortage of gasoline until new supplies can arrive at filling stations or until electric power is fully restored, so that the pumps at more filling stations can operate. If the price of gasoline remains what it has been in normal times, those who get to the filling stations first may fill up their gas tanks and exhaust the local supply, leaving those who arrive later with no gasoline to buy. But, if the price of gasoline skyrockets, motorists who arrive earlier may buy just enough of the unusually expensive gasoline to get them out of the area of local destruction, so that they can then fill up their gas tanks much less expensively in places less affected by the natural disaster. That leaves more gasoline available locally for others.

When local prices spike, that affects supply as well, both before and after the natural disaster. The arrival of a hurricane is usually foreseen by meteorologists, and their predictions of approaching hurricanes are usually widely reported. Supplies of all sorts of things that are usually needed after a hurricane strikes—flashlights, bottled water, gasoline and lumber, for example—are more likely to be rushed to the area where the hurricane is likely to strike, before the hurricane actually gets there, if suppliers anticipate higher prices. This means that shortages can be mitigated in advance. But if only the usual prices in normal times can be expected, there is less incentive to incur the extra costs of rushing things to an area where disaster is expected to strike.

Similar incentives exist after a hurricane or other disaster has struck. To replenish supplies in a devastated area can cost more, due to damaged roads and highways, debris and congested traffic from people fleeing the area. Skyrocketing local prices can overcome the reluctance to take on these local obstacles that entail additional costs. Moreover, each supplier has incentives to try to be the first to arrive on the scene, since that is when prices will be highest, before additional suppliers arrive and their competition drives prices

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

back down. Time is also of great importance to people in a disaster area, who need a continuous supply of food and other necessities.

Prices are not the only way to ration scarce resources, either in normal times or in times of sudden increases in scarcity. But the question is whether alternative systems of rationing are usually better or worse. History shows repeatedly the effect of price controls on food in creating hunger or even starvation. It might be possible for sellers to ration how much they will sell ... some of his customers by refusing to let them buy as much as they want —

We have seen that practice carried out here in Perth supermarkets —

and he may lose some of those customers after things return to normal. Few sellers may be willing to risk that.

The net result of having neither price rationing nor non-price rationing may well be the situation described in the wake of the super storm “Sandy” in 2012, as reported in the *Wall Street Journal*:

At one New Jersey supermarket, shoppers barely paused for a public loudspeaker announcement urging them to buy only the provisions needed for a couple of days of suburban paralysis. None seemed to be deterred as they loaded their carts to the gunwales with enough canned tuna to last six weeks. A can of Bumblebee will keep for years: Shoppers take no risk in buying out a store’s entire supply at the normal price.

Appeals to people to limit their purchases during an emergency, like other forms of non-price rationing, are seldom as effective as raising prices.

That is a brief lesson in the importance of rising prices which might otherwise be misidentified as price gouging by a minister who perhaps has not taken the time to read any of Thomas Sowell’s work.

Hon Sue Ellery: Or maybe disagrees.

Hon AARON STONEHOUSE: Or perhaps disagrees. It is concerning when such a practice is singled out as justification for rushing through provisions that would turn the Small Business Commissioner into an investigator with powers as broad as perhaps, if I dare say, the Corruption and Crime Commissioner to investigate and report on such heinous things as rising prices during scarcity.

I do not support this bill. There are better ways to go about ensuring that subcontractors are paid in a timely manner. I do not think that involves essentially writing a blank cheque to a bureaucrat to initiate his own investigations and to compel people to provide information.

HON RICK MAZZA (Agricultural) [7.53 pm]: I rise to make a few comments on the Small Business Development Corporation Amendment Bill 2019. This bill has been put to the house on the basis that it is part of the COVID-19 emergency package, but my understanding is that many issues this bill attempts to address have been simmering away for many years. Much of that relates to head contractors not paying their subcontractors. Quite often, that is a government contract that has been awarded to a fairly big head contractor. After a lot of their work is done by subcontractors, they go broke and a domino effect flows through the community. A lot of small subcontractors either go broke or are severely impacted by it. A case comes to mind. Not too long ago, a bridge was being constructed down at Capel but the head contractor had gone broke. A local fabrication business lost over a quarter of a million dollars out of that which pushed him very close to the wall.

I understand that we need to have fair trading in this state, but there is always that balance between having things in place to protect business while not interfering too much with free enterprise. I am not 100 per cent sure whether this is the way to go about it. There certainly needs to be work around subcontractors not being out of pocket. Maybe they could be paid more frequently or there is something in the contract with the head contractor to ensure that subcontractors are paid in a timely way.

The powers that will be granted to the Small Business Commissioner by this bill are extraordinary. It would actually hand a lot of power to executive government to look into all these matters. They can sweep through any small business or government department, a minister’s office or a ministerial office. They could really wield a lot of power within business and government spheres. I am a bit concerned about that. We are trying to deal with a lot of legislation at once and on the run. I have not been able to find, either in the bill or the explanatory memorandum, whether there is any oversight of the commissioner, like a parliamentary inspector for the CCC or whether a committee will be set up to oversee the Small Business Commissioner to make sure the commissioner’s department is not running away with a head of steam. I am very concerned about that. Maybe the Leader of the House can assure us in some way that there will be oversight of the Small Business Commissioner before handing over this amount of power to executive government.

In the briefing note on this bill that was sent to me this morning, one of the reasons for it was exploitative behaviour related to COVID-19. That could occur. Personally, I have not seen any evidence of exploitation taking place.

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

I understand that fuel prices have gone down significantly—to about \$1 a litre. I have not seen any evidence of exploitation or price gouging. Maybe the Leader of the House can provide some examples of where this price gouging has occurred, which is the reason we are looking at the legislation before us.

I am a little intrigued about insurance companies denying claims or excluding coverage, because policy documents are very clear. They are usually quite lengthy and detailed about what is and what is not covered. COVID-19 is a fairly new virus that has struck our community. I do not know that there would be exclusions in many insurance policies when it comes to death cover. In any case, can the Leader of the House provide us with some evidence of insurance policies that have particular clauses in them that prevent insurance payments related to COVID-19 deaths? I would be interested to know about that.

I understand the reason behind the bill when it comes to the subcontractor situation. We do not want a lot of small subcontractors going broke or being severely impacted because of unscrupulous head contractors, but I think we need to be very, very careful and mindful about handing over this power to the Small Business Commissioner. I would certainly like to hear how we will control this commissioner once he or she is appointed.

HON NICK GOIRAN (South Metropolitan) [7.58 pm]: I am pleased to rise to contribute to the second reading debate on the Small Business Development Corporation Amendment Bill 2019, which is before us at the moment because the government has declared it an urgent COVID-19-related piece of legislation. At the outset, I acknowledge some elements of the bill, which have been conveniently set out in the explanatory memorandum provided by the government, as far back as I understand in August last year when the bill was brought into the Legislative Council. The explanatory memorandum indicates that the bill will effectively expand the scope of the Small Business Commissioner's current investigative and reporting functions. They bring about some very interesting elements.

I was heartened by the contributions I heard this evening from Hon Aaron Stonehouse and Hon Rick Mazza, who understand the significance of the legislation before us. I also acknowledge that, according to the government, the bill intends to remedy the issue of late or non-payment to subcontractors working on government-funded construction projects. I hasten to add that I support legislation that seeks to protect and support our small business community. I also hasten to add that I am mindful of unintended consequences.

I want to spend a moment focusing on clause 6 of the bill. We will have an opportunity to consider the bill before us in greater detail during Committee of the Whole House. I note that there is a supplementary notice paper; we are up to issue 3. The bill has 14 clauses but I want to spend a moment looking at clause 6. My concern is that clause 6 provides the Small Business Commissioner with the exceptional power to compel people. Presumably, this combination of coercive and non-coercive powers is being given to enable the Small Business Commissioner to gather evidence and build investigative theories in accordance with the government's six-point expansion outline set out in the explanatory memorandum. The concern I have is that the danger of investigative bodies having these extraordinary powers is heightened when they are given such powers without oversight. When that happens, it can cause reputational harm and it can ruin careers, relationships and livelihoods. This really raises the question of whether an agency such as the Small Business Development Corporation, driven by the judgements of unelected officials in pursuit of certain mandates, should be empowered to initiate public processes that have far-reaching consequences without oversight. I think that clause 6, which provides this exceptional power, warrants additional and extra scrutiny, particularly if members are inclined to consider the fundamental legislative scrutiny principles.

It is not unusual for bills to be referred to the Standing Committee on Legislation. When bills are referred to that committee, one of the things that it routinely does in accordance with its custom and practice is reconcile bills with the fundamental legislative scrutiny principles. Two of those principles immediately jump out at me. First, are rights, freedoms or obligations dependent on administrative power sufficiently defined and subject to appropriate review? Maybe the Leader of the House will be able to provide us with some information in her reply or, if not, during Committee of the Whole House. What oversight is being provided here? When the fundamental legal scrutiny principle refers to appropriate review, that captures oversight. What oversight is being provided in this bill? The second principle that jumps out at me is principle 5, which states —

Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

This bill certainly does not do that. The bill does not require a court-approved warrant. Equally, it is fair to say that the bill does not confer a power on the Small Business Commissioner to enter premises but he or she most certainly can compel a person to provide information. The language of compulsion is set out in the fifth dot point in the government's explanatory memorandum. Expanding powers, let alone granting extraordinary ones, raises important questions for us as legislators, particularly about accountability, oversight and fairness.

As I conclude, I indicate that during my over eight years as the Chair of the Joint Standing Committee on the Corruption and Crime Commission, the need for a solid framework whenever we are granting an agency exceptional powers became

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

increasingly apparent to me. These powers can achieve commendable objectives, yet, as we know, they can cause harm and distress. I flag that although I have questions for the minister on clauses 1, 4, 5, 6 and 14, I will spend the majority of my time considering this issue at clause 6, where it appears that the commissioner is being granted an exceptional power without the oversight that would ordinarily be the case. That would trouble me at any time, let alone at a time like this when the bill is being pushed through the Legislative Council under the guise of it being COVID-urgent, notwithstanding the fact that the bill has been on the notice paper since as far back as August last year.

HON SUE ELLERY (South Metropolitan — Leader of the House) [8.06 pm] — in reply: I thank members for their contribution to the second reading debate of the Small Business Development Corporation Amendment Bill 2019. As members have noted, this bill was already before the house but, indeed, the very significant pressure that small business has been under as a consequence of the COVID-19 crisis has caused the government to push ahead to get this bill passed this week in recognition that now more than ever small business needs to know that somebody is available to assist them and they want the certainty of knowing that unscrupulous activities can be investigated and recommendations made for prosecution if appropriate.

As we have seen in the last few weeks, the impact of the COVID-19 crisis has been widespread. Some of those under the most pressure have been small business operators. Just a few weeks ago, many of our state's small businesses could not have possibly contemplated that within 24 hours some of them would either be closed down by the government or they would have to close as a consequence of the reduction in social and economic activity that has occurred as a result of COVID-19. They could not possibly have anticipated that they would be in this position. Those businesses have been contacting the Small Business Development Corporation seeking assistance and reinforcing in a policy sense that the provisions within this bill relating to the powers of the Small Business Commissioner are needed now more than ever.

I am going to respond in an unusual way. One of the issues that I want to tackle first, if I may, is the notion put forward by Hon Aaron Stonehouse that somehow if we disagree with the proposition put by Thomas Sowell, we do not understand what price gouging is. Economists are like lawyers, dare I be so bold. I am not sure who that insults the most—sorry to the lawyers in the room! People can get lots of different opinions. There are many economists who do not agree with Thomas Sowell about whether or not certain characteristics, particularly in times of national crisis, constitute price gouging at all and, if they do, whether they are good or bad. I have to dispute the proposition put by Hon Aaron Stonehouse that in this case, the Minister for Small Business just does not understand what price gouging is. He understands full well; he has a different point of view of its benefits and its disadvantages. One of the arguments put by those economists who would argue against Thomas Sowell is that price gouging can lead to inefficient displacement activity. For example, individuals who buy stock such as toilet paper and hand sanitiser from shops and try to resell them online are spending time and effort distributing resources and goods at a higher price but are not increasing the number of goods or resources that are available and consumers have to spend more time trying to find those goods. Rather than going to their supermarket, they have to find the retailers that have set up the instant shop to resell at a higher price the goods that they purchased at a lower price. Another proposition put by the economists who would argue with Thomas Sowell is that the ability to pay does not mean that there is equal need at all, because price gouging can put basic necessities, such as toilet paper, out of the reach of those people who desperately need them. If the prices are very high, those with a higher income and savings and capacity to pay, of course, can buy them, whether or not they need them. But those who are the most vulnerable may not be able to afford them.

Libertarian economics breaks down the social contract. I know that the social contract is something that Hon Aaron Stonehouse could talk at length to members of the house about. At this time in Australia and, indeed, the world when we are dealing with COVID-19, one of the most resounding and comforting messages to our community is that people are working together to address the issues and that if we work together to address those issues, we can come through it. One of the assumptions behind the proposition that Hon Aaron Stonehouse put is that we should not take any notice of that and it should be the capacity to buy and sell that is the motivator, not whether there is a common good. There are plenty of reasons to argue against the proposition put by Hon Aaron Stonehouse, but the basic assumption has to be challenged; that is, if someone does not agree with the definition he has put, they just do not understand. If there are 1 000 economists, there are about 800 different views about how the economy works. It is underplaying—I guess that is the politest way of putting it—the capacity of the minister and the government to understand the notion of price gouging to suggest that the only reason we take a different point of view is that we do not understand it. I do not accept that argument for a minute.

I will go back to where the second reading debate began and that is with the contribution by Hon Donna Faragher. I thank her for her contribution to not only the second reading debate, but also the development of the policy of the bill before us. Members will note that there are a couple of amendments in her name on the supplementary notice paper. She has made sound policy suggestions, which the government is happy to accept, and the amendments will be supported by the government. The other point I want to make is about the amendment in the name of Hon Diane Evers, which the government will also support.

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

However, I will go back to the beginning. It is the case that, unfortunately, some businesses and individuals will exploit the COVID-19 crisis to their own benefit. Contact has been made with the Small Business Development Corporation about concern about potential and other price gouging of high-demand products and claims that insurance companies are denying claims or excluding coverage for COVID-19-related consequences. There is also concern that there are going to be instances in which payments will be withheld or excessively delayed to subcontractors and suppliers. This is already a problem for our small business subcontractors and suppliers and was indeed one of the major driving motivations for this legislation, but now more than ever, it is necessary to address that. There is no doubt that some unscrupulous businesses or individuals will exploit the crisis to further delay payments to small business. That activity and the impact on small business is not to be underestimated. The Small Business Commissioner needs the power to properly investigate that and act on reports of exploitation.

I note that a couple of points were made about the need for some kind of oversight. I think it is important to understand what the Small Business Commissioner can do. He can investigate, but he does not make a decision to prosecute; that decision is made by another agency, and people need to understand that. It is not the Small Business Commissioner who makes the decision to prosecute or otherwise. The passage of the bill will ensure that the Small Business Commissioner can investigate complaints and prepare reports on those matters. The bill unashamedly enhances the Small Business Commissioner's investigative powers by enabling him to issue a notice to produce information to businesses that refuse to comply with an investigation. It also enhances the commissioner's ability to report matters to the Minister for Small Business and any other appropriate government entities that could assist in addressing any exploitative behaviour.

Hon Diane Evers raised the point that the bill differs from the Victorian version of the legislation in that there is no statutory requirement for the commissioner to give written notice of a decision not to investigate. The member wanted confirmation that this requirement was not included in the amendment bill because it is already the commissioner's ordinary practice to always provide written reasons for refusal. I can confirm that this is the case. If, after considering a complaint, the commissioner decides not to investigate or otherwise provide assistance, a written notice will be provided to that person informing them of the decision and the reasons for refusal. This practice is being adopted into the SBDC's operations manual. I can provide a template letter that was developed by the SBDC to inform complainants of the commissioner's decision. In this COVID-19 Parliament, I am not sure how I table such a document, but I table it.

[See paper [3745](#).]

Hon SUE ELLERY: Both Hon Donna Faragher and Hon Diane Evers raised whether the Small Business Commissioner will be given the power of entry onto premises. Hon Diane Evers pointed out that the act provides that the commissioner has all the powers needed to perform the commission's functions, but both members sought assurances that the commissioner's powers do not include the power of entry. I can confirm that the bill does increase the commissioner's current investigative function, but this is limited to issuing notices to compel the production of documents, things or information, and I will come back to "things" in a while. The bill does not give the commissioner the power to enter a premises. Hon Diane Evers also sought guidance on what "reasonable excuse" means with regard to a breach of the bill. The member rightly pointed out that a reasonable assumption would be that the privilege against self-incrimination and legal professional privilege would constitute a reasonable excuse. I can confirm that there is a presumption that the legislation will not abrogate legal professional privilege or the privilege against self-incrimination unless it expressly states otherwise, and the bill does not expressly state this. As the member has highlighted, the bill references "reasonable excuse" in the context of a person failing to comply with the commissioner's request. Although the amendment bill does not expressly include a defence against failure to comply, the intention is that a reasonable excuse may include circumstances in which self-incrimination against a criminal offence is likely or if the party would be breaching legal professional privilege if they comply with a notice. The commissioner will seek the cooperation of the party and encourage open dialogue on their ability to comply with the notice. The circumstance of each case will be considered, such as access to documents and the size of the business being compelled.

Hon Diane Evers said that section 18 prohibits the disclosure or use of information by specified individuals associated with the Small Business Development Corporation, unless allowed by law. The member questioned whether disclosure allowed by law includes disclosure under freedom of information laws and disclosure under section 4 of the Parliamentary Privileges Act 1891. I can confirm that the Small Business Development Corporation Amendment Bill 2019 will not override established laws such as the Freedom of Information Act 1992 or the Parliamentary Privileges Act 1891. The operation of the small business amendment bill, when enacted, will not prevent the lawful disclosure of information under established legislation. As such, disclosure that is allowed by laws such as the Freedom of Information Act and the Parliamentary Privileges Act will not be impacted by the amendments in the bill.

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

I note Hon Donna Faragher's concern regarding the impact on private citizens of extending the Small Business Commissioner's powers. Members should be aware that the commissioner's powers are limited. The bill will not enable the commissioner to enter a premises or force a person to answer a question or provide a document or thing. This house has debated "things" before. I am advised that when that word is used, it is anticipated that the sort of thing that will be seized or required will be a USB stick, for example. Recognising that technology may change in the future and wanting the legislation to keep up to date, the broadest expression has been used to capture that. The purpose of the broad nature is to ensure that the legislation remains relevant. A number of factors are built into the bill to limit the extent of the commissioner's powers. Firstly, the commissioner can investigate only matters that have a nexus to the commercial activity of small business. He cannot investigate a matter that is unrelated to the commercial activity of a small business. Secondly, the amendment bill includes a defence such that a person who is issued with a notice can refuse to comply if they have a reasonable excuse. As I indicated in my answers to the issues raised by Hon Diane Evers, the term "reasonable excuse" covers a range of situations and factors. When a person refuses to comply with a notice, the decision regarding whether it is a reasonable excuse is made by the State Solicitor's Office. That is not a decision for the Small Business Commissioner.

The member also raised concerns about the oversight of the expanded role. Safeguards have been built into the legislation to ensure the proper exercise of power. This includes, for example, the ability to check the legitimacy of complaints, providing the investigated party with a right of reply and a requirement for the matter to be related to the commercial activities of a small business. Operational procedures and policies have been developed as well. The commissioner has developed an operational process to verify a complaint before it is escalated to an investigation. For example, if a complainant wants the commissioner to investigate a matter, the complainant will be required to provide evidence of their claim. Once that proof is provided, the commissioner can seek a statutory declaration from the party to verify that the information provided is correct. That is provided for in the legislation.

The member also raised concerns about the use of reports by government entities. The purpose of sharing reports is to make government entities aware of the issues that are impacting small businesses. Government entities may be able to assist small business through their contractual or regulatory roles. Reports will not be shared with government entities for the purpose of making the reports publicly available. Safeguards also exist for the protection of confidential information. The commissioner may receive commercially sensitive information from investigated parties either through compulsion or voluntarily. The commissioner already receives commercially sensitive information through the SBDC's advisory and dispute resolution service. Examples of commercially sensitive documents include copies of contracts and leasing and pricing arrangements. The following mechanisms are in place to protect the confidentiality of parties and their documents: locked and restricted files, the secure destruction of documents, staff training in information management and usage, and legislative and governance frameworks. Additional safeguards have been built into the processes and systems used by the SBDC to protect confidentiality. The commissioner has the discretion to accept redacted information when appropriate. Commercial-in-confidence information will be redacted from documents before either being stored on the SBDC's system or shared. Documents relating to an investigation will be stored on files that are kept separate from the SBDC's other functions. Documents provided to the commissioner will typically not be attached to the final report unless required to substantiate findings or recommendations. In such circumstances, the documents will be appropriately redacted. The commissioner can request that a party sign a confidentiality agreement before he provides them with the report.

Finally, I will table a non-disclosure agreement policy titled "Non-disclosure policy—Recipients of Commissioner's report: Statement of Policy Intent". That document was requested by Hon Donna Faragher. The policy outlines that the commissioner will consider whether or not to require a government entity to sign a non-disclosure agreement in relation to the report.

[See paper [3746](#).]

Hon SUE ELLERY: I will go back to the issue of oversight. The bill provides for a reasonable excuse for not complying with the commissioner's notice. If someone does not comply, the State Solicitor's Office decides whether to prosecute. The Small Business Commissioner does not decide that. The matter then goes to court for the court to find whatever it chooses.

On the issue of minimising the risk of a small business being penalised for noncompliance, the minister has the discretion to refer noncompliance requests issued under the legislation to the State Solicitor's Office. The State Solicitor's Office is responsible for assessing whether it is appropriate to pursue the matter in the courts and a judicial officer will determine the quantity of the fine applied, based on the submissions made by the parties.

On the matter of the power to make binding decisions and why the commission will not have decision-making or judicial powers, the power to make binding decisions must be accompanied by safeguards to ensure that due process is followed. Other public sector bodies, regulators, procurement agencies, courts, tribunals and adjudication services have relevant decision-making powers that apply to small business. It is not the intention of government to duplicate services provided by those other public sector bodies. The Small Business Commissioner may make

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

a submission about the size of a penalty and include information on that, but the commissioner will not determine the amount; the policy for the size of a penalty is set by the court.

A question was raised about what the Corruption and Crime Commission can do that the Small Business Commissioner cannot do. Authorities have a monitoring role that includes the power to examine witnesses, search and stop people and to go into premises, none of which powers the Small Business Commissioner has.

I will leave my comments there. The supplementary notice paper contains amendments in the names of Hon Donna Faragher and Hon Diane Evers. The government will support those amendments and I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Matthew Swinbourn) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon NICK GOIRAN: Before I ask my first question, regarding procedure, I am quite happy to walk backwards and forwards to my chair, but I can indicate that I have three questions for clause 1. I say three loosely, because, of course, it depends on the answers that I get whether I will ask any supplementary questions, but with your leave I propose to ask all three questions.

The DEPUTY CHAIR: I think that is appropriate and we will play it by ear, although, if you need the exercise, just let us know.

Hon NICK GOIRAN: Thank you, Mr Deputy Chair.

The bill before us in the Legislative Council is marked 130–2, with a notation on page 1 that it was amended during consideration in detail in the other place. Can the minister advise which clauses before us are not the original clause proposed by the government, and when we consider those respective clauses, will the minister agree to provide an explanation for the differences?

Hon Sue Ellery: I thought you were going to ask all three at once.

Hon NICK GOIRAN: I can do, but I think that might elongate things. I am happy either way, Mr Deputy Chair.

The DEPUTY CHAIR: Perhaps if you resume your seat, the minister can respond.

Hon Sue Ellery: Just do all three at once.

Hon NICK GOIRAN: Do you want the other two? Okay. Mr Deputy Chair, with your leave, I will continue with the other questions I have.

The minister said in reply that the commissioner can only investigate but not prosecute. Is that also the case with the Corruption and Crime Commission? My third question is: the minister indicated in her reply that the Small Business Commissioner could seize a USB drive; does the bill grant the powers of seizure?

Hon SUE ELLERY: While my adviser is providing me with an answer to the second question, the answer to the third question about powers of seizure is no.

The first question was about the amendments that were made to the bill in the other place and the difference between the bill as it was first tabled in and after coming out of the Assembly. I will go through those. There are six of them. The Legislative Assembly amendment to clause 5 was to insert new section 14A(3), that the commissioner must not duplicate the operations of any department of the public service with the new investigatory function and that the commissioner must work cooperatively with the departments of the public service.

The second amendment in the Legislative Assembly was to clause 6, amending proposed section 14BA(2). If the commissioner requests and keeps a document after compelling it, it must be returned as soon as practicable or, in any event, within seven business days of its production to the commissioner.

The third amendment was to clause 6, amending proposed section 14BA(3), which now states —

business day means a day other than —

- (a) a Saturday or Sunday; or
- (b) a public holiday ...

The fourth amendment was to clause 6, inserting proposed section 14BA(8), which states —

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

A prosecution for an offence against this section may not be commenced without the authorisation of the Commissioner.

The amendment in the Legislative Assembly to clause 7 amends section 14C so that the commissioner cannot delegate the power to authorise commencement of prosecutions.

The amendment in the Legislative Assembly to part 6, inserting a new section 24A, is to review the operations and effectiveness of the amendments two years after the amendment act comes into operation, and then table the review within 12 months.

The second question that the honourable member asked was about the commissioner and my comments about investigation and prosecution, and whether that is the same for the CCC. The advice I have is that the State Solicitor's Office would take responsibility for the prosecution of offences under the Corruption, Crime and Misconduct Act 2003.

Hon NICK GOIRAN: Firstly, with regard to the different clauses that have changed between the chambers, is it possible to table a document that reflects those things?

Secondly, the minister indicated that the State Solicitor's Office will undertake the prosecutions for the Corruption and Crime Commission. Yes, that is the case. But the minister, in response to various concerns raised by members about these extraordinary powers that are being given to an investigator, seemed to indicate in her reply that it was important to remember that the commissioner can only investigate but not prosecute. My question was: Is that also the case for the Corruption and Crime Commission? In other words, can they only investigate and not prosecute? If that is the case, and I understand that it is, one could argue that the same level of oversight would be appropriate with regard to both those investigative bodies, given that neither of them are prosecutorial.

The third area deals with the issue of the power of seizure. The minister said in her reply that the commissioner could seize a USB drive, but in her recent response she indicates that there is no power of seizure. Can the commissioner seize a USB drive or not?

Hon SUE ELLERY: First things first, I can table this list of amendments made in the Legislative Assembly.

[See paper [3747](#).]

Hon SUE ELLERY: On the third point about seizure, I think I misspoke, so I will correct myself. It was the power to request that a USB or the like be handed over. I apologise for that. The point about the CCC is that the CCC has extraordinary powers over and above those of the Small Business Commissioner, and that was the point that I was trying to make, perhaps inelegantly—for example, the power to stop and search.

Hon RICK MAZZA: What I can gather from that is that there will be no parliamentary inspector equivalent to keep an eye on the Small Business Commissioner, or a committee set up to oversee the Small Business Commissioner. If someone is concerned with the conduct of the Small Business Commissioner, how do they go about making their complaint?

Hon SUE ELLERY: There are four avenues for complaint. It could be a complaint to the minister, a complaint to the Ombudsman, a complaint to the Corruption and Crime Commission or a complaint to the national equivalent of the Ombudsman, but specifically for small business, and that is the Australian Small Business and Family Enterprise Ombudsman.

The DEPUTY CHAIR (Hon Matthew Swinbourn): Stranger on the floor, you need to leave the house immediately.

Hon NICK GOIRAN: I thank the Leader of the House for agreeing to table that document outlining the changes made to the bill in the other place. I am not expecting this to be done now, but would the Leader of the House mind having appropriate individuals review this document, because it cannot be right? As an example, I refer to the last dot point. I have not had time to reconcile the entire thing, but the last dot point says that there was an amendment in the Legislative Assembly to clause 6, which inserted a new section 24A. As we know, the bill in front of us at the moment has that review clause—section 24A—under clause 14. It may be the case that the advisers will say that it is clause 14 in this particular version but it is not in the other version. However, there is no reference to an amendment to clause 6 in the extract of *Hansard* from the other place. I do not want to spend too much time on that; I am just asking whether this document can be reviewed and perhaps a corrected version tabled, presumably at another time.

Hon Sue Ellery: By way of interjection, you are correct. Instead of saying “amendment in the Legislative Assembly to clause 6” it should have read “to clause 14”.

Hon NICK GOIRAN: Right. I guess the question then arises: is there any other error in that document? I do not expect the Leader of the House to answer that right now; I am just asking whether someone could take it away and make sure that there are no other errors.

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

Hon RICK MAZZA: In my contribution to the second reading debate I asked what evidence there had been at this point of price gouging or issues surrounding life insurance policies in which COVID-19 might be exempt. Does the minister have any of those examples?

Hon SUE ELLERY: Reports have been received from small businesses about prices increasing unreasonably for goods. For example, people can buy common ingredients in shops to prepare takeaway food. Reports have been received about the price of these common ingredients, such as certain vegetables—for example, cauliflower—increasing despite the fact that they are not actually in-demand goods. However, because more people are using takeaway services rather than sitting in restaurants, that is being complained about. Electricity in shopping centres has been complained about. People have expressed concerns about any reduction in electricity prices not being passed on to tenants in shopping centres. I am advised that this happens now as well. Smaller petrol stations are also not passing on lower petrol prices to their consumers, which could include small businesses. I think Hon Rick Mazza asked for something else.

Hon Rick Mazza: Life insurance policies.

Hon SUE ELLERY: An insurance company—I have the name of the company—advised customers that it would be excluding doctors from the benefits of the insurance policy in the event of a COVID-19 death.

Hon RICK MAZZA: There is just one thing that I want to clarify about shopping centre managements passing on the cost of electricity. This is not directly related to COVID-19. Surely that issue has been around for some time. Rather than shopping centre managements passing on the direct cost of power, they put a higher price on power and mark it up. That is not directly associated with this COVID-19 emergency; it is something the small business sector has been suffering from for a while.

Hon SUE ELLERY: As I said, that has been going on for some time. I am advised that the Small Business Commissioner has received concerns that if there were to be discounted measures applied to electricity in the current environment, which has been a matter of public debate with respect to COVID-19, that that would not be passed on to tenants.

Hon AARON STONEHOUSE: This reminds me a lot of the Ticket Scalping Bill, as a lot of the same sort of flowery language about what ought to happen was used. In the Ticket Scalping Bill, the word “scalping” was used with no clear definition of it. Is there a statutory definition of “price gouging” that we can look to? I am having a hard time distinguishing between a high price and price gouging.

Hon SUE ELLERY: I appreciate that we could have a debate for a very long time about what is price gouging and what is not. That expression was used in the description of why we need the amendment bill. The term does not appear in the act or the bill. There is no need for a definition.

Hon AARON STONEHOUSE: I take the minister’s point. It is interesting to note, however, that the term “high prices” does not come with any baggage, whereas “price gouging” does. If we see a price that we do not like, that is obviously price gouging. If we see a price that we have no problem with, that is a high price. It is completely subjective and depends on what value one ascribes to whatever that good happens to be. What is too high a price? What is price gouging for me and what is price gouging for someone else really depends on one’s capacity to pay and the value one puts on that good. Of course, value is completely subjective. I have a 12-pack of toilet rolls. As someone who lives on their own, that is going to last me for ages, whereas for someone who is running low on toilet roll supplies, they might value toilet rolls quite a lot more than I do. Again, what is a high price and what is price gouging in that instance? It may not be so important in terms of the clauses of the bill, but it is important in terms of perhaps the policy and interpretation of the legislation. It has been mentioned during the parliamentary debate. In years to come, when the judiciary is considering the interpretation of the powers of the Small Business Commissioner, it may look to the parliamentary debate as a source of law and may be interested to know what was meant by price gouging. I have made that point. I suppose it is worth making clear, however, that price gouging is not necessarily illegal, just as scalping, whatever that means, is not necessarily illegal either; it is merely a somewhat negative term attached to a practice that one does not like that would otherwise be legal, aboveboard and fine depending on one’s subjective view of the practice. That is all I have for clause 1 at the moment.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Section 3 amended —

Hon DONNA FARAGHER: I have a very quick question about proposed section 3(1)(h). It states that a government entity means —

any person or office prescribed by the regulations;

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

The list is already quite exhaustive. Are any other persons or officers likely to be prescribed within the regulation; and, if so, can the minister inform us of that, please?

Hon SUE ELLERY: The honourable member asked about proposed paragraph (h), which states —
any person or office prescribed by the regulations;

That provision was included by parliamentary counsel to ensure that in the event that new government entities are created as a result of a machinery-of-government exercise or whatever, they can be captured. This is the provision that lists a range of government entities that are impacted. This amendment takes account of any new government entity that is created.

Hon NICK GOIRAN: Following on from that line of questioning by Hon Donna Faragher, I take it, then, that the government considers it essential that lines 13 and 14 found on page 3 of the bill remain, no doubt to futureproof the ability to include other government entities. Can the minister advise the chamber whether the current wording in proposed paragraph (h) would limit the prescription by regulations of a person or office as something that anyone would describe as a government entity? By way of elaboration, my concern is that it says “any person”. As much as the government entity is defined as meaning what is described in proposed paragraphs (a) through to (g), proposed paragraph (h) states “any person”. That person could be Billy Bloggs, Jill Smith or any other individual in Western Australia and not reasonably be considered to be a government entity. Can the minister advise us whether there would be a better form of words for proposed paragraph (h) that would restrict the regulation to something that would be reasonably considered to be a government entity?

My second question is about proposed paragraph (d) in clause 4 of the bill. Would the Corruption and Crime Commission be captured by the broad provisions set out under proposed paragraph (d)?

Hon SUE ELLERY: Proposed paragraph (d) states —

a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body or office, post or position that is established or continued for a public purpose under a written law;

It is a broad provision intended to capture a variety of WA public bodies that may not have been captured elsewhere in the clause. Examples of bodies captured include senior executive service and non-SES organisations that are established for a public purpose under a written law. It could include organisations listed in schedule 1 and 2 of the Public Sector Management Act. The provision that the member has asked about seeks to insert into section 3 of the act, which contains the definitions, those provisions set out on pages 2 and 3 of the bill before us. Proposed paragraph (h) that appears on page 3 of the bill effectively adds to the terms used —

any person or office prescribed by the regulations;

We now go to the act and what will be new section 14BB. I have the privilege of having a marked-up act in front of me, so can the member trust me?

Hon Nick Goiran: I have one too.

Hon SUE ELLERY: On page 14 of the marked-up act, new section 14BB(3) states —

The Commissioner is not required to amend a report as a result of a submission but must include the submission with the report when the report is given to the Minister or the government entity.

That is where the reflection of “government entity” arises. Part of the member’s question went to “person” and whether or not it is appropriate to refer to a person. These provisions go to proposed section 14BB and reports by the commissioner. We want the capacity to determine at some point in the future that it might be deemed appropriate to forward those reports from the commissioner to a person, and not just the listed government entities or organisations.

Hon NICK GOIRAN: The problem with that scenario is that the bill before us sets out eight categories of government entity at clause 4 and we are dealing with the eighth, which refers to any person or office prescribed by the regulations. What the minister has said is quite true. It may be the case that the commissioner might want to provide a copy of the report to a person, but that is not what this provision says. It is providing it to a government entity. My concern is that the government would have the power to prescribe by regulations any person who is not reasonably considered to be a government entity—just citizen A or citizen B by virtue of the fact that they are any person. I want clarification on how the language in proposed paragraph (h) might be restricted so that we can only prescribe by regulations any person or office that is actually a government entity. In addition to that, is the Corruption and Crime Commission captured by proposed paragraph (d)?

Hon SUE ELLERY: I will start with the first question while the adviser is checking on whether the CCC is captured by subparagraph (d). I guess that the member is seeking a commitment in terms of the policy intent here. It is not the policy intent that a random person be provided or named to be provided with a report. It has to serve the purpose of the act as a whole and, indeed, must be prescribed in regulations. We well know that regulations are disallowable

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

instruments. It is not the case that the commissioner can think of a person who they might like to provide a report to and just do that; it would need to be prescribed in regulations.

In respect of whether proposed section 3(1)(d) will capture the Corruption and Crime Commission, the answer is yes. It is broad enough to capture, for example, senior executive service and non-SES organisations, as well as those organisations that might be listed in schedule 1 or 2 of the Public Sector Management Act, but it can also capture the CCC if that were deemed appropriate.

Clause put and passed.

Clause 5: Section 14A amended —

The DEPUTY CHAIR: I think that Hon Donna Faragher's microphone has come on, so she can probably speak from her position.

Hon DONNA FARAGHER: Shall I give it a try?

The DEPUTY CHAIR: It is working—yes.

Hon DONNA FARAGHER: Yes. I do not want to do the wrong thing.

The DEPUTY CHAIR: It has been switched off now, so you better go to the other spot!

Hon DONNA FARAGHER: It was good while it lasted!

For the Leader of the House's ease of reference, I turn to page 4 of the bill. Proposed section 14A(1)(ea) states —
to investigate any matter that affects the commercial activities of small business, and any person in relation to the matter (including, without limitation, a public sector body or local government);

I think the Leader of the House might have referenced this in her reply to the second reading, but "public sector body" includes ministerial offices. I am keen to understand from the Leader of the House why ministerial offices have been —

Hon Sue Ellery: I am sorry. Trying to manage in these circumstances is extraordinarily difficult.

Hon DONNA FARAGHER: Is the Leader of the House happy for me to continue as is?

Hon Sue Ellery: Yes. Sorry.

Hon DONNA FARAGHER: I will go back. "Public sector body" includes ministerial offices. I am keen to understand why the government believes that ministerial offices should be included. Foreshadowing that I know the answer, because I have already heard it from advisers during briefings, under what circumstances would the government see that the Small Business Commissioner would investigate ministerial offices?

Hon SUE ELLERY: I am advised that there are two reasons why it is captured—one in the positive and one in the negative. The negative is that it would be very difficult to exclude ministerial offices from being captured. I understand that those members who were briefed were advised that it is difficult to exclude a minister's office. In the positive, a reason one would want to is that there may be—parliamentarians and ministers have other lives, although it does not feel like it right now!—a conflict of interest, for example, and a particular Minister for Small Business is making decisions that are influenced by his or her other obligations and responsibilities. I am advised that the legal advice is that that is very appropriate, which was also advised to those who were briefed.

While I am on my feet, can I just indicate there are a couple of other pieces of business that we need to deal with. It is my intention to continue this until 9.15 pm and then we have other matters we need to deal with.

Hon DONNA FARAGHER: I want to go over that. Proposed section 14A(3) commences —

In performing the functions (the *investigatory functions*) referred to in subsection (1)(b)(i) and (ea) ...

The Leader of the House referred to the potential that the Minister for Small Business may well have a conflict of interest, which would be an issue that could be investigated by the commissioner. I would have thought that would be dealt with through the Corruption and Crime Commission or some other mechanism.

Hon SUE ELLERY: The advice I am given is that the provisions were put in place not specifically to capture the minister's office, but once the question was asked about whether the minister's office was captured, the response was yes. When the proposition was put, "Is there a way to exclude?", the advice was that it would be very difficult to do. Even though it might be the case that other bodies could deal with the minister's office—for example, a breach of ministerial code, which is not necessarily a matter for the Corruption and Crime Commission, but the CCC could investigate it—it is not envisaged that it will be a power that is used by the Small Business Commissioner, but the State Solicitor's advice was that it would not be possible to exclude, if you like, the capture of the minister's office. It was not a policy driver and it was not a power sought by the Small Business Commissioner, but the State Solicitor's Office, on being asked the question, provided advice that I think the member has been provided with that says they

Hon Donna Faragher; Hon Diane Evers; Hon Aaron Stonehouse; Hon Rick Mazza; Hon Nick Goiran; Hon Sue Ellery

are captured and it would not be possible to exclude them. No other state has, for example, an explicit provision excluding ministers' offices.

Hon NICK GOIRAN: The Leader of the House indicated that she would like us to conclude Committee of the Whole at 9.15 pm. I have eight or nine questions on clause 5. Is it more convenient for the Leader of the House if I list them all now so that advice can be taken, presumably overnight?

Hon Sue Ellery interjected.

Hon NICK GOIRAN: I ask the Leader of the House to bear with me because this will take a little while. The first question relates to proposed section 14A(1)(b)(i), which states —

investigate a matter complained about and any person in relation to the matter (including, without limitation, a public sector body or local government);

I am particularly interested in the use of the words “without limitation”. The Leader of the House may be able to answer this question this evening. If not, no problem; let us continue this tomorrow. Can the Leader of the House confirm that the phrase “without limitation” therefore captures the private sector, so that there will be capacity to go beyond the mere public sector and indeed into the private sector?

My second question relates to proposed section 14A(1)(ea), which states —

to investigate any matter that affects the commercial activities of small business ...

Can the Leader of the House explain what those commercial activities might be and what will trigger the commissioner to investigate a small business?

Third, can the Leader of the House explain to the house what a typical investigation will look like?

My fourth question relates to proposed section 14A(1)(eb), which states —

to give to the Minister, or to any government entity, a report on an investigation carried out under paragraph (b) or (ea);

Who will get a copy of the disclosure of information and what will happen with any private or commercial-in-confidence information?

Fifth, how will a commissioner who is responsible to a minister investigate his or her own minister? I appreciate that the Leader of the House just indicated to Hon Donna Faragher that that is not the intention and the Small Business Commissioner is not looking to have that power, but it remains the case that he or she will have that power. If that were to occur and there were circumstances when it was appropriate, how would the commissioner undertake an investigation into a minister that he or she reports to?

Sixth, why is it appropriate for the Small Business Commissioner to have the power to investigate the private sector but the Corruption and Crime Commission is not able to do so?

Seventh, what privacy protections will be put in place for the provision of these reports and will there be a policy to guide the handling of complaints without merit?

Lastly, how will complainants be protected from any adverse consequences as a result of lodging their complaint?

Hon SUE ELLERY: I thank the honourable member for providing us with those questions. We have answers for them, but they are quite lengthy.

Progress reported and leave granted to sit again, pursuant to standing orders.