

SMALL BUSINESS DEVELOPMENT CORPORATION AMENDMENT BILL 2019

Time Limits — Statement by Leader of the House

HON SUE ELLERY (South Metropolitan — Leader of the House) [10.34 am]: I advise members that the maximum time limits for the Small Business Development Corporation Amendment Bill 2019 are: Committee of the Whole, 45 minutes; adoption of report, five minutes; and third reading, five minutes.

Committee

Resumed from 31 March. The Chair of Committees (Hon Simon O'Brien) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 5: Section 14A amended —

Progress was reported after the clause had been partly considered.

Hon SUE ELLERY: When we were last dealing with this matter, Hon Nick Goiran indicated that he had a series of questions about clause 5 and, helpfully, he provided us with that list to ensure that we provided him with comprehensive answers. I will now provide the answers to his questions.

The first question was: does the phrase “including, without limitation, a public sector body or local government” in proposed section 14A(1)(b)(i) capture private businesses to enable the commissioner to investigate these bodies? The response is as follows. Clause 5 amends section 14A to enhance the commissioner’s investigative function to enable the commissioner to receive complaints about any matter that affects the commercial activities of small business and to investigate the matter or otherwise provide assistance to resolve the complaint. The member has questioned whether the phrase “including, without limitation, a public sector body or local government” will allow the commissioner to investigate private businesses. This provision enables the commissioner to receive complaints about matters involving private businesses and either investigate the complaint or assist in resolving the complaint. The words “to receive complaints about any matter that affects the commercial activities of small business” are broad enough to capture private business. The commissioner should be investigating private businesses as well as public sector bodies and local governments so that small businesses have someone to investigate their complaints.

I refer to complaints about unfair contract terms, late or non-payment of invoices and a range of other issues that smaller businesses are subject to by larger business. The Small Business Commissioner needs to be empowered to properly investigate subcontractor complaints against head contractors who refuse to pay their invoices. These matters need to be addressed before more harm is suffered by subcontractors.

The member also asked: what does the term “commercial activities” mean in proposed section 14A(1)(ea)? It is not defined. It is to be given its ordinary meaning. The term covers a range of activities that relate to the operation of a business. Some examples include financial arrangements, supply of services and products, licences and permits, leasing commercial premises, taxation, business-to-business disputes, business-to-government disputes, contractual matters and franchising arrangements.

The honourable member asked two questions about the same issue. His questions 3 and 4 asked for clarification about the investigation process and the provision of the commissioner’s report under proposed section 14A(1)(eb) and, specifically, who will get a copy of the disclosure of information and what will happen with any private or commercial-in-confidence information. If we put both of those questions together, the commissioner’s investigation process consists of an assessment, an investigation and a reporting phase. In the assessment phase, upon receiving a complaint, the Small Business Commissioner’s investigations and inquiry unit—IIU—will use an assessment process to determine jurisdiction, determine whether the matter has been examined by other bodies, assess the validity of the complaint, and assess its reasonableness and merit. Information about each complaint will be included in a complaint management system. At the assessment stage, the IIU may contact a potential respondent to assist in satisfying the reasonableness of an allegation. If an assessment of an allegation is that it is reasonable, the IIU will provide advice to the commissioner recommending an investigation. Then, in the investigation phase, an investigation may be commenced following an assessment process and only after the commissioner approves the commencement of an investigation. At that point, compulsion powers to require information or other things may be used but only if required, not as a matter of course. To be clear, compulsive powers could not be used in the assessment phase.

An IIU investigation is designed to establish the facts, and any findings will be based on evidence. This may include obtaining documentation that may prove or disprove the alleged conduct, such as purchase orders, subcontract agreements, copies of invoices or progress payments. Unless the alleged conduct is finalised as not being reasonably supported by evidence, the respondent will be given an opportunity to respond to the alleged conduct. In seeking a response to the alleged conduct, the commissioner and his staff will do all things reasonable to protect the identity of a complainant to an investigation. Regular reports will be made to the commissioner during the course of an

investigation. If an investigation is unable to voluntarily obtain evidence from individuals or organisations, a formal request, signed by the commissioner or delegate, may be required.

In respect of a report on an investigation, upon concluding an investigation, a report will be prepared and considered by the Small Business Commissioner. Consideration will be given as to the most appropriate entity to receive the report, such as the minister or a specific government entity. A draft of the report will be provided to the respondent if it contains adverse information that could affect their interests. If the report is positive, there is no obligation to provide an opportunity to respond. The commissioner will receive the written submission and may amend the report accordingly, although there is no requirement for him to do so. There is a requirement to include any submission from an adversely affected person with the report. Consideration will also be given to the redaction of commercial-in-confidence or personal information as well as the need for a non-disclosure agreement if the report is being provided to a government entity. At this stage, the commissioner may provide the report to the minister or government entity for their consideration.

In question 5, the honourable member asked how the commissioner will investigate the Minister for Small Business. The Small Business Commissioner will be empowered to investigate the minister if the minister's actions impact on the commercial activity of small business. The process for investigating a complaint against the minister will follow the same process that I have just outlined. When there is a complaint by a small business or a suspicion by the commissioner of ministerial corruption or misconduct, the commissioner will refer those matters to the appropriate body—for example, the Corruption and Crime Commission. The commissioner's function will not duplicate that of other bodies. Examples of how ministerial behaviour or actions that could be investigated by the commissioner that would not constitute misconduct or corruption may include: a complaint by a small business or a number of small businesses that the minister is deficient in their duty as a representative of the sector; interference or undue influence on the Small Business Development Corporation to change its policy positions—yes; we get that every day, about all of us—relating to small business issues; and the minister advocating for a regulatory system for administrative procedure that adversely impacts the commercial activity of small business; for example, the minister supports a change in an occupational licensing system that would adversely impact on small business operating in that industry.

Question 6 asked: why is it appropriate for the Small Business Commissioner to investigate private sector bodies when the Corruption and Crime Commission cannot? The Corruption and Crime Commission can investigate individuals and private businesses. The commission also works to identify—this is directly in the CCC's own material—persons who have accumulated unexplained wealth through unlawful means. A person who lives beyond their apparent means is required to justify the legitimacy of their financial circumstances—that goes to private citizens. A recent example can be seen in the investigation into private contractors involved with the North Metropolitan Health Service matter.

Question 7 asked: 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? I tabled the Small Business Commissioner's non-disclosure policy when this matter was last before the chamber. That policy sets out the guiding principles that will be applied by the commissioner when providing reports to government entities. Within that policy, the commissioner will consider whether it is appropriate to redact information, place restrictions on the distribution of the report and require nondisclosure agreements before reports are released.

In respect of complaints without merit, under proposed section 14A(2), the commissioner can refuse to investigate a matter, provide assistance or give a report in a particular case if the commission considers it inappropriate to do so. This gives the commissioner discretion to refuse to deal with a matter when a complaint is considered to be without merit. I will give member's some context; the commissioner has received 281 complaints about the construction industry since December 2018. None of these complaints were considered vexatious or without merit.

The CHAIR: Hon Sue Ellery.

Hon SUE ELLERY: Kate Carnell, the Australian Small Business and Family Enterprise Ombudsman, advises that her organisation rarely receives vexatious complaints or people persistently bringing complaints without merit. She uses a decision-not-to-provide-assistance instrument to guide its decisions in relation to complaints, which is considered on a case-by-case basis. The commissioner here will adopt a similar process and manage vexatious complaints through policies and guidelines. I can now table the commissioner's dealing with complaints without merit policy.

[See paper [3765](#).]

Hon SUE ELLERY: Similar practices are adopted by state and commonwealth Ombudsmen, local government and state government agencies—for example, the Department of Local Government, Sport and Cultural Industries complaint management policy.

Question 8 asked: how will complainants be protected from any adverse consequences as a result of their lodging a complaint? It is the case that small businesses are often reluctant to complain about the actions of another business for fear of retribution for damage to their business relationship. The Small Business Commissioner is very aware of these concerns and already ensures that small business complainants are protected from having their identity released. As I indicated when the matter was last before the house, the commissioner already receives confidential and commercially sensitive information from small businesses, and I detailed then the measures that the commissioner takes to protect this information.

Regarding protecting the identity of the complainant, this is dealt with in clause 12 of the bill. Clause 12 enables the commissioner to protect the identity of a person bringing a complaint about a matter affecting the commercial activities of small business or disclosing information to the commissioner for the purpose of carrying out an investigation. There are circumstances in which it is possible to receive a complaint without releasing the identity of the complainant; for example, a group of tenants in a shopping centre requested the assistance from the commissioner to resolve a dispute with the landlord over the price of electricity. In this case, it is possible to approach the landlord and make them aware that there was a complaint without attributing it to a particular tenant. In some circumstances, the complaint cannot be verified unless the party under investigation is made aware of the source of the complaint. In those cases, the commissioner may release details about the source of the complaint, but only with the complainant's permission. If the small business does not want its identity released by the commissioner, this will be respected; however, this will limit how much assistance the commissioner can give in certain circumstances. This will be clearly explained to the complainant in order to manage their expectations.

Hon NICK GOIRAN: I thank the minister for the comprehensive response to the questions that I asked on Tuesday night, when this bill was adjourned at the request of the government at 9.15 pm. The matter was not brought on yesterday, at the choice of the government, and the matter is now before us today. I put those matters on the public record because the government has seen fit to have individuals lobby me about the progress of this bill, notwithstanding the fact that it remains entirely in the province of the government. With regard to the eight responses, unfortunately we are operating at the moment—again, for the public record—under the battering ram temporary order, which prevents us from being able to fully explore these important matters. For the public record, I indicate that we currently have 31 minutes left for this debate—a matter that has been chosen and directed by the Leader of the House. Because we are limited to the time we have today, I will simply make two remarks and ask one question to the minister. In the minister's response to my question about the powers of the Small Business Commissioner to investigate the public sector in comparison with those of the Corruption and Crime Commission, she indicated that the unexplained wealth provisions have some relevance to the explanation. We do not have the time to explore that today, so I will just put it on the record that that explanation is nothing short of ridiculous. My second comment is about the commissioner being able to investigate his or her own minister—that being the Minister for Small Business. I do not have the time to unpack that further now, but I will say that the response that has been provided only underscores how utterly inappropriate it is that a public servant would be able to investigate his minister because he is not happy about policy matters. That was the response, and I would encourage any member who is interested in that to review *Hansard* and the response provided by the minister. Lastly, one of the questions I asked on Tuesday night was what would trigger the Small Business Commissioner to investigate a small business. The response that was provided was coupled and grouped with a number of other responses. To the best that I was able to understand the response, I understand that a complaint would trigger an investigation into a small business. I simply ask for confirmation that that is the case.

Hon SUE ELLERY: Yes, it would.

Hon DONNA FARAGHER: Just for ease, can the minister consider tabling that advice? I am particularly interested in the answer about ministerial officers and that complaint. I also reiterate that the advice that has been provided about a circumstance in which the Small Business Commissioner could investigate a minister is very concerning. I think the government has not thought this through. We are on limited time, but the other night, the minister received some advice that reflected the advice of the State Solicitor. I will quote from the uncorrected *Hansard*, which states —

... 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 are captured and it would not be possible to exclude them.

I appreciate that the minister in this place is the representative minister. I have had the opportunity since then to go back to the advice—I am talking about State Solicitor's advice, which is not normally tabled in this place—and I would invite the minister to look at the advice that has been provided. In general terms, my reading of that advice is that it does not say that it cannot be excluded, but rather that it reflects policy considerations and what might be good or bad in relation to excluding it. But, at the end of the day, there are points that state that it is a matter of policy as to whether any individual should be exempted. We can argue whether that is justified or not, but that is

a matter for the government and Parliament to determine. I appreciate that the minister is representing the Minister for Small Business in this place, but I am concerned that if some advice has been provided to her that says that it cannot be excluded, my reading of the advice is that that is not correct. I appreciate that the minister is reliant on advice about that. The minister might want to comment on that. If we had more time, I think we would be exploring this a bit further, and I think the government would probably explore it a bit further, because I do not think the government would expect the Small Business Commissioner to investigate a minister on the basis of a policy decision. At the end of the day, governments will sometimes make policy decisions that may impact the small business sector. With the COVID-19 pandemic we are seeing restrictions being placed on small businesses right now that will and are having an impact. I think this potentially puts ministers' officers and ministers in difficulty. There is a clear requirement for transparency, and ministers will be judged on their performance. But if one of the criteria for investigation is potentially the performance of the minister, is that really a matter for the Small Business Commissioner? I invite the minister to respond to that, and then we can move forward.

Hon SUE ELLERY: I thank the honourable member for her contribution. The first thing I will do is table the advice that has been provided to me that I referred to in the answer to the fifth question that was asked by Hon Nick Goiran.

[See paper [3766](#).]

Hon SUE ELLERY: The honourable member made a couple of points that I would agree with. First, I am the representative minister. Second, I need to act on the advice that is available to me. The advice that is available to me is that the interpretation of the advice from the State Solicitor is as I have already provided to the house. My personal view is that it is a very interesting situation. Nevertheless, I have a job to do, and that is to act on the best advice available to me, and that is what I am doing. I will, though, as a matter of course, have a discussion with the minister because, as I said, I think it is a very interesting piece of advice. I will take that up with the minister separately.

Clause put and passed.

Clause 6: Sections 14BA and 14BB inserted —

Hon NICK GOIRAN: Clause 6 will insert proposed section 14BA, “Commissioner may request documents, things and information”, which states —

- (1) For the purpose of carrying out an investigation under section 14A(1)(b) or (ea), the Commissioner may do any of the following —
 - (a) request a person to produce to the 9 Commissioner any document or thing specified, or of a kind specified ...

We all understand what a document is, and I do not have any interest in debating what a thing is, but can the minister indicate what “of a kind specified” is?

Hon SUE ELLERY: That phrase captures whatever the commissioner writes in the notice. It might refer to some specific documents or other specific material.

Hon NICK GOIRAN: In the debate in the other place, the member for Darling Range moved an amendment, which was touched on by my colleague Hon Donna Faragher moments ago. At that point in the debate, the minister in the other place stated that he had undertaken to seek advice from the State Solicitor’s Office about that amendment, which was not accepted. He said that he would provide that advice to the member. Was the advice provided to the member for Darling Range; and, in any event, will be minister now table that advice?

Hon SUE ELLERY: Yes, it has been. I am not sure whether the member is aware, but that is the State Solicitor’s advice.

Hon Nick Goiran: Will it be tabled?

Hon SUE ELLERY: It has already been provided.

Hon Nick Goiran: Will it be tabled in this chamber?

Hon SUE ELLERY: Chair, I am doing this somewhat unusually, so I want that placed on the record. I am doing it because I am advised that a copy of this advice has already been provided to both the shadow minister in the Assembly and the representative shadow minister in this chamber. On that basis, I will table it.

[See paper [3767](#).]

Hon NICK GOIRAN: Will proposed sections 14BA and 14BB empower the commissioner to compel any person, merely by oral request, to produce any “thing” that the commissioner decides he or she wants?

Hon SUE ELLERY: Yes, it does allow for an oral request. For example, if the commissioner is on the phone to somebody, the commissioner can say, “Could you please provide me with X.” The practice will be that that will be followed up by a written request.

Hon NICK GOIRAN: It is worth noting that if the person does not comply with the request, they can be subject to a penalty, hence the use of compulsion by the government in its own documents. What other persons have this type of exceptional power in Western Australia? What lawful excuses would a person have to resist such a request from the commissioner? Who would oversee the commissioner's power? The Leader of the House might be pleased to know that I have no further questions.

Hon SUE ELLERY: The first part of the question was what other authorities might have that power. I do not have that information available. I can give the member an undertaking. I can see whether the minister can provide it to the member but I have to say at this very moment, in a state of emergency, I am not sure that the minister will have the resources to look across the whole of government to get that, but I will endeavour to do that. I addressed in some detail the second and third parts of the member's question in my second reading reply. I addressed both of those issues about unlawful excuses and —

Hon Nick Goiran: Lawful excuses.

Hon SUE ELLERY: Lawful excuses, and the other matter that the member raised. I draw the member's attention to my second reading reply.

Hon DONNA FARAGHER: I appreciate the minister has tabled the State Solicitor's advice. Given I was talking in generalities on this clause, and in reference to what Hon Nick Goiran has said, I want to draw the chamber's attention to the summary of advice that is on pages 1 and 2 of that document. I want to be very clear that it states —

- (b) It is a matter of policy as to whether any individuals (such as Ministers or ministerial staff) should be exempted from the investigative powers of an investigative body;
- (c) The policy reasons advanced as set out in the Background Section above do not, on their face, appear to provide sufficient justification for the exemption, —

That is accepted —

although of course the matter is obviously for Government and Parliament to determine.

I accept that the State Solicitor has provided advice about whether it is sufficient justification, but it clearly states, on my reading, that it is a policy decision. I thank the Leader of the House for indicating that she will raise this with the minister in the other place. If we had had more time, we could have advanced this a bit better. I think Parliament needs to be aware of this matter. We are on limited time, so I am going to progress this. I have an amendment in my name on the supplementary notice paper. I move —

Page 7, line 8 — To insert after “entity” —

or under subsection (4) to the Premier and Deputy Premier

This relates to proposed section 14BB, “Reports by Commissioner”. As we have been discussing today, the minister could well be investigated by the Small Business Commissioner. If that were the case, from a transparency perspective with regard to reports, I think that it is appropriate that the report be provided to not only the minister but also the Premier and Deputy Premier in those instances. The Deputy Premier has been included in the event that the Premier of the day is also the small business minister. I had suggested, in the case of the Premier being the small business minister, the Deputy Premier, but for ease it has been suggested that we include both. It is a minor amendment but from a transparency perspective, I have moved this amendment to ensure that everyone who needs to see that report sees it, particularly if it relates to a minister.

Hon SUE ELLERY: I thank Hon Donna Faragher for the two amendments that appear on the supplementary notice paper in her name. They are linked, so I will make comments now about both. As I indicated in my second reading reply, we think they are very sensible amendments and we are happy to support them. As the member indicated, she is concerned about the transparency of those reports when the subject is the minister. Indeed, her amendment will ensure that the report goes to the Premier and the Deputy Premier. We are happy to support both those amendments.

Amendment put and passed.

Hon DIANE EVERS: I move —

Page 7, lines 13 to 16 — To delete the lines and substitute —

- (3) If a person makes written submissions in relation to a matter in a report, the Commissioner —
 - (a) must —
 - (i) amend the report to note in the report that the person has made written submissions; and

- (ii) include the submissions with the report when the report is given to the Minister or the government entity;

but

- (b) need not otherwise amend the report as a result of the submissions.

I moved this amendment because often when letters accompany a report, they can be separated or one can be distributed without the other. I think it is necessary for the report to note the response from the person who had some adverse information about them in the report so that everyone knew that there was a response, and the response would accompany the report when it was first distributed. In the conversation, we talked about adverse information. The adverse information might be because they just have not put in some information, so there might be kind of an ambivalence about whether it is adverse or causative. It might be middle of the road. I hope that would also cover that middle line whereby the commissioner might not see the information as being adverse, but in the end it could be adverse for the business owner.

The only other comment I will make is that if we proceed with the next amendment, proposed subsection (3)(a)(ii) of the amendment will need to be changed to include reference to the Premier and the Deputy Premier.

Hon SUE ELLERY: As I indicated in my second reading reply, the government will support this amendment. We think it is a sensible one. An investigated party must be given the opportunity to provide a written submission in response to the commissioner's report before it is provided to the minister or government entity. I think there needs to be a clerk's amendment to give effect to the amendment that we have just dealt with. I assume that that will happen. As I said, this is a sensible amendment and it is reflective of the Small Business Commissioner's policy position on natural justice for the investigated party.

Hon DONNA FARAGHER: I also indicate that the opposition will support this amendment. I think there needs to be an amendment, perhaps by the mover of the amendment, to include in proposed subsection (3)(a)(ii) reference to the Premier and Deputy Premier. Then I would not need to move my foreshadowed amendment on the supplementary notice paper, but I will leave that to the clerks and the Deputy Chair to work through.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Can a member of the chamber move that amendment on the amendment?

Hon DONNA FARAGHER: To assist, I move —

That the amendment be amended by inserting after "Minister" —

, Premier, Deputy Premier

The DEPUTY CHAIR: If Hon Diane Evers is comfortable with the amendment moved by Hon Donna Faragher, she will not need to move an additional amendment. If she is not, we will deal with that when we get to it.

Hon Diane Evers: That is fine.

The DEPUTY CHAIR: The question is that the amendment on the amendment be agreed to.

Amendment on the amendment put and passed.

Amendment, as amended, put and passed.

Hon DONNA FARAGHER: I indicate that I do not intend to move the next amendment standing in my name on the supplementary notice paper because it has been sufficiently dealt with. There is one final amendment to this clause in my name. I am not sure that I need to move it now, given that we have accepted the other two amendments, but I think I should. Therefore, for the same reasons that I have already outlined, I move —

Page 7, after line 16 — To insert —

- (4) If the Commissioner investigates the Minister under section 14A(1)(b) or (ea) and prepares a report on the investigation, the Commissioner must give the report to the Premier and Deputy Premier.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 7 to 13 put and passed.

Clause 14: Section 24A inserted —

Hon DONNA FARAGHER: I indicate that this clause relates to the review of the amendments made by this bill. Discussion has already been had about new section 14BA, "Commissioner may request documents, things and information". As I indicated in my second reading contribution, and given the concerns that have been raised about this new power and how it may well be exercised or, indeed, to see how it is exercised over a period, I note that

a review provision has been included as a result of a decision made in the other place. Although we do not want to limit that review, I think there needs to be a particular focus with this new section. With that, I move —

Page 10, line 9 — To insert after “2019,” —

with particular regard to Section 14BA,

The amendment simply seeks to include a request that the review have particular regard to new section 14BA.

Hon SUE ELLERY: I thank the honourable member for her amendment. Although the ability to compel information is a function that most small business commissioners have in other jurisdictions, the member’s amendment will ensure that there is a focus on that particular power in the review. Accordingly, we are happy to support it.

Amendment put and passed.

Clause, as amended, put and passed.

Title put and passed.

Report

Bill reported, with amendments, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Sue Ellery (Leader of the House)**, and returned to the Assembly with amendments.