

EXPLANATORY MEMORANDUM

Small Business Development Corporation

Amendment Bill 2019

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Overview of the Bill

The purpose of the *Small Business Development Corporation Amendment Bill 2019* (**the Bill**) is to enhance the Small Business Commissioner's (**Commissioner**) general investigative and reporting function.

The Commissioner's position is established in Part 3 of the *Small Business Development Corporation Act 1983 (WA)* (**the SBDC Act**). The Commissioner has a dual role as the chief executive officer of the Small Business Development Corporation (**SBDC**) and is appointed under the *Public Sector Management Act 1994 (WA)*.

The Commissioner's current investigative functions are set out in section 14A(b) and (c) of the SBDC Act and enable the Commissioner to receive and investigate complaints:

- about unfair market practices affecting small business and attempt to resolve those complaints; and
- by small businesses about the actions of public sector bodies that affect the commercial activities of small business.

The Commissioner's current reporting function provides an ability to make representations to another person or body on behalf of a small business that has made a complaint.¹ Additionally, the Commissioner can advise the Minister on any matter related to the functions of the Commissioner related to section 14A(b) to (f).²

The Bill will expand the Commissioner's current investigative and reporting functions by:

- expanding the scope of matters that the Commissioner can investigate from the current topics of unfair market practices and actions of public sector bodies that affect the commercial activities of small business to "any matter that affects the commercial activities of small business";
- clarifying that the Commissioner can investigate the actions of private sector, local government and state government that affect the commercial activity of small business;
- enabling the Commissioner to investigate a matter without the need for a formal complaint by a small business. This will allow the Commissioner to launch an own volition investigation if trends of behaviour or activity are observed in the market place that impact on a small business or small businesses in general;
- enabling the Commissioner to investigate a matter that impacts on the commercial activities of small business based on a complaint by a party known to the Commissioner but who wishes to have their identity protected from disclosure;

¹ Section 14A(e) of the SBDC Act

² Section 14A(g) of the SBDC Act

- enabling the Commissioner to compel a person to produce a document or provide information in relation to an investigation; and
- clarifying that the Commissioner can report investigation findings to the Minister, local government, State government and specified Commonwealth government bodies and regulators.

Increasing the Commissioner's access to information about practices and behaviours that impact on the commercial activity of small businesses will increase transparency on issues impacting the sector. Enabling the Commissioner to share reports with the Minister and government entities will further increase government's oversight of such practices and behaviours, allowing it to take informed action to rectify these issues.

Whilst the proposed amendments will have benefits across the WA small business sector, the impetus for these amendments was the impact of late or non-payment of subcontractors working on government funded construction projects.

A culture of late payment, as well as other poor behaviour, including bullying and oppressive behaviour by parties at the top of the contract chain can have devastating personal and financial impacts on subcontractors. Enhancing the Commissioner's role will assist in improving the security of payment for subcontractors in the construction industry.

Summary of each clause

	PART 1 – PRELIMINARY
Clause 1	Sets out the name of this Act.
Clause 2	Provides for commencement: <ul style="list-style-type: none"> Sections 1 and 2 – on the day on which this Act receives the Royal Assent; and The rest of the Act – on the day after that day.
Clause 3	Provides that this Act will amend the <i>Small Business Development Corporation Act 1983 (WA)</i>
Clause 4	<p>Amends section 3(1) by inserting the following definitions:</p> <p>Government entity which includes:</p> <ul style="list-style-type: none"> WA public service departments; Local governments; WA and Commonwealth Ombudsman; WA bodies and positions established for a public purpose under a written law; Specified Commonwealth government regulators (the Australian Competition and Consumer Commissioner, Australian Securities and Investments Commissioner and the Australian Taxation Office Commissioner); and Other persons or officers prescribed by the regulations. <p>Local government includes a regional local government and a regional subsidiary;</p> <p>The purpose of inserting these new definitions is to clarify which bodies or persons the Small Business Commissioner (Commissioner) can share investigative reports with under the proposed section 14BB.</p>
Clause 5	<p>This provision enhances the Commissioner’s investigative and reporting function by replacing section 14A(b) and (c) with an amended section 14A(1)(b) and a new 14A(1)(ea) and (eb).</p> <p><u><i>Receive, investigate and resolve complaints – 14A(1)(b)</i></u></p> <p>The proposed subsection 14A(1)(b) enables the Commissioner to receive complaints about any matter that affects the commercial activities of small business. The Commissioner may investigate the matter complained about and any person in relation to that matter (which includes public sector bodies or local governments) and may provide assistance to attempt to resolve the complaint.</p> <p>Note the distinction between ‘public sector body’ and ‘government entity’ (as defined in section 3(1)) allows the Commissioner to investigate WA public sector agencies, ministerial offices and non-SES organisations (as defined</p>

	<p>in section 3 of the <i>Public Sector Management Act 1994</i>) but not Commonwealth government agencies.</p> <p><u><i>Investigate and report on complaints – 14A(1)(ea)</i></u> Proposed subsection 14A(1)(ea) enables the Commissioner to investigate any matter and any person in relation to the matter (including a public sector body or local government) that affects the commercial activities of small business.</p> <p>The words “including, without limitation, a public sector body or local government” were included in subsection 14A(1)(b) and 14A(1)(ea) to make it clear that the Commissioner can investigate the actions of State government entities and local governments as they impact on the commercial activities of small business. Whilst these words weren’t necessary in a legal sense, they were included to provide clarity about the purpose of this provision when it is applied to future investigations.</p> <p><u><i>Reporting – 14A(1)(eb)</i></u> Proposed subsection 14A(1)(eb) enables the Commissioner to give to the Minister or any government entity, a report on an investigation carried out under 14A(1)(b) or (ea). The use of the term ‘government entity’ instead of ‘public sector body’ in this paragraph ensures that the Commissioner can share reports with interested government bodies and regulators (local, State and Commonwealth).</p> <p><u><i>Refuse to deal with a matter – 14A(2)</i></u> Proposed subsection 14A(2) enables the Commissioner to refuse to investigate a matter, provide assistance or give a report in a particular case, if the Commissioner considers it inappropriate to do so.</p> <p>The purpose of this provision is to ensure that the Commissioner has the discretion to refuse to investigate matters in cases where it is not in the public interest to do so or where a complaint is considered to be without merit.</p> <p><u><i>Duplication – 14A(3)</i></u> Proposed subsection 14A(3) requires that the Commissioner avoid duplicating operations of other departments in the performance of investigatory functions.</p> <p>This section ensures that the Commissioner does not duplicate the functions of other departments of the Public Service in terms of dealing with a complaint that is best dealt with by another department.</p>
Clause 6	<p>This provision enables the Commissioner to compel the production of documents, things or information in relation to an investigation. This provision also sets out penalties for non-compliance with the Commissioner’s notices and sets parameters around the Commissioner’s reporting function.</p>

Compel the production of documents, things and information – 14BA

This provision empowers the Commissioner to compel a person to provide documents, things and information for the purpose of an investigation.

Proposed subsection 14BA(1)(a) enables the Commissioner to request any document or thing specified, or of a kind specified, that the Commissioner considers relates to the investigation under section 14A(1)(b) or (ea).

Proposed subsection 14BA(1)(b) enables the Commissioner to request any information that the Commissioner specified, or of a kind specified, that the Commissioner considers relates to the investigation under section 14A(1)(b) or (ea).

Proposed subsection 14BA(1)(c) enables the Commissioner to keep a document or thing for the purpose of taking an extract or making a copy.

Proposed subsection 14BA(2) states that the Commissioner must return any document or thing retained under subsection 14BA(1)(c) as soon as practicable after taking the extract or making the copy, and, in any event, within 7 business days of the document or thing being produced to the Commissioner.

Proposed subsection 14BA(3)(a) states that a request may be made orally or in writing.

Proposed subsection 14BA(3)(b) states that a request must specify the time within which the document, thing or information must be produced or given to the Commissioner.

Proposed subsection 14BA(3)(c) states that the request may require a statutory declaration be given to verify the document, thing or information produced.

Penalty for non-compliance with a notice – 14BA(4)

Proposed subsection 14BA(4) states that a person must not fail to comply with the Commissioner's request without a reasonable excuse. The penalty is a fine of \$20,000.

Penalty for providing false or misleading information – 14BA(5)

Proposed subsection 14BA(5)(a) states that person must not provide a document or thing, or give information that they know is false or misleading in a material particular. The penalty is a fine of \$20,000.

Proposed subsection 14BA(5)(b) states that person must not omit anything without which the document, thing or information is, to the person's knowledge, misleading in a material particular. The penalty is a fine of \$20,000.

	<p><u><i>Penalty for altering a document – 14BA(6)</i></u> Proposed subsection 14BA(6) states that person must not alter, suppress or destroy any information or thing that the person is requested to produce. The penalty is a fine of \$20,000.</p> <p><u><i>Permission to prosecute – 14BA(7)</i></u> Proposed subsection 14BA(7) states that a prosecution for an offence against this section may not be commenced without the authorisation of the Commissioner.</p> <p><u><i>Right to reply – s14BB</i></u> The purpose of this provision is to provide a person mentioned in the report with an opportunity to respond before the report is provided to the Minister or a government entity if the report contains adverse information in relation to that person.</p> <p>Proposed subsection 14BB(1) defines adverse information as information relating to a person that if published, would be likely to adversely affect the interests of the person.</p> <p>Proposed subsection 14BB(2) prohibits the Commissioner from giving a report under s14A(1)(eb) to the Minister or government entity that contains adverse information about a person mentioned in the report unless the person has the opportunity to make a written submission in relation to the matter. Proposed subsection 14BB(3) provides that the Commissioner is not required to amend a report as a result of a submission but must include the submission with the report when it is given to the Minister of government entity.</p>
Clause 6A	<p>Clause 6A amends section 14C(1) by inserting the words “(other than the powers of the Commissioner to authorise the commencement of prosecutions under section 14BA(7)).”</p> <p>The purpose of this amendment is to complement proposed section 14BA(7), which states that the Commissioner cannot delegate the function of authorising the commencement of a prosecution under proposed section 14BA.</p>
Clause 7	<p>Clause 7 amends section 15A by including local governments in the definition of <i>small business dispute</i>. The purpose of this amendment is to clarify that the Commissioner can assist small businesses in their disputes with local governments.</p>
Clause 8	<p>Clause 8 amends section 18B to ensure that the Minister cannot direct the Commissioner or Corporation in relation to investigations taken under proposed sections 14A(1)(b) or (ea).</p> <p>The purpose of this amendment is to ensure consistency with the policy position reflected by the current section 18B that the Minister cannot direct</p>

	the Corporation or Commissioner with respect to functions relating to a particular person, application, complaint or proceeding.
Clause 9	<p>Clause 9(1) amends subsection 18C(2)(b) to replace reference to s14A(b) with s14A(1)(b) as a result of Clause 5.</p> <p>Clause 9(2) amends section 18C(5) to clarify that its operation is subject to the proposed section 18C(6).</p> <p>Clause 9(3) inserts a new subsection 18C(6) which states that subsection 18C(5) does not apply to a report given to the Minister under section 14A(1)(eb). The purpose of this provision is to ensure that the Commissioner can include the identity of persons being investigated in a report to the Minister.</p>
Clause 10	Clause 10 amends section 18(1) to replace the words “the Penalty” with “Penalty for this subsection: a fine of \$10,000”. The purpose of this amendment is to ensure that references to penalties in the Act use consistent language.
Clause 11	<p>This provision protects the identity of a person bringing a complaint to the Commissioner for investigation.</p> <p>Proposed subsection 18AA(1)(a) inserts a definition of complainant as a person who makes a complaint to the Commissioner about a matter that affects the commercial activities of small business.</p> <p>Proposed subsection 18AA(1)(b) inserts a definition of complainant as a person who discloses information to the Commissioner that, whether alone or with other information, results in the Commissioner commencing an investigation under proposed subsections 14A(1)(b) or (ea).</p> <p>Proposed subsection 18AA(2) states that despite any other provision in the Act, the Commissioner is not required to, and may refuse to, disclose information that might identify a person as a complainant; or enable the identity of a complainant to be ascertained.</p>
Clause 12	This provision deletes the previous heading of Part 6 “Regulation” and replaces it with “Miscellaneous”.
Clause 13	<p><u>Review Clause – 24A.</u></p> <p>This provision inserts a review clause for the amendments made under the Bill.</p> <p>Proposed section 24A(1) inserts a review time period of two years from the date that the amendments come into operation.</p> <p>Section 24A(2) requires the Minister to table a report in parliament within 12 months after the 2nd anniversary of the legislation.</p>

