



Review of the

# ***Small Business Development Corporation Amendment Act 2020***

## **Report**

March 2023



**Small Business  
Development Corporation**



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## **Statutory review of the Small Business Development Corporation Amendment Act 2020**

In accordance with section 24 of the *Small Business Development Corporation Act 1983*, I hereby submit for presentation to Parliament the report on the statutory review of the *Small Business Development Corporation Amendment Act 2020*.

A handwritten signature in black ink that reads "Grant Cucel".

**Grant Cucel**  
Chair  
Small Business Development Corporation Board

21 March 2023



## 1. Executive Summary

In April 2020, the *Small Business Development Corporation Act 1983* (**SBDC Act**) was amended to expand and clarify the Small Business Commissioner's (**Commissioner's**) investigatory and reporting functions.

In accordance with s.24A of the SBDC Act, this statutory review has considered the operation and effectiveness of the provisions introduced by the *Small Business Development Corporation Amendment Act 2020* (**2020 Act**), with particular regard to the Commissioner's power under s.14BA to compel information for the purpose of carrying out investigations (**the Review**).

While over the review period the Commissioner has enquired into conduct that is having an adverse impact upon small businesses, the use of investigations pursuant to s.14A(1)(b) or (ea) has not been required and therefore s.14BA has not been used.

However, the presence of s.14BA in the legislation has facilitated the obtaining of information in relation to various matters. This ability to request documents and collect evidence contributes to the Government of Western Australia's increased oversight of unfair practices and behaviours that impact small businesses, allowing informed actions to rectify those.

The Review has determined that the objectives of the 2020 Act have been met and remain valid. Despite s.14BA not having been specifically utilised to date, no amendment to this provision nor any of the Commissioner's existing powers are warranted.

## 2. Introduction

### Background

In April 2020, the *Small Business Development Corporation Act 1983* (**SBDC Act**) was amended to expand and clarify the Small Business Commissioner's (**Commissioner's**) investigatory and reporting functions.

The stated objectives of the *Small Business Development Corporation Amendment Act 2020* (**2020 Act**) were to:

- Increase transparency on issues impacting the small business sector by increasing the Commissioner's access to information about practices and behaviours that impact on small businesses;
- Further increase the State Government's oversight of such practices and behaviours, allowing it to take informed action to rectify these issues identified by enabling the Commissioner to share reports with the Minister and government entities; and
- Benefit all Western Australian (**WA**) small businesses, while recognising the impetus for the amendments was the impact of late or non-payment of subcontractors working on Government-funded construction projects.



## Purpose of the report

The Review considers the application of the provisions introduced as part of the 2020 Act amendments and whether the intended objectives of the amendments have been met. Under s.24A of the SBDC Act, the Minister for Small Business must:

- Review the operation and effectiveness of the provisions introduced by the 2020 Act, with particular regard to s.14BA (the power to compel information related to an investigation), as soon as practicable after the second anniversary of coming into operation (i.e. 7 April 2022); and
- Prepare a report based on the review and cause this report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the second anniversary (i.e. 7 April 2023).

## Review Methodology

The Review was undertaken by the SBDC and incorporated:

- Analysis of enquiries, complaints and disputes received by the Commissioner;
- Liaison with counterparts from other jurisdictions; and
- Targeted stakeholder consultation with:
  - Select industry associations
    - Interviews with heads of associations (refer to **Appendix A**)
    - Surveys to members
  - Select State Government agencies
    - Interviews (refer to **Appendix A**)
  - WA small businesses
    - Survey to SBDC database of small business operators. While stakeholder responses to the surveys have not delivered a statistically significant sample, they have provided useful indications – corroborated by internal data, as well as insights to be considered at the operational level – to maximise the effectiveness of the 2020 Act provisions.

## 3. Summary of the provisions introduced

The 2020 Act expanded the Commissioner's investigatory and reporting functions by:

- Expanding the scope of matters that the Commissioner can investigate from 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";<sup>1</sup>
- Clarifying that the Commissioner can investigate the actions of the private sector, local government and State Government that affect the commercial activity of small business;<sup>2</sup>

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<sup>1</sup>Section 14A (1)(b) of the SBDC Act.

<sup>2</sup>Section 14A (1)(ea) of the SBDC Act.



- Enabling the Commissioner to investigate matters without the need for a formal complaint by a small business, thereby allowing the Commissioner to launch an own volition investigation if trends of behaviour or activity are observed in the marketplace that impact on a small business or small businesses in general;<sup>1</sup>
- Enabling the Commissioner to protect the identity of a complainant from disclosure;<sup>2</sup>
- Enabling the Commissioner to compel a person to produce a document or thing specified in relation to an investigation;<sup>3</sup> and
- Clarifying that the Commissioner can report the findings of an investigation to the Minister, local government, State Government and specified Commonwealth Government bodies and regulators.<sup>4</sup>

## 4. Operation and utilisation of the 2020 Act provisions

The 2020 Act provisions gave the Commissioner greater ability to inquire into conduct that is having an adverse impact upon small business in WA. To this end, the Commissioner has established an Investigations and Inquiry Unit (IIU) with appropriate skills set and capability.

In complex or systemic matters, the Commissioner can undertake **Preliminary Inquiries**. It is important to note that these are not **Investigations** pursuant to s.14A(1)(b) or (ea); they are designed to establish, based on evidence, if an allegation is reasonable, has merit or can be resolved at the earliest possible time.

An outcome of a Preliminary Inquiry may be to:

- Determine the alleged conduct has no foundation;
- Refer the evidence in a report to an appropriate agency for further action or consideration; or
- Make a recommendation to the Commissioner to proceed to a formal investigation.

On delegation from the Commissioner<sup>5</sup>, the Director of the IIU has the authority to exercise the powers conferred by the 2020 Act, with the exception of authorising the commencement of prosecutions under s.14BA(8).

### Matters considered by the Commissioner

Since the 2020 Act came into effect in April 2020 and as at 28 February 2023, 282 matters have been considered by the Commissioner.

Overall, the majority of matters received by the Commissioner over this period relate to non-payment disputes between a head contractor and subcontractor, which are typically remedied by following the contract dispute mechanisms and referring parties to the rapid adjudication processes under the *Building and Construction Industry (Security of Payment) Act 2021* and *Construction Contracts Act 2004* or the court system for a determination.

A number of allegations involved systemic behaviours and imbalance of power that the smaller business could not resolve, which required preliminary inquiries and reporting to the Commissioner for consideration in order to escalate the matter to an investigation as per s.14A(1)(b) or (ea).

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<sup>1</sup>Ibid.

<sup>2</sup>Section 18AA of the SBDC Act.

<sup>3</sup>Section 14BA of the SBDC Act.

<sup>4</sup>Section 14A(1)(eb) of the SBDC Act.

<sup>5</sup>Section 14C(1) of the SBDC Act.



## Industries

Despite the disruptions affecting the economic context over the review period, the data demonstrates that the focus of the application of the 2020 Act has largely remained on responding to complaints received from participants in the construction industry.

More than half (56.4 per cent) of the allegations received related to the construction industry; of these, 39.6 per cent involved non-payment of invoices for works completed.

Beyond those from the construction industry, allegations were received from the following industries:

- Accommodation and Food Services: 5.0%;
- Administration and Support Services: 3.9%;
- Transport, Postal and Warehousing: 3.9%; and
- Professional, Scientific and Technical Services: 3.5%.

More recently, the Commissioner has engaged with executives from the mining industry on matters raised by complainants. Such matters generally affect a number of subcontractors and suppliers.

## Issues

The two main issues considered across all sectors and industries were:

- Non-payment of invoices for works completed; and
- Unfair business practices.

The data demonstrates that allegations of the unfair treatment of subcontractors is still an issue for some works procured by the State Government on construction projects.

## Utilisation of the powers

### Expanded investigatory scope

The expanded investigatory scope of the Commissioner's powers has enabled several enquiries that may not have been possible prior to the 2020 Act. For example, it has been instrumental in evidencing unconscionable behaviours in a case affecting several small businesses.

This has also assisted the Commissioner's advocacy on important government reforms by providing additional insight, data and case studies for use in submissions, for example:

- At the State Government level: consultation on the *Building and Construction Industry (Security of Payment) Act 2021 (SOPA Act)*; and
- At the Commonwealth Government level: the introduction of the Payment Times Reporting Scheme.



### Conducting investigations

The process and mechanisms in place, as well as the Commissioner's productive relationships across government and key industries, have enabled positive outcomes in:

- Obtaining information from parties necessary to enquiries; and
- Conducting enquiries that have provided evidence to address the alleged issue either directly or by referring it to the relevant body.

These positive outcomes have meant that alleged issues have not required enquiries being escalated to formal investigation.

### Compelling parties to provide information

As no investigation pursuant to s.14A(1)(b) or (ea) has been conducted, s.14BA has not been utilised to date. Despite its lack of use, the presence of s.14BA in the SBDC Act has successfully facilitated the obtaining of information. Generally, informal requests for information have been well-received.

## 5. Cross-jurisdictional comparison

The enhancement of the Commissioner's powers remains consistent with those of the comparable office holders within Australia (see Table 1).

The Commonwealth Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) and State-based Small Business Commissioners (except Queensland) all have powers to compel documents and/or request information, with South Australia the only jurisdiction to have pursued a penalty for failure to provide information (on one occasion).

All inter-jurisdictional counterparts described the penalty provisions as providing a powerful incentive to comply with requests for information.



**Table 1: Inter-jurisdictional comparison of Small Business Commissioners' powers to request information**

	Compel documents and/or information	Request for information in writing	Power to compel 'things'	Must deal with information within a specific timeframe and to take copies	Penalty for non-compliance with request for information	Penalty for altering, suppressing or destroying information
<b>Western Australia</b>	Yes	S. 14BA(4) (a): <i>Orally or in writing</i> , however operational policy: in writing in the first instance, or where made orally in the first instance, followed up with a written request	Yes	Yes - within 7 business days of information/ thing being produced	Up to a max of \$20,000 for individuals, \$100,000 for corporations	Up to a max of \$20,000 for individuals, \$100,000 for corporations
<b>South Australia</b>	Yes	Yes	No	Not specified	Up to a max of \$20,000 for individuals and corporations	Not specified
<b>Victoria</b>	Yes	Yes	No	Not specified	Nil	Not specified
<b>New South Wales</b>	Yes	Yes	Yes	Not specified	Up to a max of \$5,500 for individuals, or \$11,000 for corporations	Up to a max of \$5,500 for individuals, or \$11,000 for corporations
<b>Queensland</b>	No	No	No	N/A	N/A	N/A
<b>Commonwealth - ASBFEO</b>	Yes	Yes	No	No - may keep possession of information for so long as is necessary	Up to a max of \$6,600 for individuals and corporations	Not specified



### **South Australian Small Business Commissioner**

- The South Australian Small Business Commissioner was established in 2012 by the *Small Business Commissioner Act 2011 (SA)*.
- Since 2012, the South Australian Small Business Commissioner has utilised its power to compel information on an ad hoc basis.
- In 2018, a financial penalty was issued to a business for their failure to comply with a notice requiring them to provide information.
  - In that case, builders of the Royal Adelaide Hospital pleaded guilty to a charge concerning failure to provide the Commissioner with information relating to subcontractor arrangements after it issued a formal notice under its legislation requesting the provision of information.

### **Victorian Small Business Commissioner**

- Victoria introduced a Small Business Commissioner role in 2003.
- The role was expanded and renamed on 1 July 2017 through the *Small Business Commission Act 2017 (Vic)*.
- The legislation expanded the Commissioner's functions to:
  - Resolve disputes with a broader range of organisations (e.g. professional associations, education institutions and certain bodies within government);
  - Review legislation and regulatory policy impacting on small business; and
  - Work with other small business commissions.
- Unlike other jurisdictions, the Victorian legislation does not have any financial penalty provisions for non-compliance with a request for information.

### **New South Wales Small Business Commissioner**

- The New South Wales (**NSW**) Small Business Commissioner was established in 2013 by the *Small Business Commissioner Act 2013 No 22 (NSW) (NSW Act)*.
- The powers of the NSW Small Business Commissioner are the most comparable of all jurisdictions to those in WA.
- In the 2020 Statutory Review of the NSW Act, it was determined, amongst other things, that the scope and powers provided for by the NSW Act were sufficient to allow the Commissioner to advocate and support NSW small businesses.



### **Queensland Small Business Commissioner**

- The Queensland Small Business Commissioner was established under the *COVID-19 Emergency Response Act 2020 (Qld)* and transitioned to a permanent service under the *Small Business Commissioner Act 2022 (Qld)* in May 2022.
- The legislation has a dispute resolution focus and does not appear to consider investigations with powers to compel information.

### **Commonwealth – ASBFEO**

- The ASBFEO role was established in 2015 by the *Australian Small Business and Family Enterprise Ombudsman Act 2015 (Cth)*, replacing the Australian Small Business Commissioner.
- In addition to the power to compel documents or information, the ASBFEO can also summons a party to attend a hearing and provide oral evidence or produce a document relating to an inquiry.

## **6. Stakeholder consultation**

### **Summary of consultation**

Stakeholder consultation undertaken for the Review has revealed there is strong awareness of the Commissioner's powers among State Government agencies that procure works; and productive relationships exist with the Commissioner. However, agencies consulted have suggested there is a lack of awareness of the Commissioner's powers among subcontractors in the construction industry.

Further, while most industry associations consulted have shown broad awareness of the expanded Commissioner's powers, one did not know of the Commissioner's authority to investigate matters relating to works in the private sector (thinking it was limited to government works only).

While industry associations consulted have expressed a high regard for the SBDC and Commissioner, some are hesitant in referring members to the SBDC for issues. This is due to some of these associations providing no or low-cost dispute resolution services as part of their membership offer, either directly or via an agreement with external parties.

### **WA Government works**

All State Government agencies consulted are of the view that ensuring their subcontractors are paid is important and are continuously improving their processes and mechanisms to that end.

The provisions of the 2020 Act have aligned with some State Government agencies paying greater attention to the subcontractors engaged in their works contracts and enhancing protection mechanisms in relation to disputes that may arise (for example, through the introduction of internal complaints mechanisms or undertaking spot checks on head contractors).

These agencies have and can play a role in raising awareness of the Commissioner's role in receiving and investigating complaints outside of their own processes and mechanisms.

However, the Commissioner remains acutely aware of the need to ensure the role does not duplicate that of other agencies including the Building and Energy division of the Department of Mines, Industry Regulation and Safety.



## Powers of the Commissioner

### Support of the intent of the 2020 Act

Consulted stakeholders have expressed support of the intent of the 2020 Act and operations to date. While consulted industry associations were supportive, some were uncertain of its effectiveness and commented they were interested in the number of complaints received and their outcomes.

Being more closely involved and having a greater appreciation of what has been achieved through the 2020 Act, the State Government agencies and GTEs consulted regarded it as highly effective.

### Legislation in place acting as a deterrent

While uncertain whether the Commissioner had utilised his powers, all consulted parties found that having the legislation in place was effective in acting as a deterrent. The case study below is one examples of this.

#### Case study:

One State Government agency shared a recent case where referencing the Small Business Commissioner's powers influenced a head contractor to become compliant with contractual terms. Specifically, the agency had written to a head contractor concerning a number of complaints from subcontractors. In the absence of a response from the head contractor, the agency wrote a subsequent letter referencing the Commissioner's powers. This prompted a response from the head contractor, stating that new practices were now in place to avoid the same issues recurring.

### Protection of those providing information

While there was limited awareness of the provision protecting a complainant's identity (s.18AA of the SBDC Act), all consulted stakeholders agreed it was critical.

### Feedback suggesting power of publication

Representatives from two Commonwealth regulatory agencies suggested the Commissioner be further equipped with additional enforcement tools such as publication powers and public warning notices. One agency commented that publishing that a party has not acted adequately on the SBDC's website or social media channels may be more effective and timely.

## 7. Findings

The Review finds that:

- The objectives of the *Small Business Development Corporation Amendment Act 2020* have been met and remain valid; and
- The provisions of the *Small Business Development Corporation Amendment Act 2020* are appropriate to increase transparency of the practices and behaviours impacting the small business sector and taking informed action to rectify these issues and should therefore continue to operate.

Despite s.14BA not having been specifically utilised to date, no amendment of this provision nor any of the Commissioner's existing powers are warranted. The original intent of this provision remains sound, and its stipulation in the legislation is able to be referenced in the appropriate circumstances.



## 8. Concluding remarks

Given the economic context as outlined in this report, and as we emerge from the COVID-19 pandemic, heightened disputation involving small business operators is anticipated. In preparation, the Commissioner plans to enhance how the powers conferred by the 2020 Act are operationalised, including:

- Making it easier for complainants to raise matters anonymously by introducing *Safe2Say*, an Integrity Reporting Whistleblowing Platform powered by Crime Stoppers IP; and
- Further raising awareness of the powers among subcontractors and other small business stakeholders.



## Appendix A: List of interviewed stakeholders

- Main Roads WA
- Department of Finance
- Department of Mines, Industry Regulation and Safety (Building and Energy division)
- Water Corporation
- Master Builders WA
- Civil Contractors Federation WA
- Housing Industry Association
- Australian Competition and Consumer Commission
- Australian Small Business and Family Enterprise Ombudsman