SMALL BUSINESS COMMISSIONER AND SMALL BUSINESS PROTECTION BILL 2012

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Adam Searle.

Second Reading

The Hon. ADAM SEARLE (Deputy Leader of the Opposition) [11.34 a.m.]: I move:

That this bill be now read a second time.

Small businesses are the core of our economy. They are estimated to comprise some 96 per cent of all businesses and there are two million across Australia. Together, these enterprises provide half of the employment opportunities in our society. In New South Wales there are 650,000 small businesses providing employment for half of the workforce. The health of our small business sector is and should be a matter of vital concern for our Government and for everyone in public life. Small businesses face many challenges and not all of them are readily amenable to government support. Each sector of industry has its own complexities and challenges.

However, there are some themes that link small business regardless of the products and services they provide or from where they operate. Many business operators are very skilled and innovative about the product that is their business, but not all of them have developed the business skills needed to sustain an enterprise over the longer term. Almost all small businesses experience difficulty with cash flow and management of debts and related issues involving adequacy of funds and access to affordable finance. In some of these areas governments at all levels could do more to provide encouragement and support to current and future small business operators. However, some areas will always be inherently difficult for government to address effectively.

One area of common experience for small business is the difficulties experienced when dealing with larger businesses and governments at each level. Layers of regulation could be one issue and another is the attitude and behaviour of large business towards smaller and medium size enterprises. While excesses of behaviour are often caught by trade practices legislation—the Competition and Consumer Act 2010 at the Federal level and fair trading laws at the State level—there is a large and growing gap in the law where small business is often at the mercy of bigger business without effective protection or remedy when relationships break down. The law traditionally has grown around the notion of freedom of contract or the sanctity of contract and, of course, holding to legal commitments is important. However, difficulties arise when areas of relationships have not been discussed and dealt with in any contract, where different understandings about obligations arise or where legal rights are exercised in a manner not foreseen by the parties, or at least one of them. This uncertainty has caused and continues to cause practical difficulties for the small business sector.

Of particular concern is where there exists significant inequality of bargaining power. Another area is form contracts, where the commercial relationship is offered on a "take it or leave it" basis and is not the subject of meaningful discussion or negotiation. This has long been recognised as unsatisfactory and in need of reform, at least since Professor Peden's very significant report on harsh and unconscionable contracts was handed down in October 1976.

That was addressed in the Competition and Consumer Act 2010, but only for consumers and expressly not for business contracts. This continues to assume that the commercial landscape is populated only with legally sophisticated parties dealing with one another as equals. The reality is often otherwise, with the small business operator being in reality a sole trader, or a mum and dad or family operation.

In addition, we have experienced the phenomenon in the past 20 years of governments and major corporations contracting out work and people who were once employees having to form shelf companies or to trade through companies, thereby becoming small businesses when in reality they are entirely dependent on a larger business or enterprise for all their work. Although they have always been recognised as independent businesses, franchisees often fall into that category because everything to do with the business is bought by a much larger business and they are entirely dependent on that relationship while selling to the wider public. Enterprises of this character do not have a dedicated legal department or the resources to challenge proposed contractual arrangements, or even to draft contracts. Many business contracts are still made orally and many aspects of the relationship are not discussed and agreed upon in advance. That is fine until an issue arises and the parties discover that there is nothing in place, and certainly nothing in writing. Of course, relying on people's recollections can cause mistakes and create a great deal of uncertainty about the terms of the contract. This must be changed to provide better protection and certainty for small business operators in this State.

This bill seeks to achieve three aims: to provide a proper, effective legal foundation for the Small Business Commissioner—something this Government has failed to do—so that the holder of that office can act independently and with confidence to assist small business meaningfully in this State; to create a flexible legal architecture to ensure small businesses are treated fairly by other businesses and by State and local government bodies; and, most importantly, to confer on small businesses additional legal rights. A considerable body of research, as well as case law, demonstrates beyond argument that existing protections or rights for small business, whether arising at common law or under various statutes made by Parliament, are, having regard to their real-world experience, not adequate or not readily available to small businesses. For example, fair trading and trade practices legislation is designed to protect consumers.

The unfair contracts part of the Industrial Relations Act, which has been on the statute book for more than 50 years, was a major source of remedy for small businesses dealing with contracts that had become or were harsh or unconscionable. However, in 2003 the Court of Appeal in New South Wales started a process of effectively shutting down that avenue for small business by insisting that proceedings under the Industrial Relations Act had to have an industrial context or flavour. There was a great deal of criticism about that case and a variety of High Court cases—including *Old UGC Inc v Industrial Relations Commission of New South Wales* and *Fish v Solution 6 Holdings Limited*—which saw the end of that as an effective remedy for small businesses. The courts were very concerned about the commission intruding into the commercial area, which in their view was the responsibility of the mainstream courts.

The Howard Government introduced the Independent Contractors Act 2006, which is similar to the Fair Trading Amendment (Unfair Contract Terms) Act 2010, specifically for small business. However, it was very limited in that it did not deal with situations in which contracts became unfair and it was largely unavailable to small business. However, in recent

Federal Court decisions in *Informax International Pty Limited v Clarius Group Limited* the court gutted that legislation of any effect in that the court found that it cannot provide a remedy for past conduct, so effectively it is now useless for small businesses. Other legislation, for example, the form contract provisions that are now in place in the Federal Competition and Consumer Act prohibits unfair terms in form contracts and makes them void. However, this protection applies only to consumers and not to businesses. So there is a real problem with small business having access to the law.

Common law equity requires more than harshness or unconscionability; it requires a person entering into a contract not to have been free to make a decision by reason either of duress or a failure to understand the nature of the contract that he or she was entering into. The tests, where they exist, are very high but there are a number of other obstacles. There is cost for litigation, difficulty in accessing through the institution of the courts and also risk—the risk of having to pay the legal costs of the other side if someone does not succeed in an action, as well as paying his or her own costs. All too often being a small business involves significant financial risks, including placing at risk life savings and the family home, often with tragic consequences. For many, taking on the added risk of legal costs is a bridge too far.

Even where there are legal rights, in a practical sense they are out of reach. But in many situations, as I have discussed, there are no legal rights. As is acknowledged on page 3 of the Government's extremely belated discussion paper on the role of a Small Business Commissioner, the issues faced by small businesses are unfair practices or unfair issues that arise in their dealings usually with larger businesses. Often this is not illegal or contrary to any commercial contract they have entered into and it is not the kind that is susceptible to remedy under existing laws. The effect of this on small business is to cause economic hardship, inhibit growth and often is anticompetitive, but not in a way that transgresses the high standards required by the Competition and Consumer Act or the Fair Trading Act. Small businesses, which often are run by hardworking Australian families and individuals, are damaged. That creates social hardship and, in a wider sense, inhibits economic growth more broadly in our society. Simply put, this is not good enough. While advocacy and mediation are essential and often productive, their long-term success will depend on the context in which they occur. As the Government's own paper acknowledges, "Some big business and government bodies will only respond to matters raised with them by the commissioner if they are required to do so by law." Equally, it might be said that when entering into mediation or other discussions with a party with whom they are in dispute, the minds or attitudes of big business and government bodies are shaped by the exposure, if any, should there be no resolution.

Where a small business is perceived not to have any black letter legal rights, or accessing them will be considerably expensive, the degree of willingness to meet the other party halfway, as it were, often will be lacking. Consequently, the provision of additional, meaningful legal rights that are accessible to small business must be an indispensible part of any real reform. The bill also provides protection for small businesses where they simply do not have the resources to use even these new rights. At present the Small Business Commissioner appointed by the O'Farrell Government has no legal power to do anything. Repeatedly the Government has promised legislation but 17 months later it has still failed to deliver on its promise. It was not until 23 May 2012, when I gave notice of my bill, that the Government even bothered to issues its own discussion paper. Interestingly, the discussion paper is light on detail. The only definite proposal is for the commissioner to offer mediation services and to advocate for small business. A range of other matters are vaguely described and canvassed in a half-hearted way. If that is the best the Government has to offer small business in this State should be very concerned.

Before the last election the Coalition promised to create a Small Business Commissioner to advocate for small business, provide a low-cost mediation service and to cut red tape. It appointed a commissioner in May last year but neglected to provide any legislative basis for her functions. On 6 September 2011 the small business Minister promised legislation soon and an independent advocate for the State's 650,000 small businesses, but appointed the Small Business Commissioner as a public servant. In March 2012 the Minister said that the Government would release a discussion paper shortly but that did not happen until June. The Government's chief activity in the small business space has been to scrap Small Business September, MicroBiz Week, the Young Entrepreneurs Program and the Women in Business Mentoring Program. It also closed the Parramatta Business Centre, shut regional Trade and Investment offices in Broken Hill, Tweed Head, Coffs Harbour and Goulburn, and in the process blamed its own Small Business Commissioner for this decision. I refer members to the *Goulburn Post* on 16 March 2012.

In contrast, Labor proposes a comprehensive and positive plan to support small business in this State. Over a period of months I consulted with small business operators across a range of industries about the challenge that they face and how a Small Business Commissioner could help them in practical ways. The result of those discussions was the draft bill released on 23 May for further consultation. As a result of that extensive consultation some changes have been made to the bill that is now before the House. I have spoken with many chambers of commerce, individual small businesses across a range of industries, as well as some professional bodies, and strong interest has been shown in particular by those engaged in franchising, including members of the Franchisee Council of Australia and a number of its members. A number of existing and former franchise owners and operators also expressed strong and positive interest in the bill and its approach to the difficulties being faced by small businesses.

A number of former franchise owners said they had been put out of business by the inherently unfair and unworkable franchise arrangements imposed on them on a "take it or leave it" basis. They also said that if legislation such as this had been in place they would still have their businesses as they would have had backup and remedies available to them. The existing laws did not help them. The Motor Traders Association, which represents 5,000 businesses in the motor trades industry, indicated in-principle support for "the thrust of the Opposition's private member's bill to introduce fairer terms and conditions in contracts between small business operators and large manufacturers and suppliers." I note that the Motor Traders Association is having discussions with the Government about that very matter.

The draft bill has been welcomed by parts of the rural community and by industries. I refer in particular to the Riverina Wine Grape Marketing Board. I understand that the board complained to the Office of the Small Business Commissioner that some regional wineries had not been paying growers by the due date. It was advised that the commissioner had no power to take action apart from offering mediation. While growers who are not paid by the due date may have a legal right to take the matter further, depending on the terms of their contract, they are aware that such an approach carries a level of risk of damaging

relationships with the wineries. For geographical and other reasons, there are a limited number of customers to whom the wine grape growers can sell their produce.

Under the provisions of this bill, if delays on payments continue to occur, an industry standard or code of practice could be developed for that industry, which would prohibit such systematic behaviours by the wineries. That code could be enforced by the commissioner thus preventing small businesses from having to wreck their own relationships with those to whom they sell. This will be a significant development as currently the region has no statutory provisions that set and enforce payment provisions for wine grapes. Strong support for the ideas contained in this bill have come also from the National Independent Retailers Association, which represents tenants in smaller shopping centres, strip malls and other locations as well as in different Australian States.

Of particular concern to that association are the one-sided leases forced on its members by shopping centre owners. I note in this regard that the previous Labor Government enacted amendments to the Retail Leases Act and inserted a section dealing with unconscionable conduct. I also note that those provisions were fiercely resisted by the industry but in practice were not well utilised and have not had the intended beneficial effect largely because they were based on the notion of unconscionable conduct, which in some circumstances is unlawful at common law and which is already regulated under the Trade Practices Act and the NSW Fair Trading Act. Clearly more needs to be done in that space.

However, the provisions in this bill would significantly change the situation for the benefit of tenants, in particular, in the case of standard "take it or leave it" contracts that often are effectively forced on tenants. The unfairness in some of those contracts relate not only to issues such as rent acceleration and the like but also to provisions linked to the renewal of leases and opening and closing hours. I understand that a common feature of these clauses is that shopping centre owners always require, sometimes unreasonably, individual shops to be open whenever the centres are open, which forces many tenants and operators to operate many more hours and days each year than they might wish to operate. That is interesting, particularly in the context of another bill before this House that proposes changes to retail trading laws.

Another area in which this bill would be of great benefit relates to all manner of independent or subcontractors whose arrangements often are oral and operate on the basis of not precisely executed legal documentation but understandings about the performance of work, amounts to be paid, regularity of pay and the like. Because most of these arrangements are not written down when things go wrong, or disputes arise, the precise terms of any contract are hard or difficult to identify, or are the subject of disputation. In addition, in the New South Wales building industry a number of principal or large contractors have experienced difficulty or have gone out of business—Kell and Rigby, Reed Constructions and St Hilliers come to mind—and thousands of subcontractors who performed the work in good faith have not been paid and have been left out of pocket. Government responses such as endeavouring to have as many subcontractors re-engaged by new contractors are not adequate or satisfactory because

the issue of payment for work that has already been done simply is not addressed even when they are re-engaged, which largely is not the case.

It also has been the case that principal contractors experiencing difficulties or simply not making provisions for their obligations go out of business and the persons responsible who are behind the enterprises walk away and start up a new company with a different name—the "phoenix" phenomenon—only to repeat the process all over again creating a situation where there is a constant stream of unpaid subcontractors. This has been a longstanding and inherent problem in the building and construction industry. The uncertainties it creates for many independent businesses operating in the building trades and for their employees and families not only is unfair and unsatisfactory but also is the cause of a great deal of hardship and economic uncertainty for the industry as well as personal hardship. In my opinion it undermines the economic performance of this important industry in New South Wales. The remedial provisions in this bill would enable subcontractors to be able to pursue those who in reality have benefited from their work and from the contract arrangements and to seek payments directly from them.

I note also the recent inquiry established by the Minister for Finance and Services into the difficulties being experienced in the finance industry. A number of legislative changes may emerge from that inquiry but legislation is periodically in need of updating and sometimes very good schemes that work effectively for a number of years can be undermined when people learn how to get around its provisions. An example of this is the security of payments legislation developed by the former Labor Government, which has worked well for a number of years. It is my understanding from those in the industry that the legislation depends on the usage of particular forms and forms of words. The feedback I am getting is that operators have learnt to give work only to those who do not insist on using that legislation. Therefore the mechanisms provided are not available when things go wrong. In order to secure the work, subcontractors do not avail themselves of the protections because they need the work and they no longer have the levers or mechanisms available to secure the payment they are owed.

Under this bill the kinds of measures that the inquiry will be examining could be implemented through the flexible mechanism provided in the codes of practice for industry. That can be done after careful consultation with those affected by the enactment of the codes of practice, which will be binding on those industries or sectors and enforceable by those who benefit from them and also by the Small Business Commissioner. It is not good enough that as things stand subcontractors are often the last in line to be paid after a company goes into administration or liquidation. Special arrangements—models for insurance trusts or mutual funds—could be provided for in the codes and updated periodically in the light of experience, without the need for multiple re-enactments of legislation. As people try to get around things the legislation can be more easily updated.

I turn now to a discussion of the provisions in the bill. The bill defines "government agency" to mean a public authority constituted under an Act or a New South Wales government

agency or a division of the government service or a council within the meaning of the Local Government Act or a State-owned corporation. While the Government's discussion paper does not provide any definition of "small business", resting on the belief that small businesses can be relied upon to self-identify, the draft bill provides a wide and flexible definition—a business enterprise, whether operated by a natural person, sole trader, partnership, corporation or other entity with no more than 20 full-time equivalent employees at any one time, or an annual income or annual expenditure between $10,000 and $5 million. But it expressly does not include any government agency, so government agencies will not be able to use this for their own purposes.

The bill constitutes the office of the commissioner as an independent statutory officer appointed by the Governor for a term not exceeding five years, with eligibility to be reappointed and able to be removed only by the Governor on address by both Houses of Parliament. This will ensure that the role is independent. Often the commissioner will need to address unsatisfactory government performances. There needs to be that independence if there is to be public confidence that the role will be properly fulfilled. It is not just good enough to have a public servant in the role.

Clause 5 sets out comprehensively the functions to be given to the commissioner. The commissioner is to be an advocate for small business generally and is to receive and investigate complaints by or on behalf of small businesses, either on an individual or a collective basis, regarding their commercial dealings with other businesses or their dealings with government agencies, and to facilitate the resolution of such complaints through measures considered appropriate such as mediation—including compulsory mediation—or making representations on behalf of small businesses. The commissioner may refer complaints received to a government agency as considered appropriate. The commissioner will assist small businesses in their dealings with other businesses or government agencies if requested to do so and also will have a role in disseminating information to small businesses to assist them in making decisions relevant to their commercial dealings with other businesses and government agencies.

The commissioner also will have the responsibility of administering any codes of practice and will monitor, investigate and advise the Minister about non-compliance with codes of practice and market practices that may adversely affect small businesses. The commissioner also will report to the Minister on matters affecting small businesses at the request of the Minister and on any aspect of the commissioner's functions. The commissioner will be empowered to take any other action considered appropriate by the holder of the office for facilitating or encouraging the fair treatment of businesses in their commercial dealings with other businesses or with government agencies and will be able to undertake any other functions conferred under the Act or any other Act.

Clause 6 provides that the commissioner may, by notice in writing, require a person to provide information within a specified time such as the commissioner requires. It will be an offence to refuse to do so but, of course, there are provisions to protect material that is

commercial in confidence. The role must protect and enhance the confidence of business that legitimate commercial secrets will not be exposed. This will ensure that in investigating complaints or fulfilling other reporting functions the commissioner is able to obtain the information he or she needs. Clause 7 provides a comprehensive regime permitting the commissioner to share information with a relevant agency for the purposes of sharing or exchanging any information held by the commissioner or the agency. This does not and will not authorise the disclosure of information that is commercial in confidence. Clause 8 provides that the commissioner is to report to Parliament each year on the work and activities of the office, but also on the regulatory burden faced by small business. Any such report on the regulatory burden on small business is to include the sources and the legislative, procedural or administrative requirements of the regulatory burden and recommendations for alleviation of any burden.

Part 3 provides for the codes of practice I have already mentioned for the fair treatment of small business to be made by regulation. It provides that a code of practice may be made with respect to the fair treatment of small businesses in their commercial dealings with other businesses, whether or not small businesses, and in their dealings with government agencies. Without limiting the scope of this provision, a code of practice may provide for good faith obligations in commercial dealings. This particular aspect emerges from very strong representations made to me by franchisees and their representative bodies, as well as others such as the Independent Contractors of Australia and its director Mr Ken Phillips, representatives from the Council of Small Business of Australia and the National Independent Retailers Association. That is not to say that all codes will have to have those good faith obligations but it provides the government of the day with another tool for making the appropriate arrangements for industry. Over the years there have been a number of reviews about whether or not there should be legislative requirements for good faith obligations. I will not engage in that debate now but I thought it important to highlight the possibility that those obligations would be included in the codes.

Clause 11.3 provides that a code may not be made unless the commissioner has consulted with each body or organisation considered to be representative of an industry or business likely to be affected by the code of practice—there must be full consultation. Clause 12 provides that a person must not contravene a code of practice in trade or commerce and there will be a reasonable level of penalties but there will also be provision in a civil sense for the commissioner to enforce the codes to modify and change behaviours within the industry. Many of these concepts and their shaping have been borrowed from the South Australian legislation, which I think is the most comprehensive and best of all the different State examples. However, while the South Australian legislation provides for the codes in its fair trading legislation I thought it was important for it to be in the small business commissioner regime in New South Wales. This bill envisages a much closer relationship between the commissioner and the codes of practice.

Clause 13—a provision that I borrowed from the New South Wales Fair Trading Act and adapted to this circumstance—provides that the Supreme Court may on application by the

commissioner grant an injunction if satisfied that a person has engaged or is proposing to engage in conduct that would constitute a contravention of a code or an attempt to contravene or aid, abet, procure or counsel a person to do so and it will also allow injunctions to be sought, either permanent or temporary, to prevent any person interfering with an investigation undertaken by the commissioner. As I outlined earlier in this contribution, clearly there is a need for small business to be able to seek relief from contracts that are or have become unjust or unconscionable. The bill proposes that a small business should have access to the arrangements that are already provided in the Contracts Review Act.

This legislation has provided an unjust contract regime that has operated very well and without undermining commercial arrangements, contracts or the economy in general in New South Wales. The legislation is based on the groundbreaking work of Professor Peden on harsh unconscionable contracts. While Professor Peden's work clearly identified the need for a general law covering all kinds of contracts, the legislation, when enacted, was limited to protecting consumers and unincorporated farmers only. Despite this relatively narrow focus, a review of the cases and authorities in the 32 years since shows that this law as applied by the Supreme Court has done good and valuable work by providing relief for people from contracts that are unjust, as well as providing sensible and balanced outcomes.

Whether a contract is or has become unfair is not merely left to the discretion of the judge making a common sense judgement but has been made by principles identified by Professor Peden and are found in the Contracts Review Act. Time prohibits me from setting them out in detail, but they have been followed by the courts since then. The categories are not exclusive but they provide clear guides to the court as to the factors to be considered in determining whether a contract is or has become unjust. The bill provides that small business will have access to this regime, with some modifications. The operator of a small business may apply to the Consumer, Trader and Tenancy Tribunal for an order. The bill provides that the tribunal has all the same jurisdiction as the Supreme Court and all the powers of the court in proceedings, which it does under the Contracts Review Act.

I note that the Supreme Court may refuse to enforce any or all the provisions of a contract or make an order declaring the contract void in whole or in part or varying it in whole or in part. It may also make orders with respect to any consequential or related matters, such as orders for the payment of money, whether or not by way of compensation, to a party to the contract and orders for the supply of services. This bill does not affect the jurisdiction of the Supreme Court under the Contracts Review Act, but provides small business with an additional option because currently they cannot use the legislation. There are a range of ancillary or machinery provisions, such as protecting the commissioner and the commissioner's staff for all acts done under the Act in good faith to protect them from liability. The bill repeals the Small Business Development Corporation Act because the commissioner will take over all the functions currently undertaken by that body.

Schedule 2 provides for the amendment of other Acts consequential upon the enactment of this legislation and contains a number of important machinery provisions, such as a series of

amendments to the Contracts Review Act, which are necessary to provide for access to protect small businesses. Also, some changes will be made to the nature of the relief that may be sought under the Contracts Review Act. For example, that Act is limited to contracts that were unfair at their inception. The bill comprehends contracts becoming unfair during their lifetime and also ensures that even when contracts have been fully performed or terminated there are still remedies available where, having regard to the triggers or principles contained in the Contracts Review Act, harshness or unjustness in the contract can be established.

The bill also provides that where systematic unfairness has been established, the court or tribunal may also deal with systematic contracts where providers of contracts, for example, for contracts on a take-it-or-leave-it basis, are endemic in a certain industry. If systemic contracts are found to be unfair there is the ability to say that in the future a contract in those terms will not be able to be offered in order to protect small business more generally in industry. It would be ridiculous where a court or tribunal finds a flagrant abuse of unequal bargaining power, which is inherently flawed and unfair in a particular case but is unable to provide a more general remedy. The bill also provides a section 12A that enables the small business commissioner, with the consent of an operator, to bring proceedings under the Act to protect that small business or to take over a course of action started by a small business.

I note that towards the end of June the Independent Contractors Association of Australia issued a release supporting the Government's discussion paper because the commissioner will have power to initiate or be involved in litigation on behalf of small business against large business or government. That is not provided for in the Government's discussion paper but it is provided in this bill. I say to members opposite: If they want to see meaningful provisions in the Act that protect small business they will support this bill.

Debate adjourned on motion by the Hon. Dr Peter Phelps and set down as an order of the day for a future day.