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SMALL BUSINESS COMMISSION BILL 2013

Second Reading

The Hon. DUNCAN GAY (Minister for Roads and Ports) [5.01 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Small Business Commissioner Bill 2013 demonstrates the importance which this Government places on the small business sector in New South Wales. For the first time a bill is being introduced to establish the role of the New South Wales Small Business Commissioner. This appointment will be as a statutory officer who will be a truly independent and strong voice for small businesses across this State. The bill confers the necessary legislative powers and responsibilities so the Small Business Commissioner can effectively carry out the specified objectives and functions of this office. The inaugural New South Wales Small Business Commissioner, Ms Yasmin King, was appointed by the New South Wales Government in 2011 to support small businesses throughout the State.

Small businesses are the backbone of Australia's economy, representing 96 per cent of all businesses. In New South Wales alone, there are 680,000 small businesses which provide employment for around 50 per cent of the New South Wales work force. In addition to contributing to the economy directly, the small business sector is a crucial platform which underpins the efficient operation of many medium-sized and large businesses. The role of the Small Business Commissioner was established by this Government in recognition of the fact that small businesses are an integral part of the economy, yet historically, their needs have not been adequately met. For the first time in New South Wales, small businesses have an, independent person to speak on their behalf within Government. The Small Business Commissioner will have the ability to provide input, on behalf of the small business sector, in relation to policy development and to assist small businesses in their dealings with other businesses and Government agencies.

The Small Business Commissioner will be able to investigate and assist in the resolution of disputes involving small businesses. The role of the Office of the Small Business Commissioner is critical because it is responsible for providing low-cost mediation services for small businesses to keep disputes out of court—as small business can often not afford to pursue costly and lengthy legal action. The Small Business Commissioner will also assist small businesses to navigate through government, identify where systemic issues impacting on small businesses can be addressed and endeavour to reduce administrative burden more generally.

There are a number of good examples where Ms Yasmin King, our State's inaugural Small Business Commissioner, has already assisted small businesses to resolve real problems. I will refer to an example. The first example is where metropolitan traders contacted the commissioner with concerns about the interruption to their businesses because of infrastructure upgrade works being conducted along their major retail strip. These works were to be carried out for a number of months, including across the peak Christmas trading period. In addition, large machinery parked in front of shop premises for the entire time would significantly reduce the number of parking spaces available for customers. It would also block the view from the road so that the shops would appear shut.

The commissioner attended a group meeting within two days of being contacted and worked with the traders to find a way forward. The commissioner then arranged a meeting with the organisation doing the upgrade works and obtained their commitment to postpone the works until a more favourable time for the business owners after the Christmas trading season. When works recommenced, traders were still concerned about the impact which the works would have on their businesses. The commissioner brokered an agreement with the infrastructure provider for works to take place in shorter stages and at night, albeit over a longer period. This approach minimised the negative impact of the works on the businesses and assisted traders in working through an already difficult retail climate. Without the intervention and assistance provided by the commissioner, it is likely that these businesses would have been significantly financially impacted. The traders were extremely grateful that they had a senior person within government who could translate their concerns to be understood by the infrastructure provider and who could retrieve the relationship between the traders and the infrastructure provider so that they could work together collaboratively into the future.

I will now outline the key provisions of this bill which will provide confidence to the small business sector. If a small business is facing unfair treatment, if there is a public interest in a matter in which the business is involved or if the small business is involved in a dispute with another business or a government agency, for the first time, there is someone within government where they can turn. Division 1 of part 2 of the bill relates to the appointment of the Small Business Commissioner. Clause 4 provides for the appointment of a Small Business Commissioner by the Governor

on the recommendation of the Minister. The appointment of the commissioner as a statutory officer by the Governor means that the commissioner is truly independent, which is a necessary requirement for this role to be effective.

Clause 5 requires the commissioner to report to the Minister in relation to the exercise of the commissioner's functions but is not subject to the control and direction of the Minister in relation to the investigation of complaints by small business; the provision of advice to the Minister; referrals to the director general of the Department of Finance and Services under section 18; and in relation to the contents of any report by the commissioner. This provision reinforces the independence of the role of the commissioner. The remaining clauses in division 1 of part 2 include provisions relating to the term of office, remuneration, removal from office and employing staff.

Division 2 of part 2 sets out the objectives and functions of the commissioner. Clause 13 provides that the commissioner's first objective is to deal with issues concerning the small business sector in a neutral and independent manner. It is important to note that the Office of the Small Business Commissioner must maintain a neutral stance when an allegation is brought forward by a small business. The Office of the Small Business Commissioner must look at the facts objectively and attempt to engage with both parties involved in the matter to identify whether there has been unfair treatment or whether it is in the public interest to deal with the complaint. When dealing with all parties to a dispute it is critical that the commissioner has the respect of all parties so that the parties are willing to come to the table and work out a way forward.

The second objective of the commissioner is to provide a central point of contact for small businesses to make complaints about their commercial dealings with other businesses and their dealings with government agencies. The third objective is to encourage government agencies and larger businesses to enter into productive working relationships with small businesses. One of the key objectives of the commissioner is to facilitate the resolution of disputes involving small businesses through the provision of low-cost mediation and other forms of alternative dispute resolution. This is of real value to small businesses because it is a tried and tested formula which keeps disputes out of costly and expensive legal processes.

The Government has been providing alternative dispute resolution services to help tenants and landlords come to agreement over retail lease disputes, through what used to be called the Retail Tenancy Unit. This unit now sits within the Office of the Small Business Commissioner. This group of highly skilled experts, with the addition of staff with a small business focus within the office, now provides not only alternative dispute resolution services in relation to retail lease matters, but also in relation to general business-to-business and business-to-government matters. This is a low cost service which has not previously been provided in this form before and which has been enthusiastically embraced by the small business sector.

Remaining objectives include facilitating and encouraging the fair treatment of small businesses, promoting a fair operating environment in which small businesses can flourish and identifying and supporting measures to reduce the administrative burden for small businesses. The commissioner's general functions are provided for in clause 14. One of these key functions is receiving and dealing with complaints made by or on behalf of small businesses regarding their dealings with other businesses and government agencies. It is important to note that pursuant to clause 15, the commissioner may deal with a complaint only if satisfied that the subject matter relates to unfair treatment or an unfair practice or if it is in the public interest to deal with the complaint. The commissioner may decline to deal with complaints considered to be vexatious or trivial. This also means that the commissioner will not become involved in matters such as licencing decisions or planning decisions where a small business does not obtain the result it was hoping for.

The commissioner also has functions to investigate complaints or refer complaints to another person or body, make representations or take action on behalf of small businesses and conduct investigations into the treatment of small businesses by other businesses or government agencies. In relation to investigative functions, the commissioner may reasonably require any person or government agency to provide information or answer questions relating to certain dealings with small businesses. This is an important provision within the bill because we are all aware of the imbalance of power when a small business is involved in dealings with larger businesses or with government bodies. This function will allow the commissioner to ask questions and reasonably require information so that the commissioner can have available all the relevant information to determine whether a small business has been treated unfairly, or if in fact the business has been treated in an appropriate fashion, by an organisation. For these reasons, it is important that any investigation is not compromised and clause 27 provides that the Supreme Court may, on application by the commissioner, grant an injunction if satisfied of conduct that constitutes interfering with an investigation.

In fact, the bill allows for government agencies to be excluded from providing information if there is an overriding public interest against disclosure for the purpose of the Government Information (Public access) Act 2009 or if access to the information would otherwise be denied under that Act. It is critical to note that this is not about witch hunts or overturning valid decisions made by an organisation if a person does not like a certain outcome. The commissioner's function is to look at allegations of unfair treatment or where it is in the public interest to deal with a complaint. An additional function of the commissioner is to facilitate the development of codes of practice by industry that deal with issues concerning the small business sector. Codes of practice are one of a number of tools which can be used to address instances where behaviour resulting from power imbalance leads to unfair treatment of certain classes of businesses within an industry.

Clause 17 of the bill provides that the commissioner may certify the outcome of dispute resolution assistance. Under the Retail Leases Act 1994 the commissioner is also the Registrar of Retail Leases, and has the ability to certify in writing the outcome of an application made for assistance in resolving a complaint. In a dispute about a retail lease, this allows for the certificate to be admissible as evidence in any legal proceedings relating to the complaint, where mediation has failed to deliver an outcome acceptable to the parties. Clause 17 introduces this concept into the Small Business Commissioner Bill. The bill is acknowledging that it is important, when a matter proceeds to be determined by a court or a tribunal, that the decision-maker can be made aware of the outcome of dispute resolution assistance—that is, whether the mediation or other form of alternative dispute resolution resolved the dispute or whether and agreement

was reached.

Clause 18 provides for referral of certain findings. The main principle upon which this bill is based is that parties to transactions should treat each other fairly. The provisions in the bill aim to address those instances where one party has a power imbalance compared to the other party and can "get away" with treating that party unfairly. One way that the commissioner can address this issue is to make other parties to transactions aware of instances where unfair treatment has occurred. The intention of clause 18 is to provide the commissioner with the ability to refer to the director general of the Department of Finance and Services any finding by the commissioner that a person or body has persistently engaged in anticompetitive practices that are in contravention of any law and that adversely affect the small business sector. This is an important provision because some large businesses which think they can treat smaller businesses in a way that they may not treat a government agency or another large business would not like to think that the director general of the Department of Finance and Services, the government agency that oversees government-wide procurement, could be made aware of some of their bad behaviour. This is what clause 18 allows—and this should put businesses which behave unethically on notice that their behaviour is now more likely to be found out than has been the case before.

Division 3 of part 2 of the bill relates to reports by the commissioner. For example, the commissioner is required to prepare and furnish an annual report on his or her work and activities to the Parliament and may make a special report which can also be provided to the Presiding Officer of each House of Parliament. In the first instance and prior to provision to Parliament, the commissioner must provide to the Minister a draft of any report and give the Minister or any person or government agency criticised in the report, an opportunity to make a submission. This is entirely appropriate and it needs to be noted that the commissioner's independence is maintained as the commissioner is not required to amend any report, but merely to consider any submissions and include a reference in the report that a submission from a government agency or person has been made. Part 3 contains the miscellaneous provisions including clause 30 which repeals the Small Business Development Corporation Act 1984.

Finally, clause 31 provides that the Minister is to review the Act as soon as possible after the period of five years from the date of assent. This Government is committed to improving the environment in which small businesses operate. These legislative provisions will establish the statutory office of the Small Business Commissioner and provide valuable services to the small business sector to assist in the day to day operations of their businesses. The Government has undertaken an extensive process of consultation including the public release of the consultation paper: A legislative framework for the New South Wales Small Business Commissioner for a six-week consultation period.

The Small Business Commissioner hosted 15 listening tour events across the State and engaged with approximately 330 small business operators regarding the proposed legislative framework and general issues impacting on small businesses, as well as industry associations and government representatives. Overall, there was overwhelming support for the proposed legislative framework which is contained the bill. In summary, this bill introduces important legislation, which for the first time legislatively establishes the role of the New South Wales Small Business Commissioner—a truly independent and strong voice for small businesses across this State. I commend the bill to the House.