



New South Wales

Small Business Commissioner and Small Business Protection Bill 2012

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to create the position of Small Business Commissioner as an independent statutory office and to confer functions on the Commissioner in relation to small businesses,
- (b) to ensure that small businesses are treated fairly in their commercial dealings with other businesses and their dealings with government agencies through enforceable codes of practice,
- (c) to enable small businesses to obtain relief under the *Contracts Review Act 1980* in respect of unjust contracts.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 defines certain words and expressions used in the proposed Act. A *small business* is defined as a business enterprise with no more than 20 full-time equivalent employees or with an annual income or expenditure of between \$10,000 and \$5 million.

Part 2 Small Business Commissioner

Clause 4 creates the statutory office of Small Business Commissioner.

Clause 5 specifies the functions of the Commissioner. These include assisting small businesses in their dealings with government agencies.

Clause 6 enables the Commissioner to require information to be provided from persons about their commercial dealings with small businesses.

Clause 7 enables the Commissioner to share information with government agencies and certain other persons and bodies.

Clause 8 requires the Commissioner to report annually to Parliament on the Commissioner's work and activities and on the regulatory burden on small businesses.

Clause 9 enables the Commissioner to delegate his or her functions.

Clause 10 provides for the staff of the Commissioner.

Part 3 Protection of small businesses

Clause 11 enables the regulations under the proposed Act to prescribe codes of practice with respect to the fair treatment of small businesses in their commercial dealings with other businesses and their dealings with government agencies. The Commissioner will be required to consult with representatives of industries or businesses likely to be affected by a code of practice before any such code of practice is made.

Clause 12 makes it an offence to contravene a code of practice.

Clause 13 provides that the Supreme Court may, on application by the Commissioner, grant an injunction in relation to contravention of a code of practice and also to prevent a person from interfering with an investigation by the Commissioner.

Clause 14 confers on the Consumer, Trader and Tenancy Tribunal (the *CTTT*) jurisdiction under the *Contracts Review Act 1980* (the *CR Act*) with respect to unfair contracts to which a small business is a party. Under the proposed section, the operator of a small business will be able to apply to the CTTT for relief under the CR Act in relation to contracts the operator considers to be harsh, oppressive, unconscionable or unjust. The proposed provision does not affect the jurisdiction of the Supreme Court under the CR Act in relation to such contracts.

Part 4 Miscellaneous

Clause 15 provides that the proposed Act binds the Crown.

Clause 16 excludes the Commissioner, members of staff and persons acting under the direction of the Commissioner from personal liability.

Clause 17 provides for the manner in which proceedings for offences are to be dealt with.

Clause 18 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 19 repeals the *Small Business Development Corporation Act 1984*.

Schedule 1 Provisions relating to Small Business Commissioner

Schedule 1 contains provisions relating to the Commissioner, including term of office. The Commissioner may be removed from office by the Governor but only on the address of both Houses of Parliament.

Schedule 2 Amendment of Acts

Schedule 2.1 amends the *Contracts Review Act 1980* to extend the operation of that Act to contracts to which small businesses are a party. The Supreme Court or the CTTT will be able to provide relief to small businesses in respect of a contract that was unjust (which includes unconscionable, harsh or oppressive) at the time it was made or that has become unjust since it was made. The Commissioner will also be able to bring proceedings for relief on behalf of small businesses or intervene in proceedings on their behalf.

Schedule 2.2 amends the *Government Information (Public Access) Act 2009* to prohibit applications being made under that Act for access to information of the office of the Small Business Commissioner.

Schedule 2.3 amends the *Statutory and Other Offices Remuneration Act 1975* to add the Small Business Commissioner to the list of public offices to which that Act applies.

Schedule 3 Savings, transitional and other provisions

Schedule 3 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. These include the power to make regulations of a savings or transitional nature consequential on the enactment of the proposed Act. The proposed Schedule also abolishes the Small Business Development Corporation and provides that the proposed Act (including the amendments to the *Contracts*

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Explanatory note

Review Act 1980) extends to contracts in force immediately before the commencement of the proposed Act.



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New South Wales

Small Business Commissioner and Small Business Protection Bill 2012

No. , 2012

A Bill for

An Act to establish the office of the Small Business Commissioner; to empower the Commissioner to protect small businesses; to ensure that small businesses are treated fairly; and for other purposes.

The Legislature of New South Wales enacts: 1

Part 1 Preliminary 2

1 Name of Act 3

This Act is the *Small Business Commissioner and Small Business Protection Act 2012*. 4
5

2 Commencement 6

This Act commences on the date of assent to this Act. 7

3 Definitions 8

(1) In this Act: 9

code of practice means a code of practice prescribed by the regulations. 10

Commissioner means the Small Business Commissioner appointed under this Act. 11
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function includes a power, authority or duty, and *exercise* a function includes perform a duty. 13
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government agency means: 15

(a) a public authority constituted by or under an Act, or 16

(b) a NSW Government agency, or 17

(c) a Division of the Government Service, or 18

(d) a council (within the meaning of the *Local Government Act 1993*) or other local authority, or 19
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(e) a State owned corporation. 21

small business means a business enterprise, whether operated by a natural person, sole trader, partnership, corporation or other entity, with: 22
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(a) no more than 20 full-time equivalent employees at the one time, or 25
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(b) an annual income or annual expenditure of between \$10,000 and \$5,000,000, 27
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but does not include any such business enterprise that is a government agency. 29
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(2) Notes included in this Act do not form part of this Act. 31

Part 2	Small Business Commissioner	1
4	Appointment of Small Business Commissioner	2
(1)	The Governor may, on the recommendation of the Minister, appoint a Small Business Commissioner.	3 4
(2)	Schedule 1 contains ancillary provisions relating to the Commissioner, including term of office and removal from office.	5 6
5	Functions of Commissioner	7
(1)	The Commissioner has the following functions:	8
(a)	to be an advocate for small business generally,	9
(b)	to receive and investigate complaints by or on behalf of small businesses (either on an individual or collective basis) regarding their commercial dealings with other businesses or their dealings with government agencies, and to facilitate resolution of such complaints through measures considered appropriate by the Commissioner such as mediation (including compulsory mediation schemes) or the making representations on behalf of small businesses,	10 11 12 13 14 15 16 17
(c)	to refer, in such cases as the Commissioner considers appropriate, complaints received by the Commissioner to a government agency or other person or body,	18 19 20
(d)	to assist small businesses in their dealings with other businesses or government agencies, if requested to do so,	21 22
(e)	to disseminate information to small businesses to assist them in making decisions relevant to their commercial dealings with other businesses and their dealings with government agencies,	23 24 25
(f)	to administer codes of practice,	26
(g)	to monitor, investigate and advise the Minister about:	27
(i)	non-compliance with codes of practice, and	28
(ii)	market practices that may adversely affect small businesses,	29 30
(h)	to report to the Minister on matters affecting small businesses at the request of the Minister,	31 32
(i)	to report to the Minister on any aspect of the Commissioner's functions at the request of the Minister or on the Commissioner's own initiative,	33 34 35
(j)	to take any other action considered appropriate by the Commissioner for the purpose of facilitating and encouraging the fair treatment of small businesses in their commercial dealings	36 37 38

	with other businesses and their dealings with government agencies or assisting small businesses in their dealings with other businesses or government agencies,	1 2 3
	(k) such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.	4 5
(2)	The Commissioner is to exercise his or her functions with a view to the development and maintenance in this State of relationships between small businesses in their commercial dealings with other businesses or their dealings with government agencies or assisting small businesses in their dealings with other businesses or government agencies.	6 7 8 9 10
(3)	A reference in this section to other businesses is a reference to any type of business whether or not small.	11 12
6	Requirement to provide information relating to dealings with small businesses	13 14
(1)	The Commissioner may, by notice in writing, require a person to provide, within the time specified in the notice, the Commissioner with such information as the Commissioner requires by the notice that relates to the person's commercial dealings with small businesses.	15 16 17 18
(2)	Any such requirement may relate to information that is commercial-in-confidence but the Commissioner is not authorised to disclose information of that kind that is provided to the Commissioner.	19 20 21
(3)	A person must not fail or refuse to comply with a requirement under this section. Maximum penalty: 50 penalty units.	22 23 24
7	Exchange of information	25
(1)	The Commissioner may enter into an arrangement (<i>an information sharing arrangement</i>) with a relevant agency for the purposes of sharing or exchanging any information that is held by the Commissioner or the agency.	26 27 28 29
(2)	The information to which an information sharing arrangement may relate is limited to information that assists in the exercise of the functions of the Commissioner or of the relevant agency concerned.	30 31 32
(3)	Under an information sharing arrangement, the Commissioner and the relevant agency are, despite any other Act or law, authorised:	33 34
	(a) to request and receive information that is held by the other party to the arrangement, and	35 36
	(b) to disclose that information to the other party.	37

(4)	However, this section does not authorise the disclosure of any information that is commercial-in-confidence.	1 2
(5)	In this section:	3
	relevant agency means any of the following:	4
(a)	a government agency,	5
(b)	the holder of a statutory office,	6
(c)	any other person or body prescribed by the regulations.	7
8	Annual report	8
(1)	The Commissioner is, as soon as practicable after 30 June in each year, to prepare and furnish to the Presiding Officer of each House of Parliament:	9 10 11
(a)	a report on the Commissioner's work and activities for the 12 months ending on that 30 June, and	12 13
(b)	a report on the regulatory burden on small businesses in relation to the period of 12 months ending on that 30 June.	14 15
(2)	Any such report on the regulatory burden on small businesses is to include the following:	16 17
(a)	the sources (such as legislative, procedural or administrative requirements) of the regulatory burden on small businesses,	18 19
(b)	recommendations for alleviating any such burden.	20
(3)	A copy of a report under this section is to be provided to the Minister.	21
9	Delegation	22
	The Commissioner may delegate the exercise of any function of the Commissioner (other than this power of delegation) to:	23 24
(a)	any member of staff of the Commissioner, or	25
(b)	any person, or any class of persons, authorised for the purposes of this section by the regulations.	26 27
10	Staff of Commissioner	28
	The staff of the Commissioner are to be employed under Chapter 1A of the <i>Public Sector Employment and Management Act 2002</i> .	29 30

Part 3	Protection of small businesses	1
11	Codes of practice for fair treatment of small businesses	2
(1)	The regulations may prescribe a code of practice 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.	3 4 5 6
(2)	Without limiting subsection (1), a code of practice may provide for good faith obligations in commercial dealings.	7 8
(3)	A code of practice may not be prescribed by the regulations unless the Commissioner has, before any such regulation is made, consulted with each body or organisation that the Commissioner considers to be representative of an industry or business likely to be affected by the code of practice.	9 10 11 12 13
12	Contravention of code of practice	14
	A person must not, in trade or commerce, contravene a code of practice.	15
	Maximum penalty: 1,000 penalty units in the case of a corporation or 200 penalty units in the case of an individual.	16 17
13	Injunctions	18
(1)	The Supreme Court may, on application by the Commissioner, grant an injunction in such terms as the Court determines to be appropriate if satisfied that a person has engaged, or is proposing to engage, in conduct that constituted, is constituting, or would constitute:	19 20 21 22
(a)	a contravention of a code of practice, or	23
(b)	attempting to contravene a code of practice, or	24
(c)	aiding, abetting, counselling or procuring a person to contravene a code of practice, or	25 26
(d)	inducing, or attempting to induce, whether by threats or promises or otherwise, a person to contravene a code of practice, or	27 28
(e)	being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of a code of practice, or	29 30
(f)	conspiring with others to contravene a code of practice, or	31
(g)	interfering with an investigation by the Commissioner.	32
(2)	An injunction may be granted under this section as an interim injunction without an undertaking being required as to damages or costs or may be granted as a permanent injunction.	33 34 35

14	Jurisdiction of CTTT in relation to unfair contracts	1
(1)	The operator of a small business may apply to the Consumer, Trader and Tenancy Tribunal (the <i>CTTT</i>) for an order in relation to any contract (being a contract to which the small business is a party) that the operator considers to be harsh, oppressive, unconscionable or unjust.	2 3 4 5
(2)	The CTTT has, and may exercise:	6
(a)	jurisdiction to determine any application made to it under this section, and	7 8
(b)	the same jurisdiction as the Supreme Court, and all the powers and authority of the Supreme Court, in proceedings in which relief under the <i>Contracts Review Act 1980</i> is sought in relation to a contract to which a small business is a party.	9 10 11 12
	Note. Under the <i>Contracts Review Act 1980</i> , the Supreme Court may (among other things) refuse to enforce any or all of the provisions of the contract concerned or make an order declaring the contract void (in whole or in part) or varying (in whole or in part) any provision of the contract. It may also make orders with respect to any consequential or related matter, 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.	13 14 15 16 17 18 19
(3)	This section does not affect any jurisdiction of the Supreme Court under the <i>Contracts Review Act 1980</i> in relation to a contract to which a small business is a party.	20 21 22

Part 4	Miscellaneous	1
15	Act to bind Crown	2
	This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.	3 4 5
16	Personal liability	6
(1)	A matter or thing done or omitted to be done by:	7
(a)	the Commissioner, or	8
(b)	a member of staff of the Commissioner, or	9
(c)	a person acting under the direction of the Commissioner,	10
	does not, if the matter or thing was done or omitted to be done in good faith for the purposes of executing this Act, subject the Commissioner, member of staff or person so acting personally to any action, liability, claim or demand.	11 12 13 14
(2)	A reference in subsection (1) to the execution of this Act includes a reference to the execution of the provisions of any other Act that confer or impose functions on the Commissioner.	15 16 17
17	Proceedings for offences	18
(1)	Proceedings for an offence under this Act or the regulations may be dealt with:	19 20
(a)	summarily before the Local Court, or	21
(b)	summarily before the Supreme Court in its summary jurisdiction.	22
(2)	If proceedings are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units, despite any higher maximum monetary penalty provided in respect of the offence.	23 24 25 26
18	Regulations	27
(1)	The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	28 29 30 31
(2)	The regulations may create offences punishable by a penalty not exceeding 50 penalty units.	32 33
19	Repeal of Small Business Development Corporation Act 1984 No 119	34
	<i>The Small Business Development Corporation Act 1984 is repealed.</i>	35

Schedule 1	Provisions relating to Small Business Commissioner	1
		2
	(Section 4)	3
1	Basis of office of Commissioner	4
(1)	The office of Commissioner is a full-time office and the holder of the office is required to hold it on that basis, except to the extent permitted by the Governor.	5 6 7
(2)	Chapter 1A of the <i>Public Sector Employment and Management Act 2002</i> does not apply to or in respect of the appointment of the Commissioner.	8 9 10
2	Terms of office	11
(1)	Subject to this Schedule, the Commissioner holds office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.	12 13 14
(2)	A person is not eligible to be appointed for more than 2 terms of office as Commissioner (whether or not consecutive terms).	15 16
3	Remuneration	17
	The Commissioner is entitled to be paid:	18
(a)	remuneration in accordance with the <i>Statutory and Other Offices Remuneration Act 1975</i> , and	19 20
(b)	such travelling and subsistence allowances as the Minister may from time to time determine.	21 22
4	Vacancy in office	23
(1)	Vacancies	24
	The office of Commissioner becomes vacant if the holder:	25
(a)	dies, or	26
(b)	completes a term of office and is not re-appointed, or	27
(c)	resigns the office by instrument in writing addressed to the Governor, or	28 29
(d)	becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or	30 31 32 33
(e)	becomes a mentally incapacitated person, or	34

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Schedule 1 Provisions relating to Small Business Commissioner

(f)	is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or	1 2 3 4 5
(g)	is removed from office by the Governor under subclause (2).	6
(2)	Removal from office	7
	The Commissioner may be removed from office by the Governor on the address of both Houses of Parliament.	8 9
5	Filling of vacancy	10
	If the office of Commissioner becomes vacant, a person is, subject to this Act, to be appointed to fill the vacancy.	11 12
6	Appointment of acting Commissioner	13
(1)	The Minister may, from time to time, appoint a person to act in the office of the Commissioner during the illness or absence of the Commissioner or during a vacancy in the office of the Commissioner. The person, while so acting, has all the functions of the Commissioner and is taken to be the Commissioner.	14 15 16 17 18
(2)	The Minister may, at any time, remove a person from office as acting Commissioner.	19 20
(3)	An acting Commissioner is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine.	21 22 23

Schedule 2	Amendment of Acts	1
2.1	Contracts Review Act 1980 No 16	2
[1]	Section 4 Definitions	3
	Insert at the end of paragraph (e) of the definition of <i>Court</i> in section 4 (1):	4
	, or	5
	(f) in accordance with section 14 of the <i>Small Business Commissioner and Small Business Protection Act 2012</i> ,	6
	the Tribunal.	7
		8
[2]	Section 4 (1)	9
	Insert in alphabetical order:	10
	<i>small business</i> means a small business within the meaning of the	11
	<i>Small Business Commissioner and Small Business Protection Act 2012</i> .	12
		13
[3]	Section 6 Certain restrictions on grant of relief	14
	Insert after section 6 (1):	15
	(1A) However, a corporation may, to the extent that it is conducting a	16
	small business, be granted relief under this Act.	17
[4]	Section 6 (2)	18
	Insert “a small business or” after “other than”.	19
[5]	Section 7 Principal relief	20
	Insert after section 7 (1):	21
	(1A) In the case of a contract to which a small business is a party, the	22
	Court may also make any such decision or order if the Court finds	23
	that the contract has become, since the time it was made, unjust	24
	to the extent that it applies to the small business.	25
[6]	Section 9 Matters to be considered by Court	26
	Insert after section 9 (5):	27
	(6) A reference in this section to a contract or a provision of a	28
	contract being unjust at the time the contract was made includes,	29
	in the case of a contract to which a small business is a party, a	30
	reference to a contract or a provision of a contract that has	31
	become, since the contract was made, unjust to the extent that it	32
	applies to the small business.	33

[7] Section 10 General orders	1
Insert at the end of the section:	2
(2) Without limiting subsection (1), if the Court is satisfied, on the application of the Small Business Commissioner, that a person has embarked, or is likely to embark, on a course of conduct leading to the formation of unjust contracts that are likely to involve small businesses, the Court may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class that involve small businesses.	3 4 5 6 7 8 9
[8] Section 12A	10
Insert after section 12:	11
12A Small Business Commissioner may bring proceedings for relief on behalf of small business	12 13
(1) The Small Business Commissioner may, with the consent of the operator of a small business, bring proceedings for relief under this Act on behalf of the small business.	14 15 16
(2) If the Small Business Commissioner brings proceedings for relief under this Act on behalf of a small business, the Small Business Commissioner:	17 18 19
(a) is to have the conduct of those proceedings on behalf of the small business, and	20 21
(b) may appear personally or by a legal practitioner or an agent, and	22 23
(c) may do all such things as are necessary or expedient to give effect to an order or a decision of the Court, and	24 25
(d) is liable to pay the costs (if any) of the small business.	26
[9] Section 13 Intervention	27
Insert at the end of the section:	28
(2) In the case of any proceedings in which relief under this Act is sought by a small business, the Small Business Commissioner has the same functions as are conferred on the Minister or the Attorney General under subsection (1). This subsection does not limit the functions conferred on the Small Business Commissioner under section 12A.	29 30 31 32 33 34

2.2 Government Information (Public Access) Act 2009 No 52	1
Schedule 2 Excluded information of particular agencies	2
Insert at the end of clause 2:	3
The office of Small Business Commissioner—complaint	4
handling, dispute resolution, investigative and reporting	5
functions.	6
2.3 Statutory and Other Offices Remuneration Act 1975 (1976	7
No 4)	8
Schedule 1 Public offices	9
Insert at the end of the Schedule:	10
Small Business Commissioner	11

Schedule 3	Savings, transitional and other provisions	1
		2
Part 1	General	3
1	Regulations	4
(1)	The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.	5 6 7
(2)	Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.	8 9
(3)	To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:	10 11 12
(a)	to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or	13 14 15
(b)	to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.	16 17 18
Part 2	Provisions consequent on enactment of this Act	19 20
2	Abolition of former corporation	21
(1)	The Small Business Development Corporation of New South Wales constituted under the <i>Small Business Development Corporation Act 1984</i> as in force immediately before its repeal by this Act (the former corporation) is abolished.	22 23 24 25
(2)	A person who ceases to hold office as a member of the former corporation is not entitled to any remuneration or compensation because of the loss of that office.	26 27 28
(3)	The assets, rights and liabilities of the former corporation become the assets, rights and liabilities of the Crown.	29 30

3 Application of Act to existing contracts

This Act, including the amendments made by this Act to the *Contracts Review Act 1980*, extends to contracts in force immediately before the commencement of this Act.

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