



BUSINESS SA

Submission to Competition Policy Review – Draft Report

17 November 2014



BusinessSA

South Australia's Chamber of
Commerce and Industry

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Introduction

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

Business SA made an initial submission to the Expert Panel reviewing Competition Policy in June 2014 and subsequently makes this submission in response to the Panel's Draft Report.

Executive Summary

Business SA is broadly supportive of the Panel's draft report into Competition Policy that contains many key recommendations for reform which should deliver substantial benefits to the economy and enhance the ability of small business to compete on a level playing field.

It is essential that the key priorities for Competition Policy reform are those which focus on reducing the cost of doing business, particularly in key markets for essential services such as electricity, water and gas. As an organisation that represents many manufacturers, we are particularly concerned about competition issues in the gas market which are adding to the existing price pressures emanating from supply side restrictions; these being exacerbated by government interventions in the Eastern States. As a State with a comparative advantage in food and beverage manufacturing, including many iconic brands, we are also deeply disappointed with the lack of genuine water price reform and support the Panel's push towards nationally consistent water regulation and a national water regulator.

We are pleased that in the report there is a strong focus on improving the ability of small business to access remedies for breaches of competition law. It is particularly important that the institutional approach to enforcing competition law is structured around the actual needs of the businesses, not what suits the institutions. Small business is time poor and often lacks the resources to deal with complicated and tedious processes. Small business needs regulators to speak their language and provide direct and timely feedback, regardless of the outcome. There also needs to be stronger communication from regulators regarding what complaints have merit for investigation in their own right versus those that would only likely to be investigated 'on mass'. It may be that the vehicle for aggregating complaints sits outside the ACCC and could even be a Small Business Commissioner or a Chamber of Commerce, but small businesses still need to have confidence that regardless of their size, their complaint will be listened to and acted upon if it has merit.

Business SA supports the Panel's recommendations on trading hours deregulation which is long overdue in South Australia. We are also supportive of the recommendation to introduce competition considerations into planning legislation but we caution that such a move would need to be carefully managed so as only to be applicable in extenuating circumstances, and not act as a barrier to slowing down what is an overarching drive to improve approval timeframes in the planning system.

We are strongly in favour of strengthening competitive neutrality policies at all levels of government and we also support any moves to increase the mandate of the courts over governments when it comes to breaches of competition law. We are also supportive of moves to strengthen section 46 of the *Competition and Consumer Act 2010* (CCA), but we sound a note of caution on the potential shortcomings in the proposed defence clause.

We support the Panel's recommendations to resolve employment matters under the CCA including trading restrictions in industrial agreements restricting the use of contractors and the enforcement of secondary boycott provisions. It is critical that to meet its operational and financial needs business is not unduly restricted in managing its labour supply arrangements and the CCA needs to provide clear assurance to business that it has an overarching mandate to ensure competitive outcomes which will not be subverted by the *Fair Work Act (2009)*.

1. Competition Policy to grow Small Business

1.1 Complaint Handling Mechanisms

Business SA supports the Panel's acknowledgement that small business needs greater assurance that competition complaints can be dealt with, and supports its recommendation that the ACCC take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit, but are not a priority for public enforcement.

From our perspective, the ACCC is ineffective in communicating its capacity to prosecute small business complaints. The business community understands that competition by its very nature has winners and losers and we do not expect Governments to protect small business from the cut and thrust of competition. However, small businesses need to know that the Government is actively enforcing competition law, particularly where there are large imbalances of power between parties. Furthermore, small businesses need to understand the nature of complaints which have merit in so far as potential breaches of competition law.

What the ACCC needs to do better is communicate to small business about the nature of complaints which are worthy of investigation in their own right versus those which may only have relevance if combined with a certain number of comparable complaints. Small businesses simply need to know whether or not they have a valid concern under competition law and what is the mechanism by which that complaint can be dealt with. The ACCC may find that Chambers of Commerce and also industry organisations can act as a vehicle to promote the types of complaints which will only be pursued 'on mass'. In summary, small businesses simply want direct answers from the ACCC in order for them to 'get on with business'.

In so far as a specific dispute resolution vehicle for small business complaints about breaches of competition law, the Panel should firstly consider whether existing structures such as State Small Business Commissioners have the capacity to take on such responsibilities. It may be that Small Business Commissioners only act as a conduit to aggregate small business complaints which in their own right would not justify the ACCC using its limited resources to prosecute.

1.2 Collective Bargaining by Small Business

Business SA supports the Panel recommending changes to allow for more collective bargaining by small business, particularly related to reducing red-tape in how the ACCC is notified. We are encouraged by the ACCC's proactive approach to engaging with Chambers of Commerce and also industry organisations in order to promote the possibilities for small businesses to collaborate and improve their bargaining power.

2. Regulatory Restrictions

2.1 Parallel Imports

Business SA supports the Panel's recommendation that remaining parallel import restrictions be removed unless it can be shown that:

- they are in the public interest; and
- the objectives of the restrictions can only be achieved by restricting competition.

On the premise that competitive markets present no arbitrage opportunity for parallel imports, we see no reason to impose any parallel import restrictions which only serve to add to business input costs and consumer prices at large.

2.2 Consideration of Competition Policy in the Planning System

Business SA supports the Panel's recommendation that governments include competition principles in the objectives of planning and zoning legislation, including:

- a focus on the long-term interests of consumers generally (beyond purely local concerns);
- ensuring arrangements do not explicitly or implicitly favour incumbent operators;
- internal review processes that can be triggered by new entrants to a local market; and
- reducing the cost, complexity and time taken to challenge existing regulations.

We agree that any consideration of competition in planning legislation should not explicitly or implicitly favour incumbent operators. It should only be to ensure the preservation of competition in the long term. Importantly, consideration of competition in planning legislation needs to have regard to issues beyond local boundaries given the nature of markets such as food and groceries. It will be crucial that consideration of competition in planning decisions is only made where appropriate and that it does not unduly delay existing planning processes. South Australia is in the midst of comprehensive planning reforms which are largely premised on the need to improve the efficiency of the State's planning system, namely to reduce approval times. Consequently, any future introduction of competition into State planning systems must be carefully managed so as not to unreasonably impede the drive for efficient approval processes.

In reality, the existing governance structures in the planning system are not properly equipped to consider issues of competition policy and there may need to be provisions for referrals to the ACCC. It is simply not reasonable to expect local governments to be able to make decisions based on issues of competition policy. In light of this, the consideration of competition in any approval process should only be by exception, perhaps requiring Ministerial approval, and should by no means occur as a matter of course.

From what Business SA has heard from the Panel, we are not convinced that the introduction of competition into planning legislation will be framed to ensure the long term interests of consumers with respect to healthy competition in markets such as food and groceries. It seems the only manner in which competition is likely to be considered is to ensure that no market player is restricted in building any retail or wholesale premises. From our perspective, if competition is to be considered in the planning system, it should go broader than this to consider how businesses with significant market share may act to force smaller players out of the market. This should include consideration of secondary impacts such as how new developments impact the viability of wholesale markets, which is directly related to the ability of smaller businesses to compete in the food and grocery market.

3. Essential Service and Economic Infrastructure Markets

3.1 Gas

Business SA acknowledges the Panel's support for a review of competition in the gas sector to be channelled through the Federal Government's Energy Green Paper. Considering the Green Paper has now been released, we are pleased that the Federal Government has adopted the Panel's recommendation.

We are concerned about the rising cost of gas, particularly for small business which is a much higher relative consumer of gas than electricity when compared to residential households. A recent South Australian report showed that for small business, the average gas bill was \$5,256¹, and the average electricity bill was \$3,554². By comparison for households, the average gas bill was only \$1,007³ against an average electricity bill of \$1,868⁴. Therefore for small business, average gas bills are nearly 50% higher than electricity bills while the opposite is true for households, with average gas bills being just over 50% of electricity bills. These figures have strong policy implications for the Federal Government in terms of any action or lack thereof in addressing market issues which are putting considerable upwards pressure on gas prices.

The exit of auto-manufacturing in 2017 has South Australia's economy at the cross-roads and we cannot afford for our manufacturing sector to be further diminished by uncompetitive gas prices. Furthermore, gas price rises are already filtering down more broadly to our small business sector which has experienced price rises of 9% in 2012/13⁵ and 12.3% in 2013/14⁶. Over the same period inflation has only increased by 5.3%, and with South Australian business having just recorded its third lowest confidence result in 14 years⁷, gas prices rising at four times the rate of inflation in just two years is very difficult to absorb.

3.2 Water

Business SA acknowledges the Panel's view that "there is significant agreement as to the most appropriate means to promote competition in the water sector — promote cost-reflectivity in pricing, create clear objectives in regulation and improve governance arrangements to promote greater transparency and independence in decision-making."

We support the Panel's acknowledgement that "there is merit in governments re-committing to a national water agreement, with specific regard to promoting consistent economic regulation in the water sector and the potential for a national regulator". Furthermore, we support the Panel's recommendation that "Governments should also recommit to introducing efficient and cost-reflective pricing in water as far as it is practical to do so."

The Panel's recommendations on water have particular relevance for South Australia which is in the midst of an inquiry into water price reform being conducted by the Essential Services Commission of South Australia, under instruction from the State Government. Unfortunately this inquiry is not considering the efficiency of SA Water's operating expenditure, nor the valuation of its regulatory

¹ ESCOSA, South Australian Energy Retail Prices – Ministerial Pricing Report 2014, P33

² ESCOSA, South Australian Energy Retail Prices – Ministerial Pricing Report 2014, P20

³ ESCOSA, South Australian Energy Retail Prices – Ministerial Pricing Report 2014, P28

⁴ ESCOSA, South Australian Energy Retail Prices – Ministerial Pricing Report 2014, P13

⁵ ESCOSA, South Australian Energy Retail Prices – Ministerial Pricing Report 2013, P3

⁶ ESCOSA, South Australian Energy Retail Prices – Ministerial Pricing Report 2014, P33

⁷ Business SA, September Quarter 2014 Survey of Business Expectations, P2

asset base and it has remained silent on the marginal costs of delivering water from various sources, including from Adelaide's de-salination plant. If the South Australian Government is unable to assure businesses that it will transition to truly cost reflective water prices and that the processes to enable this will be completely transparent, then we see no alternative but to support the move towards a national regulator which can achieve such outcomes. However, before any move to national regulation is contemplated, the South Australian Government should be afforded an opportunity to prove it can adhere to the broadly accepted principles of water regulation acknowledged by the Panel.

3.3 Cost Reflective Road Pricing

While Business SA supports the principle of cost-reflective road pricing, we are also mindful that any road reforms do not impose a tax burden on business, particularly small business. We agree with the Panel that "Cooperation from all levels of government will be needed to ensure that road pricing does not result in an additional impost on road users." We are particularly reluctant to support any changes in road pricing in South Australia until the State Government is willing to explore alternative funding mechanisms for new economic road infrastructure, including various forms of tolls. Until such time as we can make progress on this front, we would not support South Australia moving more broadly to cost-reflective road pricing.

Furthermore, South Australia's regions should not be disadvantaged by any move towards cost-reflective road pricing, particularly in the case of the many rural and remote roads which would likely be classified primarily as community service obligations.

4. Employment related matters

4.1 Secondary Boycott Provisions

Business SA supports the Panel's expectation "that the ACCC will have sufficient capability both in culture and resources to enforce prohibitions on unlawful secondary boycotts in a timely way. As with all competition laws, the secondary boycott laws will only act as a deterrent to unlawful behaviour if the laws are enforced".

We also agree that the ACCC should include in its annual report the number of complaints made to it in respect of secondary boycott conduction and the number of such matters investigated and resolved each year.

While there may be fewer instances of secondary boycotts than in decades gone by, it is nonetheless critical that the law is appropriately enforced to prevent the widespread re-emergence of such anti-competitive behaviours which have caused significant economic losses across a range of industries in the past, not just the construction sector.

4.2 Trading Restrictions in Industrial Agreements

Business SA recommends a legislative amendment to the CCA which effectively prohibits enterprise agreements from containing terms which restrict the engagement of contractors. As per the draft report, Section 45E of the CCA prohibits a person (an employer) from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. We agree with the Panel that a business should generally be free to supply and acquire goods and services, including contract labour, if they choose. If employing contract labour results in a more efficient and cost effective outcome for a business, it is ultimately in the long term interests of consumers which is a key pillar of competition law.

5. Retail Markets

5.1 Shop Trading Hours

Business SA supports the Panel's recommendations that trading hour restrictions should be limited to Christmas Day, Good Friday and the morning of ANZAC Day. In our 2013 pre-state election survey, 73% of respondents supported a move to fully deregulated shop trading hours to allow retailers to choose how to best meet their customers' needs.

South Australia has an antiquated system of shopping districts with separate shop trading regulations for the CBD, metropolitan shopping district and specific proclaimed shopping districts in regional South Australia which are all small towns. By contrast, all major regional centres in South Australia have no shop trading hour restrictions at all. Furthermore, a number of shops are exempt from all shop trading hour restrictions on the basis of the types or goods they sell, or their size. Combining the various exemption categories, only 34% of retail employees are employed in shops which are heavily regulated, with another 10% being employed in shops which are partially regulated. Therefore, 56% of retail employees work in shops which are completely deregulated.⁸

Business SA has long advocated for an end to regulated shopping hours, primarily on the basis that it is not the role of government to decide when businesses can open and consumers can shop. Furthermore, in an increasingly competitive retail environment, consumers can shop on-line 24/7 and existing regulations on 'bricks and mortar' retailers places them at a further disadvantage. Deregulation would also mean that retailers can choose to align their trading hours to match consumer demand and open at times when it is the most profitable to trade, not just the times they are allowed to trade.

The total deregulation of shop trading hours also removes the situation where exempt shops are allowed to open at times when others must remain shut. These exemptions are discriminatory and irrational and some retailers are significantly disadvantaged because their competitors are able to open while they are not.

⁸ South Australian Centre for Economic Studies, 'Review of Changes to *Shop Trading Hours Act 1997* – Final Report', March 2013 - Page III

Deregulation may also encourage some smaller retailers to invest in expanding their premises and product lines as restrictions on floor space sizes and what goods can be sold by exempt shops would be removed.

In 2013 the South Australian Centre for Economic Studies (SACES) conducted an independent review of the impact of 2012 legislative changes to deregulate public holiday trading restrictions for the Adelaide CBD which included allowing non-exempt shops to trade from 12:00 pm to 5:00 pm on Anzac Day and from 11:00am to 5:00 pm on all other public holidays except for Christmas Day and Good Friday.

SACES' review found that across the 9 new CBD public holiday trading days during 2012, retail turnover was \$57.5 million. Acknowledging that some of this expenditure was likely to have been transferred from spending on other days, the review still noted the appearance of a substantial net increase in retail turnover.⁹

SACES also found that while there was some welfare gain for consumers from being able to shop somewhere on public holidays, (given it is limited to the Adelaide CBD), there is potential for significant additional gains should consumers be able to shop in their preferred location. In fact, 66% of respondents to the SACES survey of community attitudes strongly agreed that they preferred to shop in the suburbs, compared to 11% who strongly agreed that they preferred to shop in the Adelaide CBD.¹⁰

In a 2011 report, the Productivity Commission made a compelling point that 'for the vast majority of retailers deregulating shopping hours is not about operating 24 hours a day seven days a week, but simply being able to open to meet the needs of consumers, at times when retailers can also trade profitably'¹¹.

5.2 Liquor in Supermarkets

Business SA recommends the Panel proceed with some caution in recommending restrictions preventing supermarkets selling liquor be prioritised for review. Last year the South Australian Government proposed changes to liquor licensing laws to allow the sale of wine in supermarkets. At the time, many of our small winery members had significant concerns over such changes leading to increased market power by major supermarkets which could exacerbate the challenges already being faced by those smaller businesses trying to access bottle shops owned by the same supermarkets. However, independent supermarkets were also looking to increase their product offering and were proposing to have a strong focus on selling local wine. As a compromise, Business SA suggested that where a business which owns a supermarket also has a liquor outlet either co-located or located within the same shopping complex as the supermarket, then that supermarket should not be granted a licence to sell wine.

⁹ South Australian Centre for Economic Studies, 'Review of Changes to *Shop Trading Hours Act 1997* – Final Report', March 2013 - Page VI

¹⁰ South Australian Centre for Economic Studies, 'Review of Changes to *Shop Trading Hours Act 1997* – Final Report', March 2013 – Page 22

¹¹ Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, P 311

5.3 Pharmacy Restrictions

Business SA supports a cautious approach to current restrictions on the location of pharmacies, particularly given the need for timely access to pharmaceutical care which can be critical for rural and regional communities.

It is not clear to Business SA how the Panel has specifically taken into account the Pharmacy ownership restrictions under the *Health Practitioner Regulation National Law (South Australia) Act 2010*, for example section 42 (1) which provides that Friendly Society Medical Association Limited (trading as National Pharmacies) must not provide pharmacy services at more than 40 pharmacies in this State. While the Panel seems focused on ownership restrictions which prevent pharmacies from being owned by entities other than friendly societies and pharmacists themselves, it is perhaps more pertinent to review the actual ownership caps for both types of permissible owners. Furthermore, bearing in mind the high degree of price regulation which exists for pharmaceutical products, the Panel needs to consider the materiality of benefits to be gained from entirely deregulating ownership restrictions.

6. Competition Policy and Governments

6.1 Competitive Neutrality

Business SA supports the Panel's recommendations that:

- all governments review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed; and
- all governments review their competitive neutrality policies.

Unfortunately there are still examples of government entities only being able to compete with the private sector by virtue of taxpayer subsidies. As described in our previous submission, the South Australian Government still operates a wireline logging service for testing well defects which is not specifically enabled under legislation. Furthermore, that service is competing with the private sector on tenders outside the scope of any legislative requirements for the South Australian Government to test for well defects.

While it is important that all governments have robust competitive neutrality policies in place and that all regulations facilitate competition, Business SA supports the Panel's recommendation that the CCA be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce. This is particularly important in the area of procurement and considering the South Australian Government lets \$3.8 billion of tenders annually¹², tenders must be structured so as to maximise participation from all businesses large and small. On this point, we acknowledge the excellent work of South Australia's recently formed Industry Participation Advocate (IPA) which has been focused on increasing small business participation in State Government tenders. The IPA has also been successful in achieving practical change to open up tender opportunities to small businesses by reducing red tape through:

- Setting limits of liability for low-risk contracts valued up to \$1 million at 5 times contract value;
- Removing prequalification fees from 1 July 2014;

¹² Industry Participation Advocate (South Australian Government), <http://www.dpc.sa.gov.au/office-industry-advocate>

- Streamlining prequalification to ensure that a business who prequalifies for one agency is to be prequalified across other agencies in key categories of supply – which commenced on 1 July 2014; and
- In conjunction with Business SA, establishing a tender ready program to help small business access State Government contracts. As part of this program, Business SA has developed a tender ready handbook as a practical guide for small business.

6.2 Proposed Australian Council for Competition Policy

Business SA is pleased that the Panel's proposed Australian Council for Competition Policy (ACCP) will allow small business to raise issues they wish to be the focus of market studies. It is imperative that this mechanism be formally embedded into the governing legislation for this body and that genuine requests from small business, including its representative bodies, are given proper consideration. We understand that the ACCP will need to be selective in the market studies it decides to undertake, but it is equally important that market studies are not just based on political priorities, but rather reflect the demand from market participants, including small business.

7. Competition Laws

7.1 Misuse of Market Power

Business SA provides in principle support to the Panel's intent to clarify section 46 of the CCA relating to misuse of market power through:

- prohibiting a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

Where a defence would apply if the conduct in question:

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and
- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

However, we do have some concerns about how the second component of the defence clause might be interpreted in so far as quantifying the short and long-term interests of consumers. For example, how would a court decide how long major supermarkets are likely to continue selling staple food products below cost?

7.2 Price Discrimination

Business SA agrees that the Panel should not consider re-introducing any form of price discrimination protections into the CCA on the basis of significant implementation issues and the alternative of market based solutions. Businesses should have the flexibility to set their own prices and well functioning markets should force businesses to price competitively, particularly in the absence of measures such as parallel import restrictions.