



Small Business Development Corporation

**Submission to the
Competition Policy Review Draft Report**

November 2014

About the Small Business Development Corporation

The Western Australian Small Business Development Corporation ('the SBDC') welcomes the opportunity to provide further feedback in response to the Draft Report of the Federal Government's "Competition Policy Review" ('the Review').¹ The SBDC prepared a brief submission to the earlier Issues Paper, which should be referenced if information on the agency's statutory functions and strategic objectives is required.

Setting the scene

The SBDC is broadly supportive of the current competition framework as set out in the *Competition and Consumer Act 2010* ('the CCA') and is of the view that the laws and policies underpinning competition have largely served the Australian business community well. As stated in our previous submission, the SBDC believes that policy and regulatory settings should encourage and facilitate open competition in the Australian economy to the extent possible, as competition is vital for growth and innovation in the small business sector and in meeting the needs of consumers.

Given the breadth of the issues covered in the Review Panel's Draft Report, the SBDC will only comment on specific areas of federal policy as they impact directly on the small business sector in Western Australia.

Further to this, the SBDC notes that some of the recommendations proposed in the Draft Report relate directly to areas of State Government responsibility, including liquor licensing, retail trading hours and the regulation of the taxi industry. While the SBDC will not be specifically commenting on these proposed reforms, it should be noted that these policy areas were also largely examined by the State's Economic Regulation Authority ('ERA')² in its recent "Inquiry into Microeconomic Reform in Western Australia".³

On the ERA inquiry, the SBDC is generally supportive of the general principles of microeconomic reform espoused by the authority. These principles are in keeping with the Review Panel's view that it is consumers and not businesses that are at the heart of competition; specifically that "consumer preferences and choice should be the ultimate determinant of which businesses succeed and prosper".⁴

The SBDC has long advocated the need to reduce and simplify the laws and the administrative procedures and processes that regulate business activity and conduct in Australia. Due to their smaller scale and fewer resources, small businesses are typically disproportionately impacted by overly burdensome laws which can affect their ability to effectively compete with larger, better resourced companies.

¹ This submission does not represent the views of the Western Australian Government and is independently provided.

² The ERA is the economic regulator in Western Australia with advisory functions.

³ See www.erawa.com.au/inquiries/industry-and-resources-inquiries/microeconomic-reform-2014 - The Inquiry focused on identifying reforms that the Western Australian Government could introduce to encourage the growth of a more efficient and productive State economy.

⁴ Competition Policy Review Panel, "Competition Policy Review: Draft Report", September 2014, pg.183

It is also the SBDC's belief that governments should not unreasonably interfere in or stand in the way of a small business's operations, be it through excessive or onerous regulation, regulatory over-reach or unnecessary barriers to entry. This Review – along with a number of others underway (see next section) – provides an opportunity to further refine Australia's commercial and competition settings in order to enhance entrepreneurial endeavour and deliver better outcomes for consumers.

Relationship between this Review and other Federal Reviews

The SBDC acknowledges that this Review is one of several currently being conducted by the Federal Government and that some of the issues and policy settings up for consideration are intertwined. It is worth making a comment about the interaction between this Review and two other current reviews that may result in further legislative restrictions on the way small businesses trade and operate.

Specifically, the “Extending Unfair Contract Term Protections to Small Business” consultation⁵ is considering legislative reform in relation to standard form contracts where a small business is a party. In our submission to that consultation⁶, the SBDC strongly supported extending the existing consumer protections to the small business sector and provided many examples of detriment caused to businesses by unfair terms in standard form contracts.

Whilst *prima facie* this may seem at odds with the position of supporting competition and limiting government intervention in business relationships, the SBDC asserts that the current lack of protection from unfair contract terms can work to stifle competition (especially when a contract for an important service like broadband is only offered on a “take it or leave it” basis). To this end, the SBDC would argue that protecting small businesses from unfair terms in standard form contracts – especially for those goods and services vital to the daily operation of businesses – will help reduce the power imbalance between larger and smaller businesses and in so doing facilitate fairer and more open competition in the marketplace.

Similarly, the SBDC recently provided feedback to the Federal Treasury's consultation on “Improving Commercial Relationships in the Food and Grocery Sector” and the draft *Food and Grocery Code of Conduct* (‘the Grocery Code’). In our submission to that consultation, the SBDC indicated our support for the introduction of the Grocery Code as it would go some way to better protecting the rights and interests of small business producers and suppliers from the unscrupulous practices of some large supermarket chains and improving standards of conduct in the food and grocery sector.

⁵ The “Extending Unfair Contract Term Protections to Small Business” consultation closed on 1 August 2014.

⁶ SBDC submission available from www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms/Submissions [29 October 2014]

However, the SBDC made the point that the effectiveness of this initiative (along with the introduction of the Coles Supplier Charter) will largely depend on the monitoring and enforcement of compliance by parties to the Code.

The SBDC's submission also argued that many of the issues identified in that consultation – including unfair trading conditions, extended payment terms and inequitable allocation of risk – were not limited to the food and grocery sector and applied across many small business industries.

It is the SBDC's understanding that the overall policy objective of these various reviews is to make it easier for businesses to operate and compete on a more level playing field. While their approaches are different and may seem rather in conflict (i.e. the unfair contract terms review focuses on protecting small businesses while the review of competition policy seeks to remove trading restrictions and protect consumers), the SBDC believes that if their implementation is properly coordinated the reforms could achieve the Federal Government's overall policy objective of improving Australia's business operating environment.

Review of anti-competitive regulations

Draft Recommendation 11 — Regulation review

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- they are in the public interest; and*
- the objectives of the legislation or government policy can only be achieved by restricting competition.*

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

This recommendation has a number of elements, which will be addressed as follows:

1. Conduct a review of regulations that restrict competition;

2. Remove those regulations that unnecessarily restrict competition;
3. Apply a public interest test to determine if restrictive regulations should remain in place;
4. Make the review process transparent, with publication of a reform timetable; and
5. Give the proposed new body, the Australian Council for Competition Policy ('the ACCP'), oversight of this process.

Conduct a review of regulations and remove restrictive ones

The SBDC supports the proposal to review regulations that unnecessarily restrict competition in Australia. The review should be undertaken broadly to capture regulations that cause unnecessary burden on small business, including those that create mountains of paperwork, involve onerous compliance tasks or cause excessive delays in approvals. As stated earlier, the SBDC contends that regulations which unnecessarily burden small business are often a restriction on competition and impacts upon productivity and the ability to effectively compete in the marketplace.

The SBDC strongly agrees that such a review of restrictive regulations should be carried out at all levels of government, including the subsidiary legislation created by local governments.

A review of the dispute-related enquiries raised with the SBDC in recent years by small business operators regarding a tier of government indicates that half of them involved the activities or conduct of local government authorities.⁷ Whilst not all related directly to a competition issue, many disputes involved local government rules or regulations that detrimentally impacted upon a business's ability to operate in their local market. Issues with lack of clarity around local government planning rules, different interpretations of regulations by individual officers and long delays in approval processes all impact on the competitiveness of small businesses and in some cases can be significant barriers to entry.

Public interest test

The Review Panel has identified a number of areas in which they believe restrictions should be removed. While the SBDC generally supports the notion of government getting out of the way of business/commerce to the extent possible, it is acknowledged that there are instances where legislative intervention is necessary in order to address market failure or strike an appropriate balance between competing interests or policy objectives.

However, the SBDC also believes that in some cases those in charge of finding this balance can sometimes over-emphasise the importance of one interest over another, often to the detriment of supporting small business development. As an example, the

⁷ Dispute-related enquiries with local governments accounted for 50% of all business-to-government enquiries received by the SBDC between July 2011 and September 2014.

State's liquor licensing regime has – in the SBDC's opinion – focused too much in recent years on public health and safety outcomes at the expense of developing the hospitality and tourism industry and stimulating competition and employment.⁸

For this reason, the SBDC argued in our previous submission to this Review that an appropriate balance needs to be struck between competing agendas, but cautioned against allowing the pendulum to swing too far in favour of a particular interest. Applying a public interest test with apposite review transparency and oversight by the ACCP, as proposed in draft recommendation 11, may help address this concern.

Ensuring early stage engagement with key stakeholders and other interested parties is therefore critical in determining if a regulation is in the public interest. This will not only engender stakeholder buy-in and help identify the additional costs or otherwise of removing the regulation, but also assist in identifying potential unintended consequences.

In relation to the public interest test itself, the SBDC believes that this is broad enough to sufficiently capture the interests of small business. If the needs of small business are overlooked then the SBDC believes that consideration of whether the restrictive regulation is required has the potential to be dominated by other competing interests, such as environmental protection or public health and safety.

Establish guidelines for the removal phase

Once the exercise of identifying restrictions and subjecting them to public interest tests has been undertaken, government officials will then move into the removal phase. From a small business perspective, issues can sometimes arise when a government amends or removes rules or regulations that cause a sudden shift in the compliance requirements of affected small business operators.

To help minimise these negative impacts on small business, the SBDC recommends that government departments:

- Clearly communicate with affected parties on how this will change the environment in which they operate;
- Provide education, guidance and assistance pre- and post-removal;
- Introduce significant changes incrementally and consider the use of transitional arrangements; and
- Take a collaborative approach to encourage small business compliance with the changes, rather than hardline enforcement.

⁸ The SBDC notes that on 18 November 2014, the State Government announced that it will rebalance its approach to liquor enforcement to accommodate the needs of both the community and industry – see Media Release, Racing and Gaming Minister (www.mediastatements.wa.gov.au/Pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=8818)

Role of the proposed ACCP

If this proposal is supported, the SBDC recommends that the ACCP develop suitable guidance material to assist government officials to properly undertake regulatory reviews. This should include information on how to:

- Conduct a review of regulations;
- Plan the exercise of identifying restrictive regulations;
- Apply the public interest test to restrictive regulations;
- Consult with interested parties; and
- Undertake scenario testing to identify possible consequences of the action.

The provision of such material and additional assistance by the ACCP will ensure that the process is well planned and executed in a manner that achieves the policy objectives. In addition, monitoring the compliance of reviewing agencies will help minimise negative and unintended outcomes.

Misuse of Market Power

Draft Recommendation 25 — Misuse of market power

The Panel considers that the primary prohibition in section 46 should be re-framed to prohibit 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.

However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.

To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not 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.*

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of ‘take advantage’ and how the causal link between the substantial degree of power and anti-competitive purpose may be determined.

The SBDC strongly supports the Review Panel’s recommendation to amend section 46 of the CCA, as it would strengthen Australia’s competition framework by more closely aligning the provision with the Act’s overall objective to “enhance the welfare

of Australians through the promotion of competition and fair trading and provision for consumer protection”.⁹

It is the SBDC’s understanding that the main differences between the current and proposed section 46 are the:

- Change in terminology from “competitor” to “competition”;
- Inclusion of the effects test (but not the exclusion of the purpose test); and
- Exclusion of the “take advantage” element.

The SBDC fully agrees with the Review Panel’s contention that competition law should be directed at the effect of commercial conduct and not its purpose, given that it is the impact (and not the intent) of the act that harms competition.¹⁰ The SBDC also supports the Review Panel’s view that proving purpose under the current provision is troublesome given its subjective nature.

At the same time, the SBDC notes the view that introducing new terminology into section 46 to include the “effect” element may lead to confusion and uncertainty until this concept is judicially tested. Despite this possibility, the SBDC does not believe that this concern should prevent the inclusion of the effects test in section 46. As the Review Panel points out, the proposed wording of the provision (i.e. “would have or be likely to have the effect”) is already in use in the CCA, specifically in sections 45 and 47 covering anti-competitive arrangements and exclusive dealing respectively.

Further to this, the SBDC believes this view is at odds with what is playing out in the courts, where there appears to be little solid agreement on how to interpret the current section 46 terminology, specifically regarding “take advantage” in the context of “market power”. This lack of consistency amongst the judiciary is a fact highlighted by the Review Panel¹¹, and in the SBDC’s opinion this ambiguity points to a failure of the current section 46 to achieve its policy objective and provide certainty to businesses.

The SBDC notes with interest the contribution of Professor Allan Fels to the Issues Paper stage of the Review. Professor Fels pointed out that section 46 is not effectively achieving the overall objectives of the CCA due to its reliance on establishing “purpose”. According to Professor Fels, other countries have successfully implemented an effects test into their competition framework without negatively impacting on competitive outcomes.

In the SBDC’s opinion, the proposed amendments to section 46 would likely be more effective in capturing conduct that damages competition than the current provision. Introducing the proposed effects test into section 46 adds an element of objectivity, which should allow it to better fulfil the CCA’s policy objective.

⁹ Section 2 of the *Competition and Consumer Act 2010*

¹⁰ Competition Policy Review Panel, “Competition Policy Review: Draft Report”, September 2014, pg.206

¹¹ Ibid, pgs.208-209

The SBDC also recognises that some proponents will strongly oppose any amendment to section 46 and notes recent media articles to this effect, especially the vocal opposition by big business and their representatives to the proposal. For example, a recent report commissioned by the Australian National Retailers Association¹² disputes the Review Panel’s draft recommendations on section 46.

While some arguments by proponents are based on the notion that the effects test will dampen competition, the SBDC believes the Review Panel’s proposed defence to section 46 may quell those claims (see next section).

The proposed defence

To ensure that the proposed amendment does not capture pro-competitive conduct and cause long-term harm to consumers, the Review Panel has recommended a defence to section 46. The SBDC notes that the proposed defence requires the company seeking to rely on it to prove three elements, specifically that:

- They do not have a substantial degree of market power;
- Their decision to engage in this conduct is a rational business decision; and
- The effect or likely effect of the conduct is to benefit the longer term interests of consumers.

The SBDC believes that this defence is sufficient for the purpose of protecting competition in the marketplace, particularly from a small business perspective. By including the element of “a substantial degree of market power” into the test, the provision excludes the ability of larger corporations from relying on this to defend their conduct.

Furthermore and as discussed above, while judicial precedent is required to assist people to understand the meaning of the concepts, the SBDC notes that the terminology proposed in the defence (e.g. “substantial” and “effect or likely effect”) is similar to that used in other sections of the legislation.

The SBDC hopes that the Federal Government will settle on a solution, such as that proposed by the Review Panel, that puts the impact on competition first despite the fact that big business is already loud in its opposition to this recommendation.

Competitive Neutrality

Draft Recommendation 13 — Competitive neutrality policy

All Australian governments should review their competitive neutrality policies. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over

¹² Report written by Pegasus Economics and presented to the Review Panel, Minister for Small Business the Hon. Bruce Billson MP, ACCC Chair Rod Sims and Parliamentary Secretary to the Prime Minister the Hon. Josh Frydenberg MP.

which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).

The SBDC agrees with draft recommendation 13, that all Australian governments review their competitive neutrality policies and that such a review is overseen by an independent body, such as the proposed ACCP.

The SBDC is aware of a number of service-based activities operated by government entities (particularly at the local government level) that directly compete with the private sector. This type of competition is unfair as such entities have the significant competitive advantage of being backed by government. By way of examples, local governments often operate child care centres, aged care facilities, and gyms in sport and recreation centres in competition with private operators.

Anti-competitive Conduct – Cartel Provisions

Draft Recommendation 22 — Cartel conduct prohibition

The prohibitions against cartel conduct should be simplified and the following specific changes made:

- *the provisions should apply to cartel conduct affecting goods or services supplied or acquired in Australian markets;*
- *the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility;*
- *a broad exemption should be included for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services), recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition;*
- *an exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing), recognising that such conduct will be prohibited by section 47 of the CCA (revised in accordance with Draft Recommendation 28) if it has the purpose, or has or is likely to have the effect or likely effect of substantially lessening competition.*

The SBDC agrees with the Review Panel's view that joint ventures and similar forms of business collaboration should be exempt from the cartel conduct prohibition unless it has the purpose, effect or likely effect of substantially lessening competition.

Small businesses in particular would benefit from this reform as it would allow them to form partnerships with similar businesses in order to negotiate better prices and conditions in their supply contracts without fear of offending the prohibition against cartel conduct. In so doing, it would help reduce the gap between smaller and larger businesses in relation to their bargaining power and ability to negotiate better contract terms.

Access to justice

Draft Recommendation 49 — Small business access to remedies

The ACCC should 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.

The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

Draft recommendation 49 deals with two issues; firstly the role of the Australian Competition and Consumer Commission ('the ACCC') in assisting small businesses with competition-related issues, and secondly, the need for a specific dispute resolution scheme for small businesses in relation to matters arising under the CCA.

Role of the ACCC

The SBDC is very supportive of the work being undertaken by the ACCC and believes that in recent times the national regulator has made solid in-roads in not only protecting small businesses in the marketplace but also in informing them about their rights and obligations under competition and consumer laws. In particular, the SBDC acknowledges the valuable contribution and small business focus that ACCC Deputy Chairman Dr Michael Schaper has brought to the regulator.

However, as mentioned in the SBDC's previous submission, Australia's competition framework can only be as strong as how effectively it is complied with and enforced. With changes to competition law and other areas of commerce currently being considered, the SBDC would be very concerned if the ACCC was not adequately resourced to undertake the important educative and enforcement activities expected of a strong regulator.

While the SBDC agrees that small businesses would benefit from a more proactive regulator in connecting them to alternative dispute resolution ('ADR') providers, this can only work effectively if the ACCC is appropriately funded.

Furthermore, the SBDC supports the aspect of draft recommendation 49 that the ACCC should be sufficiently resourced to regularly test the law, prosecute egregious conduct and deter unlawful behaviour.

CCA-specific dispute resolution scheme for small businesses

The SBDC agrees with the Review Panel's statements regarding the importance of small businesses being able to access justice. Moreover, the Review Panel stated that small businesses require a dedicated dispute resolution service to handle their competition-related issues. It also indicated that there is a belief amongst small businesses that competition laws are difficult to enforce.

Whilst supporting the notion that small business requires easy and affordable options to resolve their competition issues and disputes, the SBDC does not agree that an entirely new scheme needs to be established to provide such a service. As the SBDC understands it, the Review Panel is considering a new scheme in order to overcome the difficulties that some small businesses presently experience when seeking a remedy for their competition-related issues.

To this end, there are two main options to resolve this issue: firstly, setting up a new scheme or, secondly, expanding existing services provided by bodies such as the Small Business Commissioners.

In the SBDC's opinion, setting up a new scheme is not the preferred option. Whilst the Review Panel refers to the ACCC in draft recommendation 49, it is unclear whether it envisions that the regulator would administer the scheme or merely refer small businesses to it. Given concerns over the ACCC's level of resourcing, the SBDC does not believe that giving the regulator more functions would deliver better outcomes for small businesses, particularly if it is not done in conjunction with additional funding.

Even if the new scheme is administered by an existing body such as the ACCC, there will be costs associated with its implementation, administration and operation. These include setting up and maintaining systems associated with providing ADR services, extra staffing costs and the cost of external expertise – all of which are ongoing. This option would require a long term commitment and commensurate funding by the Federal Government for it to deliver effective results to the small business sector as a whole.

The alternative option would be to establish a new body to administer the scheme. This would have expenses in addition to those described above (e.g. costs related to physical location, staff, new systems and processes, etc.). The SBDC does not believe that setting up a new scheme, whether it is administered by an existing body or by an entirely new body, is the most effective use of resources nor will it necessarily provide the most effective outcomes for small businesses.

The SBDC's preference is for existing services to be utilised to fulfil this function, such as those provided by Small Business Commissioners. The SBDC believes that allocating additional resources to active service providers to boost their capability to provide dispute resolution of competition-related issues would be a more efficient and effective option.

It is noted that small business operators can currently access ADR services through Small Business Commissioners based in Western Australia, New South Wales, Victoria and South Australia; as well as the new Australian Small Business and Family Enterprise Ombudsman at the federal level.

In Western Australia, the Small Business Commissioner provides (through the SBDC) an affordable, easily accessible and effective dispute resolution service to small businesses based on guided resolution and, if needed, subsidised mediation. This service covers all manner of issues, including retail leasing and contractual matters, and applies to business-to-business and business-to-government disputes.

The SBDC believes that establishing an entirely new service would duplicate what is an already highly-effective service and would not deliver better results for the small business sector in Western Australia.

Conclusion

The SBDC is generally supportive of the recommendations made in the Review Panel's Draft Report where it impacts on small business operations. While acknowledging the contribution that Australia's current competition policy framework has made to furthering Australia's economy over the past two decades, the SBDC agrees with the Review Panel's assertion that reform is now required to ensure that the law keeps up with the changes that were not apparent 20 years ago. Rather than wholesale changes to the law, the SBDC believes that further refinements to the CCA and its oversight and governance will facilitate more effective competition and lead to better outcomes for Australian consumers.

The SBDC applauds the work of the Review Panel thus far and will follow the progress of this review with interest. For further information about this submission, please contact Ms Darcy Bosch (Senior Policy Officer) on (08) 6552 3308 or email darcy.bosch@smallbusiness.wa.gov.au.