

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES
ACT 2600

Dear Sir or Madam,

RE: Review of Competition Policy Draft Report

Thank you for giving the Office of the NSW Small Business Commissioner (**OSBC**) the opportunity to comment on the Competition Policy Draft Report.

The OSBC was established in mid-2011 to support small businesses throughout NSW. As part of its remit, the OSBC is undertaking a review of the NSW Retail Leases Act (Review), with the aim of bringing a greater degree of balance to the relationship between smaller retail tenants and their landlords; in particular, large institutional landlords.

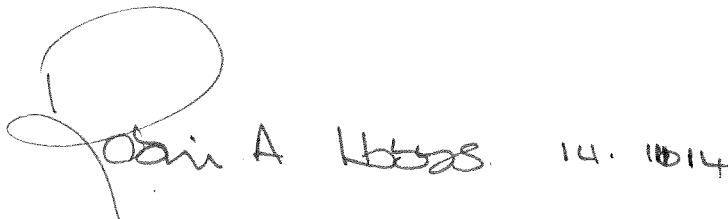
Over the course of the Review, a number of matters have been identified that touch on the anti-competitive disclosure of information, the operation of pharmacies in the market, the impact of planning and zoning regulations and access to unconscionable conduct provisions by small businesses. The OSBC's views are described in the attached table; however, in summary:

- The collection of turnover data should be treated as anti-competitive disclosure unless a) it is made readily available to retailers and prospective retailers, and b) landlords that collect turnover data are required to give retailers information about the effective rents being charged. Effective rents are advertised rents less incentives subsidies and other discounts;
- The role pharmacies play in allowing vulnerable members of the community to access the Pharmaceutical Benefits Scheme and other health services has to be considered within terms of Competition Policy, otherwise the policy will privilege one business model over another, to the disadvantage of the community as a whole.

- Planning and zoning regulations are essential tools that allow policy makers and legislators to plan and organise the public space. However, such regulations can also give shopping centre landlords significant power in the market that bears little relationship to the services they are offering into the market.
- Unconscionable conduct provisions do not provide retailers with the protections they need against behaviours that have a significant accumulative impact on the ability of small businesses to develop and grow. In such circumstances, Fidelity of the Bargain or Good Faith provisions may be more effective.

We appreciate the opportunity to comment on the competition policy Draft Report. Should you wish to discuss any of the issues raised in this submission, please contact Liam Hetherington, Project Manager, Review of the Retail Leases Act on (02) 8222 4813.

Yours sincerely



Robyn A Hobbs 14. 10.14

Robyn Hobbs OAM
NSW Small Business Commissioner

Comments

Recommendations

Draft Report

The Anti-competitive Disclosure of Information

The OSBC is concerned that there is a significant imbalance in the relationship between landlords and their retail tenants, which in some markets acts as a damper on economic growth and business development. One of the more pressing areas is the differential access to market information, which was identified by the Productivity Commission in its 2008 report. This imbalance is a product of two things: a landlord's control over information that describes the effective rent of retail premises (advertised rent less incentives, subsidies and other discounts), and a Landlord's ability to harvest information about retailer turnover data. By controlling access to these information streams, Landlords are in a dominant position in pre-lease and lease renewal negotiations, because they essentially know what the lease is worth to the market and what a retailer is likely to be able to afford. Rent levels consequently gravitate towards the upper end of the affordability band. In contrast, retailers have very limited access to this market information and so find it difficult to resist this upward pressure during negotiations.

There has been some suggestion that landlords periodically exchange detailed information about retailers' turnover, indeed the Review Team were given access to research by Urbis that described this information in some detail. While in no way suggesting that there is any collusion taking place, disclosure of this type of information between landlords allows them to confirm internal assumptions about the rent levels retailers can afford and to adjust prices accordingly. This can have the effect of increasing rental costs across the shopping centre portfolio.

Pharmacies

The Draft Report notes that the restrictions placed on PBS pharmacies constrain competition and the benefits that increased competition would bring consumers. The Draft

The OSBC recommends that the exchange of turnover data between landlords should be treated as an anti-competitive disclosure of information.

As a balancing measure, where turnover data is collected by a landlord, the effective rents being charged should be provided to the market in an easily accessible manner.

The OSBC recommends that consideration be given to the social impacts of reducing access to

Comments	Recommendations
<p>Report also notes that</p> <p><i>It is generally accepted that some regulation of pharmacy is justified to uphold patient and community safety, ensure pharmacists provide consumers with appropriate information and advice about their medication, provide equitable access to medication regardless of the patient's wealth or location, ensure accountability for appropriate standards and behaviour by pharmacists, and manage costs to patients and government.</i></p> <p>The Draft Report goes on to suggest that the Government should explore options to remove regulations concerning ownership and locations without necessarily considering how this might impact on the community health outcomes current regulations are intended to achieve. In particular, while increasing the range of providers may increase choice and reduce costs for some consumers, there is the risk that such changes could reduce choice and increase costs for some of the most vulnerable members of the community. In particular, the ability for supermarkets to capture the low cost, high value customers may undermine the ability of community pharmacists to meet the needs of those customers excluded from supermarkets because of location, access or the complexity of their needs.</p> <p>The OSBC recognises that there as to be innovation in the PBS network, but would be deeply worried if the innovations facilitated by government policy favoured one group of providers by failing to take into consideration the value added to the health system by community pharmacists.</p>	<p>community pharmacies as a consequence of any adopting a narrow view of competition policy.</p>
<p><u>Planning and Zoning</u></p> <p>The OSBC agrees with the Panel's findings that Planning and Zoning regulations can act as a significant drag on competition in the retail sector. In particular, regulations that limit competition between shopping centres results in the development of what are in effect localised monopolies. The Review of the NSW Retail Leases Act (1994) has highlighted</p>	<p>The OSBC agrees with the Panel's findings that zoning and planning regulations impose an unfair restriction on competition and that</p>

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<p>the dominant position of a small number of shopping centre owners in the retail leasing market. The Review Team has concluded that this dominance allows landlords them to adopt an aggressive negotiating position, securing terms that are more favourable than would otherwise be possible. While their dominance in the market is in part a reward for the success of their business model and their skills as entrepreneurs, it is also a product of planning and zoning regulations that restrict competition. Consequently, large shopping centre landlords are able to attract returns that are a product of restrictive planning and zoning regulations.</p>	<p>there should be greater scope for the development of retail services in commercial zones.</p>
<p><u>Unconscionable Conduct</u></p> <p>The ability for a small number of landlords to dominate key retail leasing markets raises the prospect that they may abuse their position when negotiating with smaller retailers. Where this behaviour is of a nature that offends the standards expected by businesses, retailers may be able to seek remedy for unconscionable conduct. However, as the Panel noted such actions are both expensive to pursue and difficult to mount. This means that as far as many small businesses are concerned, unconscionable conduct protections are outside their reach. The OSBC strongly supports mediation as a cost effective means of settling disputes; however, the experience of our Dispute Resolution Unit tells us that it does not necessarily improve the access of small businesses to unconscionable conduct protections.</p> <p>The OSBC is of the view that there are a number of behaviours that sit below Unconscionable conduct but which when taken together or repeated are oppressive. To address this, the OSBC feels that there should be additional, lower order protections that sit below unconscionable conduct, which can be more easily accessed through mediation and which take into consideration the accumulated impact of the behaviour.</p>	<p>The OSBC feels that there may be scope to develop provisions dealing with Fidelity of the Bargain and Good Faith. Such provisions should clearly describe the categories of behaviour that are viewed as being unreasonable and provide remedies that are appropriate and sensitive to the context.</p>

