Small Business
Development Corporation

GOVERNMENT OF
WESTERN AUSTRALIA

Our ref: D14/2577

Professor Ian Harper
Chairman, Competition Policy Review Panel
The Treasury
Langton Crescent
PARKES ACT 2600

via email: contact@competitionpolicyreview.gov.au

Dear Professor Harper,

Submission to the Competition Policy Review

The Western Australian Small Business Development Corporation ("SBDC") welcomes the opportunity to provide a submission to the Competition Policy Review ("the Review") currently being undertaken by the Federal Government.

The SBDC is a statutory authority of the Western Australian Government that was established in 1984 to support the development and growth of small businesses in this State. One of the functions of the SBDC is to advocate on behalf of Western Australian small businesses on issues that impact on their operations. Further information on the role of the SBDC has been included in our submission to the Review (see attached).

As the submission states, the SBDC is broadly supportive of Australia's current competition policy framework and considers it to be generally serving the needs of both consumers and businesses. Any potential reforms to competition policy should ensure that competition and entrepreneurial endeavour are not unduly stifled and that additional compliance burden does not befall the small business sector.

The SBDC also believes it is imperative that the Australian Competition and Consumer Commission is sufficiently resourced to continue its important educative role to industry and maintain its ability to investigate and pursue/prosecute competition policy breaches which have a detrimental impact on small business, particularly in highly concentrated markets.

Please contact Mr Martin Hasselbacher (Director, Policy and Advocacy) on (08) 6552 3302 or martin.hasselbacher@smallbusiness.wa.gov.au should you require further information on this submission.

Yours sincerely

David Eaton
SMALL BUSINESS COMMISSIONER

20 June 2014

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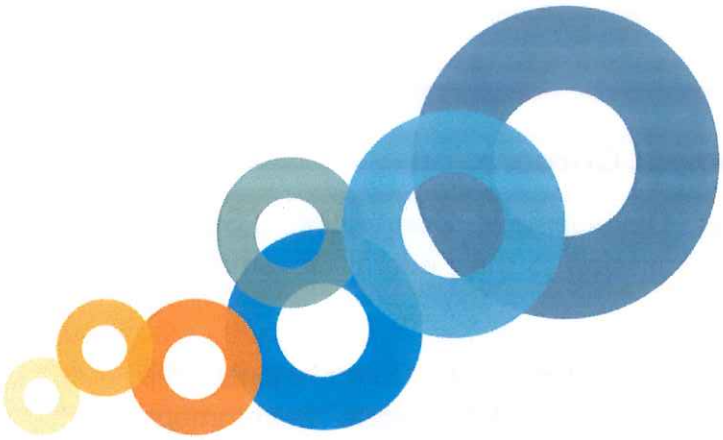

Small Business Development Corporation

Submission to the Competition Policy Review

June 2014

About the Small Business Development Corporation

The Western Australian Small Business Development Corporation ('SBDC') welcomes the opportunity to provide this submission to the Federal Government's "Competition Policy Review" ('the Review').

The SBDC, headed by the Western Australian Small Business Commissioner ('the Commissioner'), is an independent statutory authority of the State Government. Established in 1984, the SBDC supports the development and growth of small businesses in Western Australia. Among its main roles is the provision of advisory services to both small business operators and to government, as well as advocacy on behalf of the small business sector in this State. More recently, the SBDC has added an alternative dispute resolution ('ADR') service to help small businesses resolve their commercial disputes with other businesses and government authorities.

In line with these activities, the SBDC provides advice and guidance to Western Australian small business operators on a range of competition policy matters, including competitive conduct and market practices, rights and obligations under the Australian Consumer Law ('ACL') and contract law in general, and the requirements of industry codes (in particular the Franchising Code of Conduct).

Competition Policy in Australia

Competition permeates throughout all commercial industries in Australia and is the hallmark of a robust capitalist economy. On the basis of this premise, the SBDC is broadly supportive of Australia's approach to competition policy, believing that it generally strikes a good balance between the interests of small businesses and larger competitors.

While no system or legal framework is inherently perfect, the SBDC is of the view that the competition provisions set out in the *Competition and Consumer Act 2010* ('CCA') largely serve the Australian business community well, and is among the world's best.

Although some small business representatives will always argue for greater protections from supposed "big business bullies" on behalf of their constituents, the SBDC believes that these calls must be somewhat tempered by ensuring a policy/regulatory setting that does not unduly stymie open competition in a free market economy such as Australia's.

Adding to the already significant compliance burden on small businesses – through the introduction of yet more red tape and opportunity costs – is also something that must be resisted as time-poor, hard-working entrepreneurs should have the freedom to spend more productive energy growing their enterprises without undue or unnecessary interference from government.

In line with this, the SBDC is of the view that the level of regulation (with its flow-through compliance burden on industry) should be balanced according to the amount of risk that is to be mitigated. On this, the SBDC notes the Productivity Commission – in its excellent research report on "Regulator Engagement with Small Business" – expounded this position as follows:

> A fundamental guiding principle for regulators, therefore, should be ensuring that the burden imposed on all businesses is the minimum necessary, consistent with achieving regulatory objectives. Central to ensuring compliance and enforcement practices are targeted and efficient is the consistent adoption of practices which appropriately take into account the risk to regulatory outcomes that is posed by different business activities.[1]

To this end, in facilitating a risk-based approach to the regulation of competition in Australia, it is imperative that explicit consideration be given by policy-makers of the compliance costs imposed on businesses and opportunities to minimise them.

Enhancing small business protections

In recent years, the Federal Government has supplemented small business protections under the CCA – via reforms to the ACL – through *inter alia* greater clarification of, and interpretive guidance around, the specific types of commercial practice that offends conscionability. The SBDC largely welcomed these reforms, as they have gone some way to further demystifying what constitutes unconscionable conduct in Australia and providing extra guidance to the business community and the courts regarding the intent of this prohibition.

Despite these enhancements, the SBDC believes there could be merit in the Review giving further consideration to strengthening protections around anti-competitive price discrimination. The SBDC understands this is a particularly sensitive area in the highly concentrated grocery market, with smaller independent supermarkets arguing that they are at a significant disadvantage vis-à-vis the major chains when negotiating contracts for the supply of goods. It is also noted that enhancing protections in this regard may also benefit small business manufacturers and suppliers in terms of getting a fair return for their product.

Extending Unfair Contract Term Protections to Small Business

One way to improve small businesses' commercial rights is through extending unfair contract term provisions in standard form contracts to small businesses, as currently afforded to consumers. To this end, the SBDC welcomes the Federal Government's commitment to press ahead with this initiative in line with its 2013 election promise. It is noted that this proposal is currently subject to consultation, to which the SBDC will be making a formal submission in due course.

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[1] Productivity Commission, "Regulator Engagement with Small Business", September 2013, pg.104

Anecdotal evidence collected by the SBDC through its business advisory and ADR functions suggests that unfair contract terms are fairly common to business-to-business contracts in Australia, and can often be a cause of disputation between parties. The SBDC will provide further comment on the types of unfair contract terms in practice and the nature of contract-related disputes in our feedback to that consultation.

While the SBDC anticipates that the protests from big business against this proposal will be loud (as was the case in 2010 when the former Federal Government attempted this but was lobbied intensely by industry and the financial sector), if the Federal Government holds its nerve it will be an opportunity to boost the bargaining position of small businesses and likely lead to fairer standard form contracts.

The inherent nature of "an uneven playing field"

Having said the above, the SBDC wishes to briefly comment on the realities of bargaining power and agreement-making in Australia.

The ability for parties to freely enter contracts and negotiate their terms and conditions buttress healthy competitive forces in Australia's free market economy. Arguably, however, all commercial contracts are based on an unequal relationship between parties; this is something that is intrinsic, and parochial calls for "an even playing field" between different sized businesses may – in the SBDC's opinion – be misguided.

One particular party, be it an individual or a corporate entity, will typically be in a superior bargaining position vis-à-vis an other party looking to contract in, whether it is due to having more information or resources (such as time, money) at its disposal, or because it controls the supply of the good or service to be acquired (i.e. it does not have to sell something to someone if it does not want to).

The Federal Government recognises this actuality in the Issues Paper when it states that: "The CCA, through the ACL, recognises that not all parties in a transaction have equal bargaining power".[2]

At the same time, it must be acknowledged that there also needs to be a degree of levelling made in order to provide a balance between too much control on the one side and too little on the other. That is why rules and regulations have been introduced into the commercial realm to address this fundamental tension, so as to curb exploitation and abuse of power.

The contractual relationship then produces two significant imbalances between the parties that require stabilising – an *information imbalance* and a *power imbalance*:

[2] Federal Treasury, "Competition Policy Review – Issues Paper", April 2014, pg.29

- The *information imbalance* flows from the dominant party's monopoly of much of the information that would be useful or necessary to the other party in making an *informed decision* to enter into the contract. For example, a franchisor has intricate commercial information about the operation of its franchised business that would be useful or necessary to a prospective franchisee's decision to enter the franchise agreement.
- The *power imbalance* follows from the dominant party's authority to control the supply of product or support/assistance in whatever way serves its best interests. This includes deciding not to enter into an agreement to begin with.

The presence of these imbalances underpins the regulatory action in competition policy in Australia. This has led to the introduction of minimum requirements and standards under the CCA/ACL in relation to the disclosure of information, prohibitions against egregious conduct or behaviour (such as the misuse of market power), rights of redress and to remedy, access to dispute resolution mechanisms, etc.

However, any regulatory response by policy-makers in Australia must also be carefully weighed up, with the pros and cons of the proposal considered (i.e. at what cost and to what benefit) and potential unintended consequences abated.

Underscoring this argument is the fact that with any agreement between parties there are two theoretical contract principles that generally apply:

- *Freedom of contract* – the idea that individuals should be free to bargain amongst themselves the terms of their own contracts, without government interference. The practical result of this principle is that once a contract expires, a party such as a landlord or franchisor cannot be compelled to enter into a new contract.
- *Sanctity of contract* – the notion that parties are bound by the terms of the contract as framed, in the circumstances that existed at the time that the contract was entered, subject to any variations that were subsequently agreed by <u>both</u> parties. This principle assumes that contracts are complete in terms of addressing all possible future contingencies and specifying the performance required of the parties in each situation (although it is also noted that sometimes terms can be implied through conduct and under the unwritten common law).

In essence, once a contract has been agreed to and entered into between parties, the "goal posts" should not be moved whether by the manipulation of one party or by government.

So while "an even playing field" may be the ultimate goal of a truly competitive market, it is a utopian vision that can never realistically be achieved without harming the very thing that it sets out to protect (i.e. competition). If the Federal Government is able to secure small business protections from unfair terms in standard form contracts in line with its election promise, this would go a long way to reducing some of the present inequities in bargaining power between parties.

Going beyond this, however, the SBDC cautions the Federal Government against implementing further prohibitions against anti-competitive conduct that swing the pendulum too far towards "bubble-wrapping" small business rights.

The need for a strong regulatory presence

The SBDC believes that Australia's competition framework is only as strong as how effectively it is complied with and enforced. To this end, the SBDC notes with some concern recent Budget savings measures targeted at Federal regulators (most notably the Australian Taxation Office and the Australian Securities and Investments Commission) that are likely to adversely impact on essential public policy regimes and the support provided to small business operators.

A major worry would be if further cuts or restrictions to departmental resourcing impacts on the ability of the competition watchdog, the Australian Competition and Consumer Commission ('ACCC'), to continue its important educational and enforcement activities. In particular, the SBDC notes the need to continue effective diligence and enforcement of certain highly concentrated markets in Australia, especially given the relatively small population of the nation and the high barriers to entry for competitors.

It is also noted that individual small business allegations of anti-competitive conduct are often already referred to State enforcement agencies (e.g. the Department of Commerce in Western Australia's case), and this trend would be expected to hasten if further tightening of enforcement activity were to occur. This would put even more pressure on the States to take up "the Commonwealth's slack".

Within this rubric, the SBDC appreciates the guiding principles in which the ACCC assigns priority to which matters to pursue, being:

- there appears to be blatant disregard of the law;
- the conduct involves significant public detriment;
- successful enforcement will have a significant deterrent or educational effect;
- new and important issues/trends are involved; and
- there is a detriment to disadvantaged individuals or groups.

Additionally, the SBDC notes that often the length involved in pursuing (legitimate) anti-competitive matters does not provide sufficient and timely access to justice for small business operators; in many cases, small businesses are not able to "ride out" the ACCC's protracted investigation process and the length of time it takes to bring cases before the courts before the financial (and in a lot of instances emotional) consequences bring them to ruin.

Providing Western Australian small businesses with access to a speedy, low-cost, non-litigious process to resolve disputes with other businesses (i.e. through intensive

case management and where required mediation) is the fundamental *raison d'être* for the establishment of an ADR service at the SBDC.

Recognising that it is not practical or feasible for the ACCC to pursue every individual allegation of anti-competitive conduct or misuse of market power, the SBDC would be concerned, however, if more legitimate small business complaints are not pursued or are referred to State authorities as this would further undermine the regulator's authority and diminish the efficacy of Australia's competition regime.

Conclusion

The SBDC is generally supportive of Australia's current competition policy framework and believes that apart from some further refining, it represents one of the world's best systems and serves the consumer and business communities well. In a relatively small domestic market such as ours, any potential reforms to further protect small businesses must ensure that competition and entrepreneurial endeavour continue to be fostered. What's more, making it harder for business operators to "do business" (i.e. through additional red tape) should not be an (unintended) outcome of the Review.

Further feedback on the specific areas of reform that are identified as part of the next stage of the Review will be provided by the SBDC in future. For further information about this submission, please contact Mr Martin Hasselbacher (Director, Policy & Advocacy) on (08) 6552 3302 or at martin.hasselbacher@smallbusiness.wa.gov.au.