



General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: competition@treasury.gov.au

Dear Sir or Madam:

Re: Competition Policy Review's Final Report

We appreciate The Treasury's consultation to seek feedback on the Competition Policy Review's final recommendations to strengthen *Australia's Competition and Consumer Act 2010* (CCA) and issues concerning small businesses. The Office of the NSW Small Business Commissioner (OSBC) supports the Government in its efforts to promote more dynamic, competitive and well-functioning markets.

Background

The Government asked Professor Ian Harper and an expert panel to undertake an independent 'root and branch' review of competition policy. This was the first comprehensive review of Australia's competition framework in more than 20 years, delivering on a key election commitment.

The Competition Policy Review's Final Report makes 56 recommendations for reforms across three key themes: competition policy, laws and institutions.

The Treasury has sought feedback – *especially where there have been changes since the draft report* – to inform the Government's response to the report later in 2015. Following the Government's response, appropriate legislative changes will be developed for further consultation.

We offer the following feedback on selected recommendations in the Competition Policy Review's Final Report.

Recommendation 51 — ACCC governance

The Final Report includes the following recommendation:

Half of the ACCC Commissioners should be appointed on a part time basis. This could occur as the terms of the current Commissioners expire, with every second vacancy filled with a part time appointee. The Chair could be appointed on either a full time or a part time basis, and the positions of Deputy Chair should be abolished.

The Panel believes that current requirements in the CCA (paragraphs 7(3)(a) and 7(3)(b)) for experience and knowledge of small business and consumer protection, among other matters, to be considered by the Minister in making appointments to the Commission are sufficient to represent sectoral interests in ACCC decision making.

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Therefore, the Panel recommends that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

The ACCC should report regularly to a broad based committee of the Parliament, such as the House of Representatives Standing Committee on Economics.

We understand that the ACCC presently employs seven full-time Commissioners, appointed by Cabinet in consultation with states and territories, who serve terms of up to five years, being a Chair, two Deputy Chairs (one representing consumer interests and another small business), and four ordinary members.

The CCA requires that there be ‘... at least one Deputy Chairperson who has knowledge of, or experience in, small business matters.’ This provision was inserted into the Act in 2008, having been endorsed by both major political parties in the 2007 Federal Election.

For all other Commissioners, there is a requirement in the Act that they have some knowledge of economics, industry, commerce, law, public administration, consumer protection or small business. We are advised that, aside from the Deputy Chair representing small business, no other sitting Commissioners have any specific experience in small business.

We have examined the discussion in the Final Report preceding Recommendation 51 and are not convinced that the governance and legislative changes recommended above have been sufficiently supported by evidence.

The Issues Paper and Draft Report *do not* appear to discuss elements of Recommendation 51¹. We are also of the impression that these elements were not raised by the Panel with *any* of the Small Business Commissioners. Prior to a recommendation of this nature being made, we were surprised by the lack of consultation.

The Final Report refers to submissions from the Business Council of Australia (BCA) and John Dahlsen² that go to governance arrangements (though seemingly not to the core of Recommendation 51). It notes, however, that relevant comments in these submissions received limited support from other stakeholders, e.g. according to CHOICE: ‘in the absence of evidence of problems with the existing arrangements it is not clear that either of the options presented by the Panel is warranted’.

We are aware of just one submission in which concepts more central to recommendation 51 are put forward. That submission³ was made by the Shopping Centre Council of Australia (SCCA) in response

¹ Apart from the Draft Report mentioning that the ‘ACCC could also report regularly to a broadly based committee of the Parliament, such as the House of Representatives Standing Committee on Economics ...’

² We were unable to locate submissions by John Dahlsen to either the Issues Paper or Draft Report at the Competition Policy Review web site.

³ dated 6 June 2014

to the Issues Paper⁴. We might have expected this document to have been referred to in the Final Report as supporting Recommendation 51 but were unable to locate any reference.

The SCCA argued in its submission that, as an Australian Small Business Commissioner exists:

... there is no longer any justification for requiring the Competition and Consumer Act to have special regard for small business expertise in the appointment of Commissioners and Deputy Chairpersons of the ACCC.

and recommended that:

Section 7(3)(b) and section 10(1B) of the Competition and Consumer Act be repealed.

In relation to the idea that half of the ACCC Commissioners should be appointed on a part time basis, and the Chair could be appointed on either a full time or part time basis, we note the Panel's view that:

Part time Commissioners would enrich the ACCC's decision making by adding the perspectives of members whose responsibilities extend beyond the ACCC, including but not limited to roles in business, consumer advocacy and academia.

We are not convinced that appointing half of the ACCC Commissioners, and potentially the Chair, on a part time basis would enrich the ACCC's decision making. If this were effective, it is not clear why the recommendation doesn't extend to *all* ACCC Commissioners.

Because these roles, including the Chair's role, presently occupy full time staff members, we do not presume that part time occupants could fulfill these roles to the same extent as full time equivalents.

The Panel has acknowledged potential conflicts of interest that may be pursuant:

... this arrangement may give rise to concerns of conflicts of interest arising between the day to day roles of the part time Commissioners and their responsibilities as Commissioners.

The ACCC currently manages conflicts of interest through members being required to declare any actual or apparent conflicts of interest. ACCC members are required to provide the Chair with an annual statement of personal interests.

The Panel is satisfied that this approach remains sufficient to ensure that conflicts of interest are either avoided or sufficiently declared, even with the addition of part time Commissioners.

We agree with the panel that such arrangements may give rise to concerns of conflicts of interest. Declaring actual or apparent conflicts of interest is a common method of managing such risk, as is recusal from decisions where such a conflict exists. Conflicts of interest and recusal from decisions are anticipated to be more common amongst Commissioners who are concurrently engaged in outside employment.

⁴ The SCCA also made a later submission (in response to the Draft Report) but that submission did not discuss matters pertinent to Recommendation 51.

Because all Commissioners are involved in decisions of the Commission, such recusal is likely to reduce the number of Commissioners, and perspectives, available to consider decisions – contrary to the Panel’s intent.

We believe the small business representative helps in giving small business an effective voice across Government. The OSBC, and other Small Business Commissions, work collectively with the ACCC and as a result of that relationship, can secure access and results that might not otherwise be possible.

We understand that the Deputy Chair position oversees a range of ACCC activities in sectors including small business, franchising and industry codes, and interface with key industry associations.

We are concerned about the Panel advocating abolition of the two Deputy Chairs (representing consumer interests and small business) via amendment to legislation, which would mean there was no specifically identified small business (or consumer) perspective in the ACCC.

Recommendation 53 — Small business access to remedies

The Final Report includes the following recommendation:

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.

Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

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.

Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

The Panel endorses the following recommendations from the Productivity Commission’s Access to Justice Arrangements report:

- *Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;*
- *Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;*

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- *Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;*
- *Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and*
- *Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.*

In 2014, the OSBC received 17,450 calls for assistance. The OSBC offers alternative dispute resolution services, helping parties to a dispute work through their problems through early discussions. If a dispute is not resolved through these early discussions, we provide formal mediation, either in Sydney's CBD or at other locations in NSW.

We consider the mediation process essential in minimising the cost of business disputes. About 94% of all matters referred to us for mediation are resolved prior to having a court decide the matter.

The OSBC could work with the ACCC in situations where a NSW small business has advanced a complaint that is considered by the ACCC to have merit, but which is not considered a priority for public enforcement.

Noting the high volume of complaints received by the ACCC, an agreed process or memorandum of understanding would seem useful to guide any such arrangements.

The OSBC could also work with the ACCC to raise awareness of its advice and dispute resolution services.

We support the idea that 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 behavior. The OSBC highlights the fact that small businesses are often ill-equipped to unilaterally pursue legal action to enforce their rights under competition law.

Recommendation 54 — Collective bargaining

The Final Report includes the following recommendation:

The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business.

Reform should include allowing:

- *the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members;*
- *the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and*
- *different timeframes for different collective bargaining notifications, based on the circumstances of each application.*

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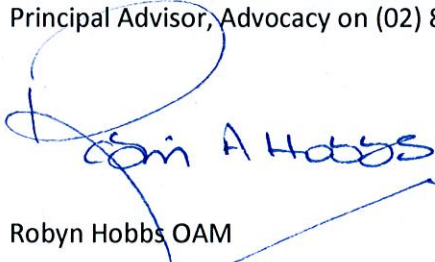
Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public.

The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions. The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.

We would support in principle reform of the CCA to introduce greater flexibility to the notification process for collective bargaining by small business.

We would also support in principle review (in consultation with representatives of small business) of the current maximum value thresholds for a party to notify a collective bargaining arrangement, to ensure they are high enough.

We appreciate the opportunity to comment on the Competition Policy Review's Final Report. Should you wish to discuss any of the issues raised in this submission, please contact Murray Johnston, Principal Advisor, Advocacy on (02) 8222 4842.



Robyn Hobbs OAM

2 June 2015