



**Small Business  
Development Corporation**

Our ref: D16/150

Mr Scott Rogers  
Manager, Competition Policy Unit  
Department of Treasury  
Via: [competition@treasury.gov.au](mailto:competition@treasury.gov.au)

Dear Mr Rogers

**Options to strengthen the misuse of market power law**

I am writing regarding the “Options to strengthen the misuse of market power law” discussion paper (“the Discussion Paper”) released by the Australian Government on 11 December 2015.<sup>1</sup>

Headed by the Western Australian Small Business Commissioner, the Small Business Development Corporation (SBDC) is an independent statutory authority of the Government of Western Australia. Established in 1984, the SBDC has been supporting the growth and development of small businesses in Western Australia for over 30 years.

Among its main roles are the provision of advisory services to small business operators and advocacy to government on behalf of the small business sector in this State. More recently, the SBDC has added an alternative dispute resolution service to help small businesses resolve their commercial disputes with other businesses or 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 and dispute enquiries, including competitive conduct and market practices, rights and obligations under the Australian Consumer Law and contract law in general, and the requirements of industry codes (in particular the Franchising Code of Conduct).

The SBDC also provides feedback and opinion on the impacts of regulatory settings and policy/legislative proposals on the small business sector. In that context, the SBDC has provided submissions to numerous reviews, including to the Competition Policy Review (‘the Review’) undertaken by the Panel led by Professor Ian Harper.

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

The SBDC has a keen interest in the Australian Government's decision regarding the proposed changes to section 46 of the *Competition and Consumer Act 2010* (CCA). The SBDC's clients, as small business operators, are likely to suffer detriment when businesses with a substantial degree of market power misuse it.

In our submission to the Draft Report of the Review, the SBDC supported the Review Panel's recommendation to reform section 46 of the CCA. The SBDC maintains the position that reform is needed to the misuse of market power provisions to better protect small business operations. A copy of our submission to the Draft Report is also attached in support of this position, with particular reference to the commentary on pages 7 to 9 regarding misuse of market power.

### **“Purpose, effect or likely effect”**

The SBDC notes that the overarching policy intent behind competition laws is to protect competition in the market. With that in mind, the SBDC agrees with the Review Panel's recommendation that competition law should be re-framed to prohibit a corporation with a substantial degree of market power from engaging in conduct that has the “purpose, effect or likely effect” of substantially lessening competition in the market.<sup>2</sup>

There are two elements in this recommendation that, in the SBDC's opinion, better align section 46 with the policy intent of the legislation. Firstly, the change in terminology from “competitor” to “competition” moves the focus from individual competitors to overall competition in the market.

Similarly, the SBDC believes that the inclusion of the term “purpose, effect or likely effect” in lieu of just the purpose test will further advance the policy intent of protecting overall competition. The SBDC believes that a focus on the “purpose of the conduct” narrows the spotlight to one competitor and agrees with the Review Panel's statement that it's the conduct that effects competition and not the purpose.<sup>3</sup>

The SBDC is cognisant of the debate around whether or not the subjective “purpose” element is in fact difficult to prove in judicial proceedings. While the SBDC maintains its support of the Australian Competition and Consumer Commission (ACCC) and the view that “purpose” is a subjective element that may not be easily established in judicial proceedings, the regulator has the decision making responsibility of whether or not to prosecute a matter based on the circumstances of that case in the context of the elements in section 46.

In the SBDC's opinion, this practical experience in making those decisions places the ACCC in good stead to provide expert guidance on the operation of this prohibition. In the current context, larger businesses can effectively hide behind the purpose of their conduct, such that unless there is evidence that they intentionally undertook conduct to damage competitors, it is unlikely that they will face penalty.

As the object of this section of the CCA is to protect overall competition, the provision should be worded in such a way to promote that policy intent. The SBDC therefore believes that broadening the test beyond “purpose” to “effect” and “likely effect” will in fact better target the conduct that causes significant detriment to

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<sup>2</sup> SBDC, “Submission to the Competition Policy Review Draft Report”, November 2014

<sup>3</sup> Competition Policy Review Panel, “Competition Policy Review Final Report”, May 2015, pg. 335

competition - particularly to small business competitors - without necessarily resulting in consumer detriment.

Notwithstanding the above, the SBDC recognises that the result of re-framing this element of the test of “purpose, effect or likely effect” will eliminate the need for such a debate and bring the focus back to the important issue of protecting competition.

## **Authorisation**

The Discussion Paper questions whether authorisations should be available for conduct that might otherwise offend section 46. The purpose of an authorisation is to permit conduct if it is unlikely to substantially lessen competition or if it may have a net public benefit.

The SBDC believes that including an authorisation process for section 46 may benefit the market and those businesses operating in it. Businesses seeking to engage in this type of conduct for legitimate pro-market purposes will save time and money by approaching the ACCC for an authorisation.

Without access to the ACCC’s authorisation process, a business seeking to engage in conduct that could misuse their market power should get expert advice on whether this proposed action offends section 46 prior to engaging in it. This could be a costly exercise and is unlikely to deliver a definitive answer. The business operator would then need to weigh up the benefit to their business of undertaking the conduct with the risk and expense of defending potential legal action. Further, the risk of prosecution by the ACCC may prevent a business undertaking an action that could actually be of benefit to the market.

Some people may argue that there are risks associated with authorising conduct that would otherwise offend section 46. Whilst the SBDC acknowledges that no process is perfect, we believe that the authorisation process currently employed successfully by the ACCC for other sections of the CCA would minimise the risks associated with permitting this type of conduct.

Assuming that the authorisation process for section 46 mirrors the process employed for authorisations in other CCA sections, the SBDC believes that this process will be robust enough to protect competition in the marketplace. The current authorisation process has a number of elements that ensure transparent and sound determinations, including:

- A \$7,500 lodgement fee, which will deter many businesses from lodging unsuitable applications;
- Interested party consultation at both the application and draft determination stage;
- The possibility of a pre-decision conference with interested parties, if requested; and
- An appeal process where the applicant or an interested party can ask the Australian Competition Tribunal to review the ACCC’s determination.



Furthermore, the ACCC must be satisfied that the public benefit of the conduct outweighs the public detriment and can grant authorisations subject to conditions and time limits. It is understood that the ACCC adopts a broad approach when determining the public benefit or public detriment of a proscribed conduct, taking into account the circumstances of the application and the feedback received from the public consultation process.<sup>4</sup>

In this regard, the Review Panel recommended that the ACCC issue guidelines on its approach to enforcing section 46. The SBDC believes that these guidelines should be issued in conjunction with the introduction of an authorisation process, as this will help educate businesses and promote conduct that fosters competition.

## **Conclusion**

The SBDC notes with interest the Review Panel's model to reform this provision, as proposed in its Final Report. In line with this, the SBDC supports the reform of section 46 to the full extent recommended by the Review Panel (i.e. Option F in the Discussion Paper).

Thank you for the opportunity to provide feedback on this important aspect of competition law. Should you require further assistance from the SBDC, please do not hesitate to contact my office via Ms Darcy Bosch (Senior Policy Officer) on [darcy.bosch@smallbusiness.wa.gov.au](mailto:darcy.bosch@smallbusiness.wa.gov.au) or via telephone (08) 6552 3308.

Yours sincerely



David Eaton  
SMALL BUSINESS COMMISSIONER

12 February 2016

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<sup>4</sup> Australian Competition and Consumer Commission, "What you need to know about: Authorisation", Available from: <http://www.accc.gov.au/system/files/Authorisation%20factsheet.pdf>, [9 February 2016]