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SUBMISSION TO THE TRADE PRACTICES ACT REVIEW

The Small Business Development Corporation (SBDC) welcomes the opportunity to make a submission to the Trade Practices Act Review.

The SBDC is a Western Australian statutory government agency incorporated under the Small Business Development Corporation Act 1983. The SBDC provides advice and assistance to new and existing small businesses in Western Australia. The SBDC also monitors and comments on policies and legislation that impact on the growth and development of the small business sector in this State. In addition, the Corporation supports a network of 37 independent Business Enterprise Centres across the State.

The effectiveness of the Part IV (restrictive trade practices) provisions of the Trade Practices Act 1974 (TPA) and the enforcement activities and operations of the Australian Competition and Consumer Commission (ACCC) are of particular concern to the small business sector in Western Australia.

There are increasing pressures and trends toward 'globalisation' in the Australian economy. There is also a view prevalent in some large business circles that Australian companies should increase in size ("national champions") to achieve the scale and efficiencies necessary to compete in world markets, if necessary at the expense of competition in the domestic economy.

The SBDC is concerned that reduced competition levels in the domestic economy, coupled with any weakening of the current trade practices regulatory regime, are likely to impact adversely on the small business sector in terms of its ability to compete fairly with larger corporations and to maintain the growth and employment levels that are significant features of the Australian economy.

The SBDC believes that a strengthened TPA should continue to have a pivotal role in restricting unfair trading practices and preventing anti-competitive merger activities that are likely to have adverse impacts on the small business sector in particular and the economy in general.

The SBDC also believes that like any legislation the TPA can be strengthened and improved to take account of emerging commercial practices and competitive trends in the economy. The following comments are made in the context of the applicable terms of reference:

Does the TPA promote competitive trading which benefits consumers in terms of services and price

Section 45

Section 45 of the TPA prohibits agreements to fix prices, anti-competitive agreements and exclusionary provisions (including primary boycotts).

Cartel activities by large corporations to fix prices in a market or to drive out small business competitors by anti-competitive arrangements are of significant concern for the small business sector. Despite the potential for significant financial penalties to be imposed by a Court if the ACCC establishes a breach of the TPA by a large corporation, the damage done to small firms may be irreversible and result in small operators closing down while litigation is in progress.

It may still be very tempting for large corporations to risk the financial penalties involved for the purposes of gaining control of a market and effectively eliminating price competition.

The SBDC is aware of anecdotal evidence that the criminal sanctions attaching to hard core cartel activities in the United States serve as a positive deterrent to business executives from engaging in these practices. In those situations the executives of large corporations are held personally responsible if they have been actively involved in breaching the law, and terms of imprisonment may result. The social and commercial stigma attaching to imprisonment for breaching the law can be significant.

The SBDC believes that the TPA should reflect world's best practice and recommends that criminal sanctions should be available for breaches of section 45 of the TPA, in line with similar remedies embodied in the 'trade practices' laws of the United States, Canada, Korea, Japan, the United Kingdom and Germany. The new criminal sanctions would operate concurrently with existing sanctions.

It should be a criminal offence for large corporations to collude with competitors to fix prices, rig bids and allocate markets. Individual executives and employees personally involved in breaking the law should be liable, upon conviction, for jail sentences.

The ACCC has suggested that only large companies which satisfied two of the following three criteria should be liable for criminal penalties:

- gross revenue in excess of $100 million;
- gross asset value in excess of $30 million; or
- more than 100 employees.

The SBDC believes that these threshold tests are set high enough to ensure that only significant anti-competitive cartel activity would be caught by the proposed criminal sanctions.

Does the TPA provide an appropriate balance of power between competing businesses and in particular businesses competing with or dealing with businesses that have larger market concentration or power

Section 46

Section 46 of the TPA prohibits large businesses from taking advantage of market power for the purpose of eliminating or substantially damaging a competitor, preventing entry into a market or deterring a person from engaging in competitive conduct.

The SBDC believes that the operation of section 46 can be improved and strengthened by the introduction of an "effects test" that would allow courts to examine uses of market power having anti-competitive effects in a market rather than being limited to consideration of the intent of the company exercising the market power.

The adoption of an "effects test" would also address the sometimes significant difficulties experienced under the current section 46 provisions of proving the 'purpose' a company had in misusing its market power. In effect, the onus of proof would be reversed and the defendant corporation would be required to prove that its actions did not effect competition in the market. The SBDC supports a reversal of the onus of proof in these circumstances.

From a small business perspective, it is often difficult for the ACCC (and courts) to decide whether a large corporation has misused its market power to damage a small competitor or whether the company is just engaging in vigorous (but fair) competition to attract market share. The small business that is adversely impacted by the conduct of the large company still suffers, irrespective of the 'intent' of the larger company.

The SBDC believes that section 46 is currently unable to provide the levels of protection for small businesses that were intended when the legislation was framed. The SBDC, accordingly, recommends that section 46 incorporate an "effects test" with some form of safeguards developed by the ACCC to ensure that large companies are not prevented from competing vigorously, but fairly, in any market.

In conjunction with an "effects test", the SBDC also recommends that "cease and desist orders" be made available to the ACCC as an interim remedy.

"Cease and desist orders" would provide a means of stopping anti-competitive conduct quickly and avoiding irreversible damage to markets (and small firms) while a case was investigated and pursued through the court system. Such orders could be issued by the ACCC where urgent action was required in the public interest, and be reviewed by a court within a determined time.

It should be appreciated that ACCC investigations into alleged anti-competitive conduct can take time to resolve, particularly where large corporations use their substantial resources to delay legal proceedings at every stage of the process. In the meantime, small firms that are the victims of the alleged conduct, and the market in general, will continue to be affected. The large company should also not be in a position to continue to profit from its behaviour during the investigation and litigation process.

Small businesses would most likely be the beneficiaries from "cease and desist" orders as they might be saved from closing down before the matter is finally resolved.

Section 50

Section 50 prohibits mergers or acquisitions that would substantially lessen competition.

The SBDC is aware of proposals from the Business Council of Australia (BCA), and other parties, that the merger provisions are too restrictive and should be relaxed to allow for the development of 'national champions' – sizeable companies able to compete at the international level by taking advantage of economies of scale and scope.

The SBDC understands that the BCA would prefer a return to the old merger test of 'market dominance' which only prevented mergers and acquisitions if the new merged entity was likely to be in a position to dominate a market.

The SBDC is opposed to any relaxation of current merger laws, particularly a return to the 'market dominance' test which would make the legislation ineffective.

The SBDC has been critical of the ACCC's application of merger laws and the seeming inability of section 50 to prevent mergers by 'creeping acquisitions' particularly in the food, retail grocery and general retail sectors.

Counter to claims by the BCA and others that the ACCC's application of merger laws is too stringent and stifling economic activity, the SBDC is aware that in 2000-2001 the ACCC considered 265 mergers, asset sales and joint ventures. Of these, the ACCC objected to only 13 on the grounds that they were likely to substantially lessen competition. Ten later proceeded after the parties signed section 87B undertakings to eliminate anti-competitive effects and the remaining three were withdrawn following the ACCC's opposition.

The SBDC understands that the ACCC opposes fewer than 5 per cent of mergers notified to it, and opposes no merger proposal where imports make up ten per cent or more of the market on a sustained basis.

From a small business perspective, the SBDC believes that current merger provisions are inadequate to prevent growth by "creeping acquisitions" (mergers by stealth) in the retail, retail grocery and food sectors. The SBDC recommends that consideration be given to tightening the merger provisions to take account of the developing process of firms gaining market share through small, unchallenged acquisitions that are likely in the long term to lead to either a substantial lessening of competition in the market or even dominance by major corporations.

Allow businesses to readily exercise their rights and obligations under the Act, consistent with certainty, transparency and accountability, and use compliance or authorisation processes applicable to their circumstances

Authorisation and Notification

Part VII of the TPA deals with the processes for the ACCC granting authorisations and notifications that effectively give immunity to certain forms of business conduct that might otherwise be challenged as anti-competitive under the restrictive trade practices provisions of the Act.

In recent times the ACCC has relaxed the relatively stringent conditions attached to granting authorisation and notification and established precedent decisions involving small business operators in some industries. These decisions were made because the balance of market power was deemed to be so predominantly in favour of major corporations that small businesses on an individual basis were unable to exercise their rights and obligations in establishing terms of trade, payment schedules and their own business structures.

Recent examples have included chicken growers negotiating collectively with a dominant acquirer of chickens, owner-driver concrete carters negotiating cartage rates with major corporations and arrangements for dairy farmers to collectively negotiate prices for dairy produce.

The SBDC supports the ACCC's initiatives in these areas but believes that there are many other small business operators in similar situations that should be able to benefit from the same concessions.

There is an urgent need to address small business concerns about collective bargaining and related concerns with the authorisation process. The SBDC recommends the introduction of a notification process for small business collective bargaining, modelled on the current notification process for exclusive dealing under the TPA.

The notification process should be faster, less expensive and simpler than the current method. It could be restricted to small business dealing with large businesses where it can be established such businesses have substantial market power, similar to the notification process for exclusive dealing.

Private legal action by small businesses

The SBDC is concerned that the complexity and costs associated with litigation are major impediments to small businesses being able to exercise their rights and obligations under the TPA.

The ACCC is unlikely to take litigation on behalf of small businesses in 'one off' cases unless the matter is taken as a test case to establish precedents for future private action. The commercial reality often appears to be that small businesses might be aware of their rights, as a result of test cases taken by the ACCC in other similar situations, but are still unable to use the law to protect themselves.

The new section 51AC unconscionable conduct provisions of the TPA provide an example of this. In 1998 the Federal Government allocated special funding of $480,000 per year, through to August 2002, to fund test cases taken by the ACCC on behalf of small businesses under section 51AC.

To date, the ACCC has litigated in 15 test cases, 6 of which have been successfully concluded and a further 9 are in various stages of progress through the courts. The ACCC also sought leave to intervene in two other private actions before the Federal Court. Many of the cases have involved franchise and commercial tenancy disputes, key areas of concern for small businesses.

The ACCC's focus has been to establish sufficient precedents through the medium of test cases so that small businesses can enforce their own rights under section 51AC through the courts. Although the ACCC's regime of test cases has been a positive step towards increased levels of protection for small businesses, the complexity and costs associated with litigation are still powerful deterrents to many small businesses from pursuing their legal rights against larger competitors – and there are many more cases in the market place than the 15 matters pursued by the ACCC.

The SBDC believes there is a need for increased funding for the ACCC to take more cases on behalf of small firms that are unable to exercise their legal rights, particularly against predatory and unconscionable conduct directed against them by larger companies. It would also be appropriate for increased funding for the ACCC to seek leave to intervene in court proceedings where a small business has exhausted its funds and is unable to see a matter through to resolution before the court.

Improvements to the Act, its administration or additional measures to achieve a more efficient, fair, timely and accessible framework for competition law

The SBDC believes that, taken as a whole, the existing legal framework and processes are appropriately balanced and that the ACCC operates in an open and accountable manner with its actions open to scrutiny by courts, tribunals, media, Parliament and the Commonwealth Ombudsman.

The SBDC is aware of proposals by the Business Council of Australia for the introduction of a Review Processes Board to oversight the actions and operations of the ACCC, similar to the Board of Taxation.

The SBDC, while not opposed to mechanisms for improved scrutiny of ACCC operations, believes that the proposal for a Review Board would need careful consideration to ensure that the Board was not simply a vehicle to restrict ACCC investigations into the activities of large corporations that perceive they have been unfairly targeted by the Commission – such as the recent 'raids' on major oil company head offices.

The SBDC appreciates the opportunity to participate in the Trade Practices Act Review and would be pleased to provide any further clarification of its views if required. Ms Juliet Gisbourne, Director Policy and Business Liaison SBDC, would be pleased to assist and can be contacted on (08) 9220 0204.

George Etrelezis
MANAGING DIRECTOR

10 July 2002

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