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Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Panel Members

Submission to Competition Policy Review Issues Paper

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Competition Policy Review issues paper. Our colleagues at Consumer Credit Legal Service WA have contributed to this submission.

Key points and recommendations

- While effective competition generally ensures market outcomes that benefit consumers, competition is not an end in itself. Competition is only desirable to the extent that it creates benefits for consumers or improves Australia's wellbeing.
- There are a number of markets in which competition is not, and may not ever, improve consumer wellbeing. In these markets, we are better off using tools other than competition to improve consumer outcomes.
- The National Competition Policy framework should focus not only on the supply side but also on how the demand side can drive competition. Some options might include:
    - funding consumer advocacy and dispute resolution mechanisms to identify competition issues, including a super-complaints process;
    - empowering consumers to participate in markets, for example, by making their purchase data available to them;
    - developing intermediaries or technological innovations which assist consumers to make informed choices or maximise their market power.
- Competition policy should serve not just the majority of Australians, but all Australians. This is particularly important in key markets like utilities, banking and insurance. The panel should consider how competition policy can not only grow the economy but improve outcomes for the most disadvantaged and vulnerable Australians.
- Consumer protection must be a core consideration in any plans to open up new markets to competition in areas traditionally dominated by governments.
- Regarding impediments to competition, we have suggested:
    - the Regulatory Impact Assessment process could be improved to ensure regulation facilitates consumer empowerment and effective competition;
    - a 'market study' regulatory power could identify and respond to impediments to competition; and

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    - minimum standards relating to health, safety and environmental protection will not necessarily create an impediment to competition.
- Regarding the Competition and Consumer Act (**CCA**), we believe the panel should:
    - consider reform to the misuse of market power provisions in section 46;
    - consider extending the prohibition on unconscionable conduct to unfair conduct;
    - consider reform to the prohibition on third line forcing in section 47;
    - recommend that the provisions relating to secondary boycotts be removed from the CCA except where they involve unfair commercial practices by a competitor. Should this not be adopted, we recommend that the legislation be updated to clarify that the provisions are not intended to apply to social or political conduct that is in the public interest;
    - consider whether section 50 is capable of preventing significant concentration in key markets;
    - consider whether a higher standard should be set for approval of voluntary industry codes;
    - consider whether the CCA should be amended to allow a court to order compensation for loss or damage suffered by non-party consumers.
- We strongly oppose any proposal to separate the competition and consumer protection functions of the Australian Competition and Consumer Commission (**ACCC**) into separate regulatory bodies. We also oppose splitting the Australian Energy Regulator from the ACCC.
- The Australian Competition Tribunal needs to be made more accessible to consumers if it is to be in a position to make fully informed decisions on the matters coming before it.
- The panel should consider whether state regulators in key markets have the necessary compliance and enforcement powers to be effective.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

1. Competition is a means to an end, not an end in itself

The core argument informing this submission is that competition is not an end in itself. Competition is only desirable to the extent that it creates benefit for consumers or improves Australia's wellbeing more generally. We refer to this sort of competition as 'effective competition'.

There is a tendency, especially amongst business, to assume that competition necessarily creates benefits and that regulation is necessarily detrimental on the grounds that it will stifle free competition and innovation. This argument appears to conflate the concepts of *contestability* in a market with effective *competition* that delivers outcomes for consumers. Just because a market

is contestable, it does not mean that it delivers efficient and fair prices and high quality products in a way that benefits consumers.

We agree that governments should always be wary about making regulation which limits competition or innovation because this will frequently harm consumer interests. But avoiding regulation on the grounds that it will limit competition or innovation misses the point if that regulation would nonetheless improve the effectiveness of competition and consumer outcomes.

Example: Retirement Villages

Regulation of Retirement Villages in Victoria is an example of how regulation which is intended to be 'light touch' can lead to a complex and uncompetitive market.

Opaque pricing: Residents of retirement villages will usually pay for their dwelling in three different ways—through a lump sum ingoing contribution; a regular maintenance charge; and exit costs upon leaving the village (which are subtracted from a refund of the ingoing contribution). Exit costs are particularly confusing. On leaving a village, residents will be liable to pay a number of fees, such as 'deferred management' fees, costs of refurbishing or reinstating the unit, and contributions to the village's capital fund. None of these fees can be determined with certainty when entering the contract. This creates uncertainty for residents as to their future financial situation and stifles competition as prospective residents cannot easily compare prices of different villages

A complex and unusual business model: The most common types of retirement village contract in Victoria are 'loan-licence' or 'loan-lease' contracts. Consumers are unlikely to have encountered these models before, and they are probably not like other property transactions a consumer has entered in the past. Despite paying a large sum upfront, the consumer does not own the property in the way they would own any other goods they paid an amount for upfront, and may not benefit from any capital gain (indeed they may make a loss even if the property's value improves). The resident will also commonly be required to pay for improvements to the dwelling when they exit the village and may have little say over which improvements should be made.

Vulnerable consumers: it is accepted that consumers entering a contract for retirement housing may be very vulnerable for a number of reasons, including the complexities noted above and also personal attributes. Consumers in this market are more likely to experience vulnerabilities related to health and advanced age, and will often enter contracts at a time of emotional upheaval (many move to retirement housing as a result of declining health or the death of a spouse)[1].

Recent consultation on improving contracts and disclosure in the Victorian Retirement Village market considered the option of prescribing contracts. This proposal was rejected by Consumer Affairs Victoria who, quoting an earlier finding by their Western Australian

[1] Consumer Affairs Victoria (2013) *Regulatory Impact Statement: Retirement Villages Amendment (Records and Notices) Regulations 2013 and Retirement Villages Amendment (Contractual Arrangements) Regulations 2013*, p 20-26.

counterparts, found that:

> The standardisation of contracts would not be practical given the broad array of arrangements existing within the industry. It is recognised that standardisation may also inadvertently inhibit competition and result in reduced innovation in the products and services offered.[2]

In our view, it is precisely the 'broad array' of contractual arrangements and the 'innovative' contractual and pricing structures that create the needless complexity in the retirement village market and cause much of the consumer detriment. In this case, the question should not be 'will this reform reduce competition and innovation?' but 'will this reform improve the effectiveness of competition and consumer outcomes overall?'

2. Competition will not always work to improve consumer outcomes

There are some markets, due to the nature of the product, service, or characteristics of consumers, where effective competition will rarely or never be able to operate to deliver good market or consumer outcomes. Policies which focus only on facilitating contestability and innovation will not be effective in these markets, and there are other tools available which may be more effective.

This point is very relevant to the Panel's considerations of markets in which competition is not working well. We give examples below of markets where competition is not working as well as it should, but also markets where competition is simply not capable of improving consumer outcomes. In summary, the themes from the examples below are that competition will be ineffective or less effective where sales are:

- driven by desperation or urgency on the part of the consumer;
- characterised by information asymmetries;
- driven by commissions;
- conducted under time pressure or other pressure sales tactics; or
- secured through a plainly unfair or unconscionable business model.

[2] Consumer Affairs Victoria (October 2011) *Retirement Villages: Contract and Disclosure Options*, p 14.

Sales driven by desperation: payday lending

Payday lending is a prime example of a market in which competition does not create benefits for consumers. Payday lending has been subject to a national cost cap since July 2013[3], but it was clear before that that there was no price competition in the market.

Consumer Action Law Centre's research into the payday lending industry from 2010 found that less than 10 per cent of borrowers chose a particular lender based on price, while 54 per cent chose a lender because they were nearby, and 17 per cent because they had used that lender before.[4]

In addition, borrowers appear to be largely unaware of the cost of their loans, either in percentage or dollar terms. When asked to report the cost of their loan, borrower responses varied widely, but the most common response was $0.[5] A relatively small number of people nominated figures that could realistically be the cost of the loan.[6] Treasury's 2011 Regulation Impact Statement on the regulation of payday lending also cited overseas research which concluded that normal price competition does not appear to apply in the short term high cost lending market.[7]

Further, despite a rapid increase in the number of payday lenders operating in Australia from the first trader in 1998, the cost of loans did not appear to fall at all, contrary to what would be expected in a competitive market. In advance of the cost cap on payday loans coming into place, Cash Converters (Australia's largest payday lender) reported to the ASX that

> These rate caps give us a sustainable business model that will see [earnings on short term credit] increase as our volumes continue to grow.[8]

This admission—that a cost cap which significantly reduced the price Cash Converters can charge for its short term loans is sustainable and allows continued growth—shows unmistakably that the prices charged before the cap were higher than a competitive market would permit.

This lack of competition is created because many borrowers are simply desperate to access money and do not feel they are in a position to look for a cheaper loan. This desperation, as well as a lack of awareness of safe alternatives to payday loans, has allowed lenders to effectively charge what they like. Effective competition will never be present in this kind of market.

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[3] Division 5A of the National Credit Code limits the cost of 'small amount credit contracts' (most loans of $2000 or less, for a term between 16 days and one year) to an establishment fee of 20% of the amount loaned, plus a monthly fee of 4% of the amount loaned. For a one month loan, this equates to an annual percentage rate of around 240%. The Code applies different caps to other forms of credit.

[4] Zac Gillam and the Consumer Action Law Centre (2010) *Payday Loans: Helping Hand or Quicksand? Examining the Growth of High-Cost Short-Term Lending in Australia, 2002-2010*, page 66.

[5] 12.9 per cent of respondents gave this response. Gillam (2010), pages 64-5.

[6] For example, 7.1 per cent responded with $100. Gillam (2010), page 65.

[7] Treasury (2011), *The Regulation of Short Term, Small Amount Finance: Regulation Impact Statement,* Australian Government, Canberra, pages 19-20. Accessible from: http://ris.finance.gov.au/files/2011/09/RIS-Short-term-small-amount-finance.pdf.

[8] Cash Converters, *Chairman and Managing Director's Review* (year ended June 30 2012), p 9.

Information asymmetry plus urgency: the 'financial difficulty' business model

By 'for-profit financial difficulty businesses' we refer to many types of businesses which purport to assist financially stressed individuals for a fee, including debt consolidation, credit repair, budgeting services, bankruptcy services, and debt agreement administration.

The information asymmetry in this case is that consumers of these services typically do not understand the nature of the service on offer, or that it may be available for free elsewhere. For example, where clients of our service have complaints against Debt Agreement Administrators,[9] it is not uncommon to hear that the consumer was actually looking for something like 'debt consolidation' (not an insolvency service) and that they then accepted the Debt Agreement option based on the assurances that it was a better option than bankruptcy. It is only when they speak later to a free financial counsellor (who has no incentive to promote one 'solution' over another) that most hear that a Debt Agreement is a form of insolvency that has many of the same sorts of impacts as bankruptcy and bankruptcy will be a superior option for many low income debtors.

The 'credit repair' business model charges consumers large amounts of money to remove unwanted listings on a credit report. We are aware of traders who charge an upfront fee of around $1000, in addition to another charge of around $1000 per listing they remove or attempt to remove. This model relies on consumers lacking an understanding of how the credit reporting system works, because:

- a legitimate listing on a credit report cannot simply be removed on request: listings remain on credit reports for a period determined by the *Privacy Act*; and
- if a listing is incorrect, credit reporting agencies are obliged to remove it and cannot charge a fee for doing so. Even if the credit reporting agency refuses a request (because, for example, they believe the listing is accurate), the matter can be considered by an independent dispute resolution scheme, also at no cost to the consumer.

Both cases involve some degree of urgency as well as information asymmetry. A client of a Debt Agreement Administrator will be in considerable financial distress and seeking a way out. Someone looking to 'repair' their credit report will usually be in need of credit and has been rejected because of the listing on their file. This urgency means consumers will be unlikely to spend time navigating an unfamiliar market to find a better deal.

Competition will have limited impact in these markets because even well educated consumers lack basic understanding of how these products work and so cannot usually make an informed decision as to which is the best option for them. They therefore rely on the advice of the business, which has an incentive to provide particular products over others, rather than recommend the option best suited to the consumer.

[9] A Debt Agreement is a personal insolvency arrangement regulated under Part 9 of the Bankruptcy Act. A Debt Agreement Administrator is a person who arranges a Debt Agreement for a debtor, for a commission.

Information asymmetry plus commission selling: extended warranties or add-on finance and insurance

As with credit repair, sales of 'extended warranties' rely on consumers lacking awareness of the protections that the law already offers consumers at no cost. The Consumer Guarantee provisions in the Australian Consumer Law broadly provide that a consumer can receive a refund, repair or replacement free of charge if a product they buy has a defect. There is no firm time limit on the operation of the Consumer Guarantees. They apply for as long as is reasonable in the circumstances of the case—the product purchased, how much was paid, and any representations as to durability are all relevant.

Extended warranties are promoted as giving essentially the same protection as the Consumer Guarantees, but for a fee. An extended warranty will often be offered when a consumer buys whitegoods or consumer electronics. These products usually come with a 'manufacturer's warranty' of around one year—a promise from the manufacturer to replace goods which break down in that period. The salesperson (motivated by the possibility of a commission) will then offer to add an extended warranty provided by a third party that offers cover for another year or two. The offer is tempting because it is made at point of sale (that is, the consumer has no time to consider why the warranty is a shoddy deal), the consumer is unaware or not confident that the law will protect them if the product turns out to be faulty, and the cost of the warranty seems like a small additional cost relative to the price of the product they have bought.

The other asymmetry is that consumers are generally unaware that the warranty's cover is limited by terms and conditions, which, due to the hurried nature of the sale, the consumer has had no opportunity to consider. This is particularly an issue in warranties attached to motor vehicles, which can include very prescriptive servicing requirements.

A similar lack of competition applies to finance provided in-store or in a car yard. Once a consumer has agreed to buy a car, there is no real competition for finance arrangements. The car dealer will be arranging finance offered by one credit provider who has an existing relationship with the dealer. By the point of sale, the consumer will not have any further chance to shop around, particularly if they have been convinced by the dealer that they will not be able to access finance elsewhere, and the deal they have been offered is available 'today only'.

In a more extreme example, it is not unusual to find an extended warranty and multiple insurance contracts (like 'gap' insurance, consumer credit insurance or 'tyre and rim' insurance) added onto motor vehicle finance arrangements provided through a car dealer. These products are often added in without the knowledge or consent of the consumer, with the cost rolled into the instalments the customer pays each month. These insurance contracts can be so limited by conditions and exclusions as to be almost worthless to the consumer, but offer extremely profitable commissions for the car dealer. Data from the prudential regulator demonstrate the claim ratio for consumer credit insurance is as low as 23 cents in the dollar, confirming a profitability level that belies effective competition.[10]

[10] Consumer Action, *Media Release; The numbers show consumer credit insurance is a poor deal for consumers,* 27 November 2013, available at; http://consumeraction.org.au/media-release-the-numbers-show-consumer-credit-insurance-is-a-poor-deal-for-consumers/

There can be no competition on extended warranties and add-on insurance as long as they are sold in a way which intentionally pushes the consumer to make a quick, instinctive decision about a product which is complex and unfamiliar to them.

Pressure sales tactics plus commission selling: in home sales

Consumer Action's legal practice regularly receives complaints about in-home sales. In recent years, products sold through this channel are most commonly educational software and vacuum cleaners, though different products will feature over time.

In 2010, together with Deakin University, we published a report called *Shutting the Gates*[11] which detailed the sales practices involved in in-home sales of education software. In these cases, salespeople gain entry to a consumer's home through a promise to conduct a free assessment of their children's educational ability. In reality, this assessment is a ruse—it is simply there to allow the salesperson to create anxiety in parents that their children are falling behind, creating a need for the product. The sales process then uses a number of psychological techniques to pressure parents into making the purchase.

These packages typically cost many thousands of dollars and are sometimes sold on onerous credit terms or through lengthy direct debit arrangements, causing significant affordability problems. Another variant is that what is passed off to clients as a sale is, in fact, a lease, meaning that clients do not have a right to keep the product at the end of the contracted period.

We also understand from our clients that support services sold with the software, such as tutoring, are often not provided, prove to be sub-standard, or are virtually impossible to access. When parents attempt to cancel the contract, they find that there are substantial fees for cancellation.

Similar business models are used to sell other products both in the home, or in other venues that are off business premises (for example, we know of holiday timeshare and high cost beds which are typically sold in hotels or conference venues).

Competition does not exert any pressure on the price or features of these products, because they are sold using processes specifically designed to pressure consumers into buying something they would not otherwise buy, and often cannot afford. The products sold in this way will often not be available outside of a high pressure sales channel. Prices cannot be found anywhere except the sales presentation, so consumers cannot verify if the price they are paying is reasonable. Even then, the price is not disclosed until the end of the presentation, and is obscured by 'discounts', trade-ins and through a high interest finance deal.

There is little or no competitive pressure on the price or features of any of the products mentioned above. However, we do not believe it is necessarily a useful exercise to try to solve

[11] Paul Harrison, Marta Massi, Kathryn Chalmers and Consumer Action Law Centre (March 2010) *Shutting the Gates: An Analysis of the Psychology of In-Home Sales,* http://shuttingthegates.wordpress.com/the-research-report/

the problems in these markets by promoting more competition. In these examples, the lack of competition is only a symptom of the vulnerability of consumers in these markets, and business models which are consciously designed to exploit those vulnerabilities.

In these situations, it will be far more efficient to design regulation that targets exploitative conduct by traders and actively enforce that regulation. This reduces the incentives for dishonest or exploitative trading and so creates a situation in which competition can exist.

3. Effective competition policy will consider the demand side as well as the supply side of markets

Consumers are the beneficiaries of effective competition, but they also have an important role in driving competition. This being the case, an effective competition policy should focus not only on the supply side but also the demand side of markets.

This argument was put well by Louise Sylvan in her 2006 lecture, *The interface between consumer policy and competition policy*, while discussing 'the category of consumer protection that might be best described as consumer empowerment'. She stated:

> It is the analysis that addresses not the question of 'what does competition do for consumers?' but the equally crucial question of 'what do consumers do for competition?' I call this area of inquiry 'economics for the demand side'. Competition policy is concerned with the supply side structure of markets and the behaviours of firms. Consumer policy starts from the position that the structural soundness of markets should be being properly attended to, and focuses on a well-informed understanding of what's happening on the demand side.
>
> We have all observed markets where consumers seem entirely capable of driving competition, while in other markets, consumers appear to have serious difficulty or some consumers appear to have difficulty. I take it as a given that without consumers activating competition, you don't have competition. As Ron Bannerman has put it so concisely 'Consumers not only benefit from competition, they activate it, and one of the purposes of consumer protection law is to ensure they are in position to do so.'[12]

The Productivity Commission made similar remarks in its *Review of Australia's Consumer Policy Framework*, which led to the reform of the trade practices law:

> As a general rule, competition works best when the bulk of consumers are reasonably well-informed and willing to act on information. To this end, a key goal of consumer protection is to overcome significant information failures that can hinder effective competition. … It is also important to note that good consumer protection benefits good businesses (and their shareholders) as well as consumers.[13]

[12] Louise Sylvan, Deputy Chair, Australian Competition and Consumer Commission, Consumer Affairs Victoria Lecture, 2006, available at: https://www.accc.gov.au/system/files/The%20interface%20between%20consumer%20policy%20and%20competition%20policy.pdf

[13] Productivity Commission, *Review of Australia's Consumer Policy Framework, Inquiry Report No 45,* April 2008, p 28.

Page 11 of the issues paper provides the following summary of the fundamental elements of the National Competition Policy framework developed following the Hillmer review:

1. Limiting the anti-competitive conduct of firms.
2. Legislation should not restrict competition unless it can be demonstrated that:
    a. the benefits of the restriction to the community as a whole outweigh the costs, and
    b. the objectives of the legislation can only be achieved by restricting competition.
3. Structural reform of government monopolies to facilitate competition.
4. Providing for third-party access to significant infrastructure facilities that are essential for competition.
5. Independent prices oversight of government business enterprises.
6. Fostering competitive neutrality to ensure that government businesses do.

The obvious gap in the National Competition Policy framework is that there is no consideration of how consumers might be enabled or encouraged to drive competition.

This can in part be achieved through an effective consumer law which promotes choices which are simple and comparable, marketing and sales practices which are honest and fair (not subject to commissions which distort messaging); and contracts free from hidden surprises (like unilateral price increases, unexpected fees and charges).

We acknowledge that these kinds of measures are the domain of the Australian Consumer Law and so out of scope for the current review. However, it is open for the panel to consider other measures that enhance the ability of the demand side to drive competition, such as:

- ***the role of consumer advocates and dispute resolution processes in identifying competition problems, and the funding of those functions.*** For example, Consumer Action and other organisations regularly identify systemic problems in markets and bring these problems to the attention of regulators, industry and governments. Industry dispute resolution schemes are required by their terms of reference to identify and report systemic issues arising in their casework. These roles could be expanded through, for example, the introduction of 'super-complaints' which bring further transparency to regulatory decision-making and action.

Super Complaints

A super-complaint is a complaint made in the UK by a state-approved 'super-complainant' / watchdog organisation on behalf of consumers, which was fast-tracked to a higher authority such as the Office of Fair Trading (**OFT,** prior to its dissolution on 1 April 2014) or, now, the Competition and Markets Authority (**CMA**). The OFT included responding to super-complaints as one of the diagnostic tools available to it to address market failures and help make the market work well for consumers.

Section 11 of the UK *Enterprise Act* creates the super-complaints mechanism. Consumer bodies that are designated by the UK Secretary of State under this section can make a

complaint to the regulator that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'.[14] The important feature of these provisions is that the making of a super-complaint triggers a statutory obligation for the regulator to respond to the super-complaint within 90 days. The regulator must state how it proposes to deal with the complaint, for example what action (if any) it proposes to take and the reasons for its decision.[15] Such actions might include:

- enforcement action by the regulator's competition or consumer divisions;
- launching a market study into the issue;
- making a market investigation reference to the CMA if there is a competition problem;
- referral to or action by a relevant sectoral (industry) regulator; and/or
- finding the complaint requires no action or is unfounded.[16]

The super-complaint mechanism is not intended for complaints about matters that can be handled directly by existing enforcement powers, particularly single-firm conduct. It instead provides a 'fast-track' system for certain consumer bodies to bring market features harming the interests of end consumers to the regulator's attention.[17] The super-complaints mechanism is therefore another means of ensuring that analysis of demand side or consumer problems takes place as part of an effective competition regime.

For example, UK Secretary of State for Trade and Industry, Patricia Hewitt, said during the second reading on the Enterprise Bill:

> As strong competition is the best form of consumer protection, all our competition reforms are good news for consumers. In particular, we are putting consumer interests at the heart of the new system with our new super-complaints, where the OFT must make a considered response within 90 days to properly investigated complaints from designated consumer bodies.[18]

In practice, the super-complaints mechanism has proved to be an important addition to the UK's competition and consumer laws and plays a central role in initiating market studies and investigations. Several consumer groups have been designated for the purposes of super-complaints, including Which? (the UK Consumers' Association) and Citizens Advice (the National Association of Citizens Advice Bureaux). They have made several super-complaints on matters such as doorstop selling, aged care homes, payment protection insurance and most recently the Scottish legal profession.

In 2011, the New South Wales Office of Fair Trading and consumer group CHOICE entered into an agreement to pilot an 18 month 'Super complaints' project.[19] The project allowed CHOICE to

[14] *Enterprise Act 2002* (UK) s.11(1). Note that the grounds for a super-complaint dovetail with the grounds on which the a market investigation may be undertaken by the CMA.
[15] *Enterprise Act 2002* (UK) s.11(2),(3).
[16] Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003, at 9. The CMA has adopted guidance relating to super-complaints prepared by the OFT: https://www.gov.uk/government/publications/how-consumer-bodies-can-make-super-complaints.
[17] Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003, at 4.
[18] Secretary of State for Trade and Industry, Ms Patricia Hewitt, *Enterprise Bill: Second reading*, Hansard Commons Debates (UK), 10 April 2002, Volume No. 383, Part No. 125, Column 48.
[19] NSW Fair Trading, 'Super complaints', available at: http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_compliance_role/Our_compliance_priorities/Super_complaints.page

present evidence to NSW Fair Trading that a feature of a market for consumer goods or services is, or appears to be, significantly harming the interests of consumers. Fair Trading then researched and assessed the issue and reported on actions that may be taken to address the issue. CHOICE has provided two super-complaints: one on energy-switching sites, and another on free-range eggs. The latter has resulted in a recent agreement among Ministers of Consumer Affairs to develop a standard relating to free-range eggs.[20]

- ***how consumers might be empowered to participate in markets***. For example, allowing consumers better access to their transactional or other data held by businesses will help them understand their spending patterns and make informed choices; or

Use of consumer data: benefits and risks

Use of aggregated customer data has the potential to create benefits for consumers. Where consumers have access to this data in a useable format, it can provide information which helps consumers choose products and services which best meet their needs. The UK mi data initiative aimed to get more private sector businesses to release personal data to consumers electronically, to empower them to make better buying choices.[21]

One local example where this is currently working is in the energy market. The mandatory rollout of smart meters across Victoria has allowed consumers to access their electricity usage data from their energy distributor or retailer. This creates opportunities for consumers to quickly identify where they might be able to save money by reducing electricity use (for example, by quantifying how much power is being used by appliances on standby overnight) or by shifting demand (by moving more use to off peak times). Through comparison services that 'read' the consumer's data, consumers are able to compare different 'flexible' energy tariffs (which charge different rates for energy at different times of the day) based on objective data about when they use energy the most.

However, use of data by businesses to target consumers creates risk and can be anti-competitive. Target marketing is not new, but advances in information technology permit businesses to access consumers' personal information and use complex systems to predict an individual's behaviour. In consumer lending, this technology can be used to identify consumers who are likely to be profitable, tailor and price products that the most profitable customers are likely to accept, and develop strategies to reduce the likelihood that the most profitable customers will close their accounts. The increased use of this technology by large players in a market can not only cause consumer detriment but can entrench market power.

Our report *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry* produced with Deakin University drew on the limited public information about customer management systems, but describes how banks use sophisticated systems to glean intimate

[20] Joint Communiqué, Meeting of Consumer Affairs Ministers, 13 June 2014, available at: http://consumerlaw.gov.au/content/Content.aspx?doc=caf/meetings/006.htm,
[21] See UK Government, The mi data vision of consumer empowerment, available at; https://www.gov.uk/government/news/the-midata-vision-of-consumer-empowerment.

personal details, using information gathered from spending patterns, call centres, product registration and point-of-sale transactions, in order to predict an individual's behaviour.[22]

- ***the development of intermediaries to help consumers choose or increase their power compared to supply side participants***. For example, comparison websites and mass switching exercises (like One Big Switch) have their limitations (commissions can drive poor conduct), but are examples of how consumers can be assisted to make choices in complex markets or maximise their market power. Technology, particularly through smart phone apps and the like, have the potential for 'disintermediation'—that is, connecting consumers directly to the goods and services they want, and reducing reliance on commission-driven intermediaries. The UK mi data initiative, mentioned above, also encouraged businesses to develop apps that will help consumers make effective use of their data.

4. Competition policy should work for everyone, particularly in essential markets

In its review of National Competition Policy, the Productivity Commission outlined a number of key benefits of Australia's micro-economic reform program for consumers. These include improved productivity, sustained economic growth and increased consumer choice. The Commission noted, however, that 'experience with NCP reinforces the importance of ensuring that the potential adjustment and distributional implications are considered at the outset'.[23] The review noted the 'mixed impacts' of reforms on regional communities and adverse impacts on the environment (such as increased greenhouse gas emission from the reform-related stimulus to demand for electricity).

Economic growth should serve not just the majority of Australians, but all of them. Public policy programs must not place such an emphasis on wealth creation that we pay insufficient attention to how we distribute wealth. Further economic reforms must sit alongside of social justice policies that ensure a fair, decent and inclusive Australia. The pursuit of economic efficiency, by governments, is pointless unless it contributes to social ends.

This is particularly important when considering policy for key markets like utilities, banking and insurance. In our view, the benefits of competition have not been spread to all consumers who need these services. For example:

- **banking** consumers who can purchase multiple products will receive bundling discounts, while those with basic needs may lack access to banking and credit at all. While banks have improved their efforts around promoting basic low-fee or fee-free bank accounts for low income consumers,[24] the evidence still suggests that many lower income Australians are paying significant fees and charges for banking services. The now regular *Measuring*

[22] Consumer Action and Deakin University, *Profiling for Profit: A report on target marketing and profiling practices in the credit industry,* 2012, available at: http://consumeraction.org.au/policy-report-profiling-for-profit-a-report-on-target-marketing-and-profiling-practices-in-the-credit-industry/.
[23] Productivity Commission, *Review of National Competition Policy Reforms (Report No 33)*, April 2005, p 150.
[24] See http://www.affordablebanking.info/

Financial Exclusion in Australia[25] monitor finds that the average cost of basic banking in Australia (that is, a basic bank account, a basic credit card, and a general insurance policy—a basic level of service) was $1801 in 2013. This research, based on information on actual account balances and transaction data, confirms that consumers' use of banking services can drive costs, particularly for credit (e.g. not paying back a credit card in full) and transaction accounts (e.g. using foreign ATMs). When it is acknowledged that many consumers with mortgages or investments will be eligible for reduced or waived basic bank fees, it can be seen that the average of $1801 might actually be higher for medium and lower income households. For those that cannot access basic credit from a bank, the cost of exploitative lenders will be far higher again. The research also found that for 8.1 per cent of the population, $1801 in banking costs will amount to 15 percent of their income.

- the rollout of cost reflective pricing in **energy** will allow informed consumers to save money by shopping around for tariffs which suit their usage patterns. However, disadvantaged consumers who have trouble navigating the complexity of energy market offers will tend to remain on expensive and uncompetitive 'standing' tariffs (or alternatively switch from one unsuitable tariff to another through a door to door sale). This outcome can be contrasted with the recent MySuper reforms which provided that disengaged customers would be placed in a superannuation account with lower fees, recognising that they have not bought into a product 'with bells and whistles'; and

- large numbers of Australians, particularly young people and those born in a non-English speaking country remain excluded from access to basic in **insurance**.[26] This is a complex problem but some of the key factors are affordability (both in the sense that the price is out of reach and that measures which make payment easier, like regular payments through direct debit or Centrepay, are more expensive or unavailable), and complexity of the product. Many who have insurance cover are underinsured, because it is almost impossible for most consumers to accurately assess the value of a home and contents, and because comparing different insurance products is a highly complex process.

We believe there is a role for the inquiry to consider how competition policy can not only grow the economy but how the implementation of competition policy can improve outcomes for the most disadvantaged and vulnerable members of the community. One way to do this is to ensure that markets are subject to regular reviews, to understand whether they are operating efficiently and how different classes of consumers are faring. The UK's model for market studies and investigations is recommended.

Market studies and investigations

Market studies and investigations have been part of the competition law framework in the UK for

[25] Centre for Social Impact and NAB, *Measuring Financial Exclusion in Australia*, April 2014, available at: http://cr.nab.com.au/what-we-do/research-and-advocacy

[26] For example, the *Measuring Financial Exclusion in Australia* found that 19.5 per cent of Australians were excluded from basic insurance, with that number 'increasing dramatically' for young people and those born in non-English speaking countries. C Connolly (2013) *Measuring Financial Exclusion in Australia*, Centre for Social Impact (CSI) – University of New South Wales, for National Australia Bank, p 44.

some years. The UK's new competition enforcement regime re-enacts market studies and investigations, and rather than have the OFT undertake market studies which can then be referred to the Competition Commission for investigation, the Competition and Markets Authority (**CMA**) has power to undertake both phases.[27] Sectoral regulators in energy, telecommunications, financial services and others also have power to undertake market studies, and to subsequently refer a market to the CMA for further investigation.

These studies and investigations are a powerful tool available to UK competition regulators to examine markets they believe may not function sufficiently well—even if there is no evidence of unlawful conduct—and to demand wide-ranging changes to how those markets operate, including requiring companies to divest parts of their businesses. This can include consideration of competition-failures, regulation-failures or other factors that impact the effective operation of the particular market. Markets that are currently the subject of such investigations include private health care, cement/ready-mix concrete/aggregates, and statutory audit services. Most recently, the UK energy regulator Ofgem has referred the energy market to the CMA following widespread concerns about the effectiveness of competition in that sector.

5. Reforms of other sectors

Chapter 4 of the Issues Paper asks whether there are opportunities to promote free markets and effective competition in sectors with significant government participation. Should further reform occur, it is important that consumer protection is a core consideration in any plans to open up new markets in areas traditionally dominated by governments.

One area where we currently see this problem is in the private colleges market (that is, providers of certificate and diploma level education). Allowing private colleges to offer these services has presumably created more variety for students, but it has also created opportunities for unscrupulous providers to target vulnerable consumers with courses that are very expensive and have harsh contract terms.

Case study: opening up education to competition

Our client, a single parent, entered into an agreement with a private college in 2010. The full cost of the course fees (almost $16,000) was paid up front because payment by instalments would have cost another $2,500. Our client advises that he didn't understand a lot of the contract and signed where he was told to. One of the clauses of the contract states that no refunds will be made once the course a student is enrolled in has commenced.

Our client made the required payments and began attending classes in 2011. After attending approximately 10% of the course hours, our client was forced to defer to care for a family member who had become seriously ill. Our client is now the carer and financial provider for this family member, as well as for his child. At the time of deferring, our client was not notified that there would be extra fees payable when he chose to re-enter the course.

[27] Competition and Markets Authority, Market Studies and Market Investigations: Supplemental guidance on the CMA's approach, January 2014, available at: https://www.gov.uk/government/publications/market-studies-and-market-investigations-supplemental-guidance-on-the-cmas-approach

Our client later contacted the college inform them that due to his continued hardship he would not be able to continue the course. Our client asked to withdraw from the course and be refunded part of his course fees. He was told that, under the agreement he had signed, no refunds would be made. In early 2012, our client again made contact with the college in the hope of re-starting the course and thereby mitigating his loss. At a subsequent meeting our client was informed that there would be a $1500 fee for the re-entry. The college made undertakings to contact our client about the details of a possible re-entry but this contact was never made.

Consumer Action Law Centre wrote to the college on our client's behalf requesting refund of our client's course fees. Solicitors for the college responded offering our client a chance to re-enter the course without the imposition of a deferment fee. However, our client advised that he is no longer in a position to restart the course. Ultimately as the client was unsure whether he wished to take his matter to VCAT, no further action was taken by Consumer Action on behalf of the client.

This case study outlines how poor conduct and lax consumer protection can lead to bad market outcomes. Poor consumer protection can negatively impact effective competition as well—it can be anti-competitive in that it gives legally non-compliant traders an anti-competitive advantage over those that do comply with good conduct standards. It can also lessen consumer confidence and trust in the market, as well as community acceptance of deregulation.

When opening up government services to the private market, it is our experience that governments have generally intended to create regulatory systems focused on service quality issues rather than general consumer protection. For example, our experience with private colleges issues is that education regulators focus on education standards (which we agree is important) but do not take interest in complaints around miss-selling, contract terms and conditions or dispute resolution. There can be significant confusion when raising complaints about these providers with general consumer protection regulators, who tend to refer issues to the industry-specific regulator. Rather than there being duplication, both regulators can ‘vacate the space’ giving oxygen to the misconduct, reducing consumer trust in these emerging markets. Rather than managing these problems after the fact, governments need to take the time to consider what consumer protection issues are likely to arise when opening new markets and design regulation (and regulators) which is capable of protecting vulnerable consumers.

6. Impediments to Competition

This section responds to chapter two of the issues paper, which asks for feedback on whether there are unwarranted regulatory impediments to competition that should be removed or altered.

Improving the Regulatory Impact Assessment (**RIA**) process

New legislation introduced in the Commonwealth and most states and territories is usually submitted to a process of assessing the probable impact of the regulation on the market. The purpose of these assessments is to measure the likely benefit of introducing the regulation and weigh it against the costs that regulation will create on business, governments and the community more broadly (including, for example on consumers).

We approve of the objectives of this process, but we find that the RIA process tends to focus more heavily on the costs regulation will create for business than on the benefits that regulation will provide or on the cost to affected groups of retaining the status quo. This is because the benefits of regulation (or the detriment of retaining the status quo) are very difficult to quantify, but costs to business are quantified relatively easily. In our experience this means that consumer benefits and costs are much less likely to be properly assessed through the RIA process and thereby carry less persuasive weight than costs.

The outcome of this detriment focus is that the RIA process is less able to judge if proposed regulation will do what it is designed to do—that is, create a particular benefit. It also brings the serious risk that where a range of regulatory options are available the system is likely to prefer solutions that impose lesser costs on business with insufficient focus (or capacity to judge) the likely effectiveness of the full range of options. It is only by counting the range of costs and benefits that true assessment can be made of whether net benefit arises.

This has been exacerbated by the recent reforms to the RIA process at the Federal level. The most recent Guide to Regulation[28] is prefaced by a number of key principles, one of which is that the cost burden of new regulation must be fully offset by reductions in existing regulation. The clear concern here is cost to business rather than cost to the broader community. Our understanding of this requirement is that this offset must be found before a policy or law is considered for the RIA process. Even if a RIA demonstrates an overall benefit to the community of a particular policy option, it may not proceed where the policy's direct cost to business isn't offset by a reduction in cost. While we recognise that the starting point of this new guideline is that 'there is too much regulation and it is costly for business' (and, even if we accepted that view), we do not comprehend how regulation is to be developed to support new consumer markets or opening up government services to competition, where there is no or limited existing regulatory burden to remove.

We believe that Australian RIA processes need to have its focus on the overall benefit or cost of regulation to the community, rather than solely business. We also believe that there should be improvement to the level of guidance on assessing the less tangible aspects of consumer detriment and the benefits of regulation. We suggest this kind of guidance could be based on the OECD's Consumer Policy Toolkit[29] and Treasury's companion to the toolkit.[30]

Identifying and reviewing impediments to competition

As noted above, we recommend that the Panel consider whether giving regulators 'market study' powers could help identify and respond to impediments to competition. As outlined above, an existing model that the panel could consider is the UK's Competition and Markets Commission, which may assess markets in which there are suspected competition problems, and require market participants to take remedial action.[31]

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[28] Australian Government, 'Australian Government Guide to Regulation', available at www.cuttingredtape.gov.au

[29] The toolkit can be accessed here: http://www.oecd.org/document/34/0,3746,en_2649_34267_44074466_1_1_1_1,00.html

[30] *Consumer Policy in Australia: A Companion to the OECD Consumer Policy Toolkit* http://www.consumerlaw.gov.au/content/consumer_policy/downloads/Companion_to_OECD_Toolkit.pdf

[31] Competition and Markets Authority (July 2013) *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach*, para 1.2

Pro-competitive consumer protections

The issues paper asks whether there are regulations governing the sale of goods and services for health, safety or environmental reasons whose purpose could be achieved in a manner more conducive to competition. We believe that such considerations should be left for regulatory impact assessment processes (described above), which should include consideration of whether a policy reform impacts competition.

That said, we also think that the creation of minimum standards regarding health, safety or the environment—whether voluntary or regulated—do not negatively impact competition. Minimum standards impact all businesses equally, but importantly they work to protect consumers, reduce the potential for a small number of unscrupulous players tainting the industry and create conditions for true engagement with the marketplace. Minimum standards work best when implemented early and when developed in consultation with consumer groups, industry and government.

7. The Competition Law

This section responds to chapter five of the Issues paper.

Section 46: Misuse of market power

Consumer Action supports reform to section 46 in the Act. Court proceedings alleging misuse of market power under section 46 of the Act have had 'an extraordinary lack of success'.[32] Predatory pricing conduct, in particular, has proved very hard to address, especially following the *Boral* case in the High Court.[33] Leading economists Niblett, Gans & King noted in 2004 that

> …a firm that has an ability to behave in a way that is detrimental to competition over the longer term…appears to be exempt from a claim of abuse of market power under section 46.[34]

Establishing that a firm has 'a substantial degree of power in a market' has proved to be a significant stumbling block in previous cases under section 46 alleging that a firm's sustained price-cutting conduct constituted predatory pricing. The adoption of the 'substantial share of a market' approach in the 2007 'Birdsville amendment' to the Act (which introduced subsection 46(1AA)) attempted to address this problem, although there has been debate as to whether this was an effective means to do so.[35]

[32] Merrett, Alexandra, 'The court speaks for itself: what Australian decisions say about assessing market power for the purposes of s 36 of the TPA', (2004) 11 *Competition & Consumer Law Journal*, page 2.
[33] *Boral Besser Masonry Ltd v Australian Competition and Consumer* Commission (2003) 215 CLR 374.
[34] Niblett, Anthony, Gans, Joshua & King, Stephen, *Structural and Behaviorual Market Power under the Trade Practices Act: An Application to Predatory Pricing*, Melbourne Business School, The University of Melbourne, 2004, page 2.
[35] See, eg, Hay, George A. & Smith, Rhonda L, 'American and Australian Approaches to Exclusionary Conduct', Cornell Law School, Legal Studies Research Paper Series, *Melbourne University Law Review* [Vol. 31 2007], page 1121; Cambell, Garth, 'The big chill from Birdsville', [November 2007] *Law Society Journal* (Law Society of New South Wales).

While there has only been one court decision that has failed by reason to establish a proscribed purpose,[36] given there are such limited cases that come before the courts, we wonder whether this is due to the high bar required in establishing such a proscribed purpose. An effects test may be better suited to ensuring anti-competitive conduct is proscribed, and we encourage the Panel to investigate the need for such a test.

Consumer Action also recommends the Panel investigating whether divestiture should be a remedy for misuse of market power.[37] There is a risk that large fines can be seen to be a 'cost of doing business'. Another option may be a fine that is some multiple of the profits obtained by the relevant business—in the recent Review of the Enforcement Provisions of the National Energy Laws, it was recommended that the maximum penalty for contravention of the rebidding rule be set by reference to a multiple of three times the gains derived from a contravention.[38]

Unconscionable and unfair conduct

We note that the recent ACCC action against Coles alleging market misconduct was taken under unconscionable conduct provisions rather than under Part IV of the CCA. This perhaps demonstrates the point above that the misuse of market power provisions are too restrictive.

The issues paper asks whether existing unfair and unconscionable conduct provisions work effectively. We note that it asks this question only insofar as they relate to small business. While our experience is in consumer issues, it is our view that there would be value in extending the prohibition on unconscionable conduct to unfair conduct. This would help both consumers and small businesses by making the law more accessible—small businesses and every day consumers are far more likely to know the meaning of 'unfair' compared to 'unconscionable', and that could mean they are more likely to use it to resolve disputes without reference to legal forums.

A prohibition on unfair trading would be more adaptable to problematic and exploitative business models, compared to the prohibition on unconscionable conduct. There are a number of exploitative business models, some facilitated by regulation, that have been able to prosper despite the prohibition on unconscionable conduct. Motor vehicle leasing (particularly Motor Finance Wizard[39]), payday lending, funeral insurance, and vendor terms home ownership schemes are a number of such models that have survived.

Unconscionable conduct requires a very high standard of wrongdoing, with courts finding that unconscionability 'requires a high level of moral obloquy' or conduct which is 'highly unethical', and that it is not sufficient that the conduct was 'unfair, unjust, wrong or unreasonable'.[40] Further, the prohibition against unconscionable conduct generally targets individual transactions, and not systemic business practices (though amendments to the provision make it clear that the prohibition is capable of applying to a system of conduct or pattern of behaviour).

[36] RP Data Limited v State of Queensland [2007] FCA 1639
[37] Divestiture is a remedy available in relation to mergers, ss 81 and 81A, CCA.
[38] NERA and Allens Linklaters, *Report – Review of Enforcement Regimes under the National Energy Laws* (December 2013), available at: http://www.scer.gov.au/workstreams/energy-market-reform/review-of-national-enforcement-regimes/
[39] See http://consumeraction.org.au/motor-finance-wizard/.
[40] See for example Consumer Affairs Victoria v *Scully* [2013] VSCA 292, but cf *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

Examples of prohibitions on unfair trading exist in other jurisdictions, and these commonly focus on conduct that distorts the economic interests of consumers. These include section 5(a) of the Federal Trade Commission Act (and its policy statement on unfairness) and the EU Unfair Commercial Practices Directive. Such prohibitions support effective competition in markets.

Third line forcing

The panel should consider whether the prohibition on third line forcing in section 47 of the CCA is operating effectively. In our view this provision is too easily avoided through 'bundling' arrangements to be effective.

In the energy market, bundling products is an attractive marketing tool as it creates a single multi-dimensional product that gives retailers greater pricing flexibility. In markets where competition is low the potential for consumer detriment being caused by product bundling is high.

For example, consumers in the Australian Capital Territory wanting to sign up to a particular market contract with electricity retailer ActewAGL, have to accept the bundling of other products and services, including agreeing to a land line telephone contract, in order to receive the savings on offer.

Another example is bundling of home building insurance in residential villages for retirees. In one case we have seen, residents are bound by their contract to pay for home building cover bought by the village manager. The contract includes the safeguard that management must buy cover which is competitively priced. However, residents are not in any position to know whether the process is providing them with value for money (they are simply told that cover was arranged through a broker), there is no opportunity for residents to tailor cover to their needs, and there is a lack of transparency on how claims are processed.

Bundling of products and services is a legitimate innovation by suppliers, and can lead to more competitively priced goods and services. However, it can have serious anti-competitive effects where it is practiced by suppliers with significant market power, leaving consumers with little ability to exercise their own market power by choosing another supplier.

Secondary boycotts

The Commonwealth Government has recently suggested that the secondary boycott provisions of the CCA may be amended to prohibit secondary boycotts related to environmental protection. Coverage in *The Australian* reported that

> The timber industry has long complained about green groups organising boycotts and campaigns to pressure their customers not to accept products sourced from so-called high-conservation-value forests. The tactic has been used successfully in Australia and in Japan to pressure timber companies such as Gunns and Ta Ann to shift out of contentious forest areas and to adopt top-flight green certification.[41]

[41] 'Companies to get protection from activists' boycotts', Matthew Denholm, September 23 2013 Accessed 13 June 2014 from http://www.theaustralian.com.au/national-affairs/companies-to-get-protection-from-activists-boycotts/story-fn59niix-1226724817535

This kind of proposal is of considerable concern, whichever industry is involved. Whatever views one holds about sourcing timber from the forests in question, it cannot be a bad thing for consumers to be made aware of a business practice that may influence their purchasing decisions. Consumers have the right to purchase (or not purchase) any goods or services on any criteria they think are relevant. As long as the information being disseminated is not untruthful and a secondary boycott is otherwise lawful and non-violent, this process allows consumers to send accurate signals to the market.

Consumer Action has long held concerns that the existing exemptions from the secondary boycott provisions (for the purposes of consumer protection and environmental protection, found in sub-section 45DD(3)) could be construed narrowly, given there is no definition of these terms in the legislation. Further, there is a risk that a consumer organisation acting alone is at risk of breaching the secondary boycott provisions. This is despite section 45D of the CCA stating that a person must act in concert with a second person before they can be found to be engaging in an illegal boycott. Despite the requirement for two persons to be acting in concert, a single organisation could be in breach of the provisions, as the organisation (the first person) may act in concert with an employee of that organisation (the second person).

There is no benefit to competition in restricting a secondary boycott designed to provide consumers with information about a particular product or service. On the contrary, it is a protectionist response—it shields traders who are unwilling or unable to respond to customer preferences.

Consumer Action recommends that the provisions relating to secondary boycotts be removed from the CCA except where they involve unfair commercial practices by a competitor. Should this not be adopted, we recommend that the legislation be updated to clarify that the provisions are not intended to apply to social or political conduct that is in the public interest.

Mergers and acquisitions

The panel should consider whether section 50 of the CCA is capable of preventing significant concentration in key markets. Recent history—such as the acquisitions of Macquarie Generation by AGL[42] and Wesfarmers by Insurance Australia Group—create reason for doubt. Both markets are already concentrated and neither demonstrate effective competition. As noted above, market study powers may provide for a more effective process to consider the effectiveness of competition in a particular market, rather than waiting for an acquisition in a market to trigger consideration of whether there is a substantial lessening of competition.

Authorisations and notifications—the case of voluntary industry codes

The panel should consider whether a higher standard should be set for approval of voluntary industry codes. Voluntary industry codes involve members of an industry coming together to set some common standards of conduct. Authorisation under Part VII of the CCA is sought for conduct that would otherwise be anti-competitive because it involves competitors acting in concert.

[42] Noting that this merger authorization is currently subject to a decision of the Australian Competition Tribunal.

We approve of the general principle behind the authorisation and notifications scheme—that the law needs to be flexible enough to permit anti-competitive conduct where the detriment caused by the conduct is outweighed by the benefits. However, the process seems to grant authorisations even if there is only an insignificant public benefit, as long as it is considered that there is no detriment.[43] Our experience with industry codes in energy door to door sales as well as direct marketing are discussed below. While on decision in the Australian Competition Tribunal did require that the public benefits to support authorisation 'must be more than negligible', we submit that this is insufficient to ensure code authorisations deliver meaningful consumer protections.

The process could be improved by requiring that industry codes must be expected to raise industry standards to a significant degree, or require signatories to meet a standard significantly higher than the law already requires. For example, ASIC's Regulatory Guide 183 (regarding approval of financial services sector codes of conduct) considers that a code should respond to identified and emerging consumer issues, deliver substantial benefits to consumers, raise the standards of the relevant industry sector and complement existing legislative requirements.[44]

Energy Assured Limited's Energy Assured Code of Practice

The Energy Assured Code of Practice is an 'industry initiative to ensure the best practice of face to face sales of energy contracts'. When Energy Assured Limited (**EAL**), the industry peak for Energy Retailers originally requested ACCC to authorise the code, we recommended the ACCC refuse on the grounds that the code did not create any new consumer protections, and could create public detriment.[45] Detriments we identified included consumer confusion as to complaints handling, the fact the code could hide rather than address systemic misconduct relating to energy marketing, and consumer misapprehension that ACCC "authorisation" means that the code has been assessed as effectively protecting consumers.

Importantly, the code did not deal with the central issue driving poor conduct in the door-to-door sales industry, that is, conflicts of interest caused by commission-based sales which drive pressure selling. This was a key issue identified in submissions to the initial authorisation application, and in the ACCC's initial draft decision. Further, the code did not make energy retailers responsible for any misconduct of sales agents—instead it put primarily responsibility on the sales agents themselves by imposing a framework for deregistration (sales agents could subsequently find work with retailers that were not members of the code).

The initial authorisation found, however, that there were very limited public detriment resulting from the code. While noting there were risks of 'public detriment arising from consumer confusion, or a lack of transparency and procedural fairness', the ACCC concluded that there was limited public detriment due to steps EAL had taken.[46] Given there were only low levels of

[43] We discuss this in more detail in our report *Defining 'Social Benefit': Social and Environmental Considerations in Part VII of the* Trade Practices Act 1974 *(Cth)*.
[44] At RG 183.3-183.4.
[45] This submission is available here:
http://registers.accc.gov.au/content/index.phtml/itemId/954326/fromItemId/278039/display/submission
[46] *Determination: Applications for Authorisation lodged by Energy Assured Limited in respect of a scheme to self regulate door to door energy sales*, 23 June 2011 (Auth number A91258 and 91259).
http://registers.accc.gov.au/content/index.phtml/itemId/954326/fromItemId/401858/display/acccDecision

public detriment, the code only required a relatively low level of public benefit before it was authorised. While in its final decision, the ACCC referenced commentary from the Australian Competition Tribunal that any net benefit must be 'more than a negligible benefit', the fact that the code did not deal with the central conflict of interest issue before it was authorised indicates that the authorisation process was largely ineffective in improving consumer protection standards in the industry.

It is important to realise that the existence also inhibited the development of more substantial consumer protections. In 2012, a Do Not Knock Register Bill was introduced into the House of Representatives which, if enacted, would have provided for a simple register through which consumers could opt out of door-to-door marketing, operating in a similar way to the Do Not Call Register. A House of Representatives Economics Committee Inquiry recommended against the passing of the bill. One reason for this recommendation was the existence of recent industry self-regulation. [47]

When the code was submitted for revocation and substitution in 2013, we opposed approval again because:

- the Code still did not offer, and never attempted to offer, any protection that is not already offered by the law;
- the Code had had no noticeable impact on consumer outcomes. Between November 2011 and November 2013, Consumer Action referred 399 consumer complaints to the ACCC about misconduct by door to door salespeople across all industries. Forty per cent of these complaints were against traders that would have been covered by the code.
- analysis of these complaints suggested that none of the consumer complainants were aware of the EAL Code; and
- In the period from 2011 to 2013, ACCC enforcement of the Australian Consumer Law had created significant consumer benefits. That is, the existing framework was already getting results better than the industry code.

Noting these concerns, the ACCC re-authorised the code but required substantial improvements.[48] These included a stronger focus on the responsibility of energy retailers themselves to comply with the Energy Assured standards beyond disciplining individual sales agents.

ADMA Direct Marketing Code[49]

In 2003, the Australian Direct Marketing Association (ADMA) Code of Practice was widely criticised as lowering consumer protection standards in key areas such as consumer disclosure, refund policies, independent dispute resolution and privacy protection. If the code had been

[47] House of Representatives, Standing Committee on Social Policy and Legal Affairs, *Do Not Knock Register Bill 2012*, para 1.107. http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/bill%20do%20not%20knock/report/report.htm

[48] *ACCC reauthorises energy code of practice*, ACCC Media Release, 6 June 2014. http://www.accc.gov.au/media-release/accc-reauthorises-energy-code-of-practice

[49] The following is an excerpt from Consumer Action, Social and Environmental Considerations in Part VII of the Trade Practices Act 1974, August 2007, available at: http://consumeraction.org.au/policy-report-social-and-environmental-considerations-in-part-vii-of-the-trade-practices-act-1974-cth/

tested against any consumer standard prevalent at the time (e.g. ASIC's standards for dispute resolution[50], or State and Territory consumer protection legislation regarding direct marketing) it would have failed a basic test of equivalence.

However, because ADMA was able to argue that the anti-competitive detriment was small, they only needed to show a minimal public benefit. The ACCC considered itself unable to measure the Code against higher standards of consumer protection. This resulted in a Code with very low consumer protection standards receiving ACCC authorisation—causing confusion amongst consumers about whether the Code was 'endorsed' in some way by Government, and causing delay to other forms of regulation of direct marketing.

Remedies, powers and penalties

As noted above, we support investigation of alternate remedies for breach of competition laws, such as divestiture and disgorgement of multiple-times profits.

We similarly support efforts to simplify or encourage private enforcement of competition laws. A mix of public and private enforcement and remedies provisions is desirable. It provides a more flexible enforcement system that does not rely solely on the state to regulate and enforce laws, nor does it leave remedies solely to individuals and businesses to pursue through private actions.

Too much reliance on private actions taken by individuals or businesses can be socially regressive, because individuals generally, and low-income and disadvantaged consumers in particular, are less likely to take action on their own behalf. In addition, individuals are at a disadvantage in the legal system to 'repeat-player' companies with much greater resources.

On the other hand, relying principally on governments or regulators to enforce the law is also a risk, because public enforcement can tend to concentrate on issues affecting wealthier consumers or business interests due to social and political pressures. In addition, public agencies simply do not always take action.

The CCA does not currently allow the ACCC to seek redress for businesses or consumers harmed by breaches of the CCA competition provisions, other than identified, individual persons who have provided consent to the ACCC's application on their behalf in writing before the application is made.[51] In practice this mechanism has simply not been workable and has meant the ACCC has been unsuccessful in attempting to obtain redress even where a contravention is made out.

The Australian Consumer Law (**ACL**) has amended this situation with respect to breaches of the consumer protection provisions. The ACCC is now able to seek "orders to redress loss or damage suffered by non-party consumers" (section 239). Consumer Action was one of the

[50] See for example ASIC Regulatory Guide 139 - *Approval of external complaints resolution schemes*, at https://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg139-published-13-June-2013.pdf/$file/rg139-published-13-June-2013.pdf

[51] Sub-section 87(1B), CCA.

principal stakeholders advocating for this change and we strongly support it. We think there is scope to consider extending this new mechanism to breaches of the competition provisions.

This provision can work well with *cy pres* remedies, as it is inherent to the provisions that parties for whom redress is sought are not necessarily individually identified. *Cy pres* is a legal doctrine, meaning literally "as near as possible", and in effect it enables compensation to be aggregated and refunded to a cause that relates to the needs of the affected parties generally. In this way, compensation is achieved without requiring inefficient processes to identify and refund every affected party. Instead under the doctrine of *cy pres* it is possible to compensate consumers at large by ensuring the businesses paying a fine into a fund—precedence exists in the very establishment of Consumer Action's predecessor, the Consumer Law Centre Victoria.[52]

Civil proceeding orders available to the competition regulator should be expanded to allow it to seek compensation for consumers by way of *cy pres* orders or settlements. When consumers have suffered loss as a result of market failure, and that loss cannot be apportioned back to those consumers individually, it is appropriate that the money is directed to a purpose that serves the interests of consumers. Such powers should not be limited to educational initiatives but rather a wide suite of options could be available including research, provision to organisations that aggregate and represent the interests of consumers or litigation funding for public interest matters. This research representation and advocacy ought to lead to fairer marketplaces which ultimately should lead to fewer consumers suffering loss from breaches of competition law in the first place.

One legislative model for this exists. The Victorian ACL implementation legislation expressly provides for the Victorian Consumer Law Fund into which compensation payments can be made.[53] The provisions expressly provide for a Court to be able to order that surplus funds after distribution to non-party consumers be left in the Fund (for grant making for consumer purposes) or be treated in any other way considered appropriate by the Court.

Administration of Competition Policy

This section responds to chapter six of the issues paper.

<u>The ACCC as competition and consumer protection regulator</u>

Consumer Action strongly supports the ACCC remaining responsible for both competition and consumer protection, and we reject any move to split the regulator's functions. As noted elsewhere in this submission, effective competition and consumer protection are mutually reinforcing. Indeed, consumer protections are designed to empower consumers to participate in markets so that they can benefit from competition among businesses.

There are risks to both functions should they be split between different bodies. For example, a competition regulator is unlikely to closely consider the demand-side of markets as it conducts

[52] Information about the action that led to consumer payouts and the provision of $2.25m to establish the Consumer Law Centre Victoria can be found here: http://consumeraction.org.au/resources/hfc-financial-services/.
[53] *Australian Consumer Law and Fair Trading Act 2012* (Vic) section 134.

its work. A consumer protection regulator might become overly focused on restricting some forms business conduct to the immediate benefit of consumers, thereby inadvertently limiting the ability of effective competition to satisfy consumer preferences over the longer term. A single regulator with a focus on the long term interests of consumers is more likely to benefit both consumers and the broader economy.

In 2013, Consumer Action published a report, *Regulator Watch: The enforcement performance of Australia's consumer protection regulators*.[54] While this report was primarily in relation to consumer protection enforcement rather than competition enforcement, it is relevant when considering the performance of the ACCC. The report rates a number of consumer protection agencies and names the ACCC as only one of two agencies whose enforcement is 'trending up'. The report also comments positively in terms of ACCC' enforcement culture and development of an enforcement policy.

The Regulator Watch report also identified a number of influences on the enforcement culture of regulators that may raise barriers to good practice. We encourage the Panel to consider these matters as relevant to its consideration of the administration of competition law.

Influences on regulators[55]

Regulator location: Where the regulator sits in an agency that also has business development or business promotion functions, there is a risk that the enforcement culture will be undermined or unjustifiably softened.

Narrow industry specific remit: Where the remit of the regulator is too narrowly focused it can both lose sight of the ultimate aim—to benefit consumers—and fail to learn from the experience of regulators in other industries or with broader remits: A regulator that is industry-specific may be at a great risk of industry capture. It may also result in an insufficient breadth of view to borrow effective tools or solutions from other markets.

Potential conflicts with other functions of the regulator Such conflicts can undermine a regulator's enforcement effectiveness: do the other functions of the regulator (for example as a conciliator or licensor) impact on enforcement decisions?

The regulators attitude to media coverage and its strategy and capacity to correct wrong impressions in the media Concern about media reporting of unsuccessful prosecutions can make regulators overly cautious. They need to stake their ground and explain why less certain prosecutions or civil actions are appropriate in some cases, and why a 100% win rate would be indicia of failure not success as a regulator.

Concerns about too much "red tape" impeding business Regulators are sometimes criticised for taking "disproportionate" action against business. Often, this sort of criticism considers only the interests of the affected business and not the actual or potential harm caused to consumers that the enforced regulations seeks to protect. This is not to say that regulators should not ensure that their resources are well targeted. But fear of criticism may improperly deter some regulatory

[54] Available at http://consumeraction.org.au/new-report-regulator-watch
[55] *Regulator watch*, page 128-9.

actions. Further weighing against any such reluctance is the value in avoiding an apparent need for additional regulations to address a problem that could have been fixed or ameliorated through good enforcement of current law.

The ACCC and AER

We strongly oppose any proposal to separate the Australian Energy Regulator (**AER**) from the Australian Competition & Consumer Commission (**ACCC**).

In our view, there are significant benefits from keeping the ACCC and AER together. Not only are there operational efficiencies in the AER and the ACCC sharing resources (the two regulators share many functions and it means that the AER is able to be represented in a number of state capital cities), it is also our view that regulators that focus narrowly on one industry are at significant risk of becoming 'captured' by industry interests. A broader view across different industries is likely to keep the regulator independent and focused on the interests it exists to serve—that of the long-term interests of consumers.

The Australian Competition Tribunal

The Australian Competition Tribunal (**the Tribunal**) needs to be made more accessible to consumers if it is to be in a position to make fully informed decisions on the matters coming before it.

Appeal of Victorian Energy Network Prices 2011-2015

In 2010, the AER determined Victorian energy network prices following a consultation process which considered views of consumer representatives including Consumer Action and the Consumer Utilities Advocacy Centre (CUAC). All five Victorian energy distributors sought a merits review of the AER's decision from the Tribunal.

Following the announcement of the distributors to appeal the AER's decision, Consumer Action and CUAC lodged a notice to intervene in the Tribunal's proceedings.

Despite significant efforts by both Consumer Action and CUAC, on the basis of legal advice we withdrew our notice to intervene in January 2011. The barriers to our continued intervention included:

- significant financial resources required to participate effectively, such as for senior counsel and expert technical advice of worldwide standing;
- the timelines for developing applications for leave, and the fact that applications had to be developed over the Christmas / New Years' period, when advice was hard to access;
- the National Energy Law requirement for consumer representatives to be granted leave before they intervene;
- the National Energy Law criteria for intervention;
- potential risks faced by consumer interveners of a costs order.

All of these barriers meant that the Tribunal lacked an informed consumer perspective on a decision which had serious implications for the cost of living for Victorian consumers.[56]

While there have been subsequent reforms to the procedures of the Australian Competition Tribunal as they relate to energy distribution pricing determinations, there is not yet evidence that the Tribunal is well-placed to consider the interests of consumers. In 2013, amendments were passed requiring the Tribunal to 'consult' with consumers before reaching a determination.[57] While these amendments have not been tested, given the Tribunal operates more like an arm of the Federal Court than an investigatory body, we are not confident in its ability to do this. Our more recent experience with its consideration of merger authorisations confirm this—while the Tribunal calls for consumer submissions as part of a merger authorisation, it is not clear how these submissions are considered. Rather, the Tribunal gives far more consideration to 'evidence' proffered by legal or other experts, through affidavits drafted by top-tier law firms. Relying on this type of evidence alone will inhibit the ability of the Tribunal to understand consumer concerns and views.

State regulators

The panel should consider whether state regulators in key markets have the necessary powers. Where both Commonwealth and state regulators are active in the same market, it is important that they have similar powers to ensure consistent responses to trader misconduct. For example, our experience with the Victorian Essential Services Commission has generally been very good (in particular, the ESC's openness to consideration of the consumer perspective) but it seems to us that they can be hamstrung by a lack of enforcement powers. Despite significant misconduct identified by energy retailers it supervises, the ESC has only ever pursued administrative enforcement action, rather than seeking civil penalties and/or other legal action.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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[56] May Mauseth Johnson, Consumer Action Law Centre and Consumer Utilities Advocacy Centre (August 2011) *Barriers to Fair Network Prices: An Analysis of Consumer Participation in the Merits Review of AER EDPR Determinations*.
[57] *Statutes Amendment (National Electricity and Gas Laws — Limited Merits Review) Act* 2013 (SA)