

26 May 2015

Submitted online via treasury.gov.au

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

Dear Sir/Madam

Competition Policy Review Final Report

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Final Report of the Competition Policy Review.

Key points

- Competition policy should promote the long-term interests of consumers. Governments should more clearly acknowledge and facilitate the role empowered consumers play in driving effective competition.
- User choice and competition should not be the central principles for human services delivery. Access and equity in addition to consumer voices are defining considerations in these areas.
- The use of data by industry to profile and target consumers can drive economic inequality. Consumers should have the right to receive their personal and transaction data in a standardised and machine-readable format.
- A new market study power should be included in our competition law, with the Australian Competition and Consumer Commission (**ACCC**) having power to undertake such studies.
- A “super complaint” mechanism should be established to facilitate consumer organisations initiating a market study.
- The governance arrangements of the ACCC should not be dramatically altered, and the positions of Deputy Chairs for consumers and small business should be maintained.
- The ACCC should not be limited in its dealings with the media.
- The ACCC should remain responsible for competition, consumer matters and economic regulation. Should economic regulation be moved to a new access and pricing regulator, it should be given consumer experience at board level and should have operations designed to allow and encourage consumer input.
- Any new Australian Council for Competition Policy should be specifically constituted to involve consumer interests.
- The procedures of the Australian Competition Tribunal should be improved to facilitate direct engagement with consumer representatives.

Consumer Action Law Centre

Level 7, 459 Little Collins Street Telephone 03 9670 5088
Melbourne Victoria 3000 Facsimile 03 9629 6898

info@consumeraction.org.au
www.consumeraction.org.au

Our comments are detailed more fully below.

About Consumer Action

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

1. Competition principles

We strongly support the principle that competition policies, laws and institutions should promote the long-term interests of consumers. This principle should be recognised by all governments. To meet this principle, however, much more effort needs to be focused on ensuring that consumers are provided the pre-conditions for effective exercise of choice. These include appropriate and adequate consumer protections (including effective dispute-resolution), policies that empower consumers in the marketplace, and other measures that aid consumer decision-making. We encourage governments to accept the **Recommendation 1** but only on the basis that the role of consumers in promoting and ‘activating’ effective competition be more clearly stated.

Recommendation:

- That Government accept that competition policies, laws and institutions should promote the long-term interests of consumers, and that empowered consumers play an important role in driving effective competition.

2. Human services

We do not support the adoption of choice and competition as the primary principles informing human service delivery and design. Human service delivery is far more complex than most consumer goods and services, and effective delivery relies on careful planning, cooperation and evaluation to deliver quality and accessible services. We suggest that a contestable market can be at cross purposes with the collaboration required for such planning, cooperation and evaluation.

The experience with market principles in human service delivery, for example vocational training or employment services, has not been positive for many consumers. Rather than consumer choice being at the heart of service delivery, provider interests have been prioritised, negatively impacting consumers as well as government policy objectives. In the vocational training sector, the availability of government grants as well as government-sponsored loans has led to a strong incentive for private service providers to take advantage of many consumers. As noted in our submissions to the Competition Policy Review and more recently to the Senate Committee

examining the vocational training sector¹, too much faith has been provided in a framework which delivers a contestable supply side without considering the impact for consumers.

We do not mean to say that consumer choice is not important in human service delivery—it can be. Where human service delivery agencies factor in the consumer voice into their planning, collaboration and evaluation, services can be of a higher quality and meet the needs of consumers. There are various measures in which this can be achieved through, for example, rigorous consumer feedback and advocacy mechanisms. However, relying on competitive choice alone to deliver good consumer outcomes in human services delivery is fraught.

We support the finding in the Final Report that where user choice is adopted, policies should be designed to align the incentives of purchase advisers with the best interests of consumers. This should mean that commission-based selling arrangements and other structures which mean that business interests are preferred to consumer be banned or severely curtailed. We believe that rather than accept **Recommendation 2**, Governments undertake further consideration of when and how consumer choice can be effective in human service delivery, and the pre-conditions required for effective choice.

Recommendations:

- That Governments look further at the issue of the consumer voice in human service delivery, and not rely on market principles alone.
- That Governments ban commission-based selling arrangements and other structures which mean that human service delivery agencies have incentives to act in their own interests rather than consumers.

3. Informed choice and access to data

We strongly support **Recommendation 21** that consumers should be able to access their data and information in an efficient format to improve consumer choice. We submit that a standard format for the provision of data to consumers would improve efficiency. Australian Privacy Principle 12 allows consumers the right to request personal information held by businesses. We expect that different businesses are all developing their own strategies for providing this information to consumers, and that use of the information for broader purposes (for example, product comparison) will be limited if all businesses make the data available in different formats. We also support the involvement of consumer groups in the development of necessary standards.

In making this recommendation, we note that the growth in technology and 'big data' poses risks for consumers. In particular, the growth of target marketing and the role of technology is being used to predict consumer 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.²

¹ See <http://consumeraction.org.au/submission-private-vocational-education-and-training-providers-in-australia/>

² Paul Harrison, Charles Ti Gray and Consumer Action Law Centre (2012) *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry*, Deakin University and Consumer Action Law Centre, pp 5-6.

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 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.

Without some counter-balance, the centralisation of data in the hands of large corporations can help drive economic inequality. More and more businesses collecting and sharing data is enabling advertisers to offer goods at different prices to different people to extract the maximum price from each individual consumer. Financially strained consumers are already paying more for many services, including financial services like payday loans and consumer leases, and consumer harm will be exacerbated by further profiling and targeting. We acknowledge that the Final Report recommended against a prohibition against price discrimination in our competition law. However, we submit that policymakers should restrict practices that harm consumers, including banning price discrimination where consumers are not informed of all discount options available.

Recommendations:

- That consumers should have the right to receive their personal and transaction data in a standardised and machine-readable format.
- That policymakers consider further the implications of economic inequality caused by price discrimination practices, and that it be prohibited not only where competition is impaired by also where consumers are not adequately informed.

4. Market study powers

We support the introduction of a market study power as proposed by **Recommendation 45**, but that this power should sit with the Australian Competition and Consumer Commission (**ACCC**). A regulator must be engaged in policy and research or it risks losing track of changes in the marketplace and may become ineffective. The notion (attributed to the Monash Business Policy Forum, s25.6 of the Final Report) that regulators should be excluded from playing any role in policy development should be rejected. While there may be others that are better placed to make policy, regulators will frequently have the most expertise on market problems and are thus well placed to provide policy advice (as the Monash Business Forum's submission to the Issues Paper acknowledges).³ The Federal Government's own 'regulator performance framework' states that regulators should actively contribute to the continuous improvement of regulatory functions⁴—this implies that they should provide input into the development of policy.

We do not believe that, if a market study power was held by the ACCC, the market study would only ever be used as a precursor for enforcement. Enforcement action will legitimately follow a market study which uncovers unlawful conduct. But it is in the nature of a market study (which considers the operation of a market as a whole, rather than individual players) that the body conducting the study will make recommendations for reform that apply to the whole market

³ We note that the Monash Business Policy Forum's submission to the Issues Paper agrees (page 17) that regulators may have better information on market problems, complete exclusion of regulators from policy processes may be impractical, and input can be sought so long as the process is transparent.

⁴ Australian Government, Regulator Performance Framework, KPI 6, available at: <http://www.cuttingredtape.gov.au/resources/rpf>

rather than individual businesses. We expect the significant value of market studies will come from recommendations that promote consumer empowerment, or reduce some barrier to effective consumer participation in markets.

The Panel has noted that the Productivity Commission could be a national market studies body, but that it is an Australian Government body and therefore lacks the capacity to cover all Australian jurisdictions. Instead it proposes the establishment of an Australian Council for Competition Policy (**ACCP**). We remain agnostic as to the value of this new body, and will engage in good faith in any further consultation on the details once the Government has responded. At the very minimum, we submit that the ACCP should be constituted to represent consumer interests and not industry interests alone.

Returning to the current situation, while the Productivity Commission does an excellent job of large national studies, it may not be nimble enough to respond to rapid market changes. In this case, giving the ACCC the ability to conduct market studies with the necessary mandatory information gathering powers would significantly improve market transparency, consumer confidence, and competition.

We welcome **Recommendation 46** that all market participants should be able to request competition studies of Australian markets. This recommendation does not specifically include consumers, but does not exclude them either. The Panel also suggests that the body vested with competition market study powers will need to have some mechanism for prioritising requests for studies based on its assessment of where the potential public benefit is greatest. We recommend that to ensure the consumer voice is amplified, an additional channel for complaints, similar to a 'super complaint' mechanism, is established which would require the relevant agency to investigate the complaint, as long as it met certain requirements.⁵

Recommendations:

- That, market studies powers be given to the ACCC, to enable it to respond to rapid market changes.
- That should the ACCP be established, it be constituted to represent consumer interests.
- That a "super complaint" mechanism is established to require the relevant agency to investigate a consumer complaint subject to meeting certain requirements.

5. Australian Competition and Consumer Commission (ACCC)

5.1 Competition and Consumer functions

We strongly support **Recommendation 49**, that competition and consumer functions should continue to be administered by the ACCC.

5.2 Governance

We do not believe a strong case has been made that changes are required to the governance of the ACCC, as proposed by **Recommendation 51**. We reiterate our view that the ACCC is performing to a high standard and significant changes should be avoided. We strongly reject the recommendation to abolish the roles of Deputy Commissioners with responsibility for Small Business and Consumers. Large businesses and their industry bodies are well resourced and

⁵ We discussed the super complaint process in more detail in our submission to the Issues Paper.

can make representation in their interests across all arms of policy and regulation. Small businesses and consumers are less able to do this, and rely on a dedicated channel within the ACCC, with access to a Commissioner, to raise concerns and identify solutions to systemic issues. Removal of these positions would create significant imbalance in stakeholder access, agency expertise and regulatory credibility.

If the desired outcome is to further strengthen the ACCC's governance and accountability and incorporate a wider range of viewpoints through adopting part-time Commissioners, we see no reason why this should be done at the expense of sectoral Commissioners.

We are supportive of all Commissioners being required to make decisions across the full range of the ACCC's operations, even if they have been appointed into a sectoral role. It ensures that there is a whole-of-Commission approach to regulation and gives confidence that the Commission speaks with one voice.

An alternative option to the appointment of part-time Commissioners may be to provide greater capacity to the advisory processes that are already in place. Our previous submission described a possible model based on the Financial Services Consumer Panel (FSCP) which is hosted by the UK's Financial Conduct Authority (FCA). The FSCP is an independent statutory body set up to represent the interests of consumers in the development of policy for the regulation of financial services. The FSCP panel members are selected through a competitive recruitment process, paid fees and supported by a small secretariat. The Panel Chair meets regularly with the FCA Chairman and Chief Executive, has a research budget and produces annual reports. The FSCP describes its role as bringing a 'consumer perspective to aid effective regulation', supporting or challenging the FCA where required and acting 'as an independent counter balance' to parallel boards which represent the interests of industry.⁶ The Consumers' Federation of Australia could provide a similar function in Australia's consumer and competition policy framework, and should be funded appropriately to do this.⁷

2.3 Use of the media

We do not agree that there is a need for the ACCC to develop a Code of Conduct for its dealings with the media, as proposed by **Recommendation 52**. Further, we would strongly advise against any proposal which would limit the ability of the ACCC (or any regulator) relaying factual information through the media.

Use of the media, including to discuss enforcement activity, should be encouraged, because:

- it will help deter businesses engaging in misconduct by giving clear messages about what kinds of conduct will not be tolerated, and by reinforcing the perception that unlawful conduct will be detected and punished;
- it will build consumer awareness of their rights under the law, helping them to avoid problem business models and stand up for themselves if they are treated unfairly;
- it may reassure honest businesses that they are not being disadvantaged by rivals who are not playing by the rules; and

⁶ See FSCP website at <http://www.fs-cp.org.uk> and Annual Report, 12/13, available at <http://www.fs-cp.org.uk/publications/pdf/FSCP%202012-13.pdf>;

⁷ The Productivity Commission has previously recommended that public funding be provided to support the basic operating costs of a representative national peak consumer body: Inquiry into Consumer Policy Arrangements, 2008, recommendation 11.3

- it helps the public and the government assess whether they are getting value for money out of regulators.

There is still no credible case that the ACCC's use of the media has been inappropriate. The Final Report, like the Draft Report before it, gives no little indication of what the ACCC is doing that is causing concern, only that there is a 'perception' that use of media related to enforcement actions is problematic may stray into 'advocacy'. It could be suggested that the ACCC is in fact being highly effective in bringing poor business practice to account, and that this is the real reason to attempt to shackle the regulator from publicly commenting on its activities and the reasons for its actions.

Recommendation:

- There is no need for significant changes to the governance of the ACCC, or to its use of the media.

6. Access and Pricing Regulator

We remain unconvinced of the need to establish a new Access and Pricing Regulator (**APR**), as proposed by **Recommendation 50**. It is our view that this proposal will proliferate regulatory bodies in direct contrast to Federal Government policy to reduce the number of government agencies and bodies.

We have submitted there are significant benefits in maintaining one national regulator responsible for competition, consumer protection and economic regulation. These functions all inter-relate and are based on an economic understanding that fair and effective markets are in the long-term interests of consumers. We have seen clear consumer benefits in the working relationship between the ACCC and the Australian Energy Regulator (**AER**), including joint projects and investigations across the responsibilities of the inter-connected agencies.

However, if such a new body were to be created:

- it should work closely with the ACCC, and perhaps even be co-located as is currently the case with the AER and ACCC. Competition and economic regulation are closely inter-related and should be coordinated;
- it will need to be given specific consumer expertise at board level to ensure that the consumer perspective is understood; and
- the operations of the body will need to be designed to allow and encourage consumer input. Access and pricing are technical issues and most consumers and consumer advocates will have trouble contributing to the discussion, leading to an overrepresentation of industry views.

On this last point, the recent experience of Consumer Action attempting to effect a national energy retail rule change exposes the flaws in current energy market rule making and regulatory functions. A report on this experience will be released shortly.

Recommendation:

- If the APR is introduced, it should work closely with the ACCC, be given consumer experience at board level and should have operations designed to allow and encourage

consumer input.

7. Australian Competition Tribunal

Finally, we reiterate concerns expressed in our earlier submissions about lack of effective access for consumers to the Australian Competition Tribunal. We welcome the view of the Panel that the review process “*would be greatly enhanced if the Tribunal were empowered to hear from relevant business representatives and economists responsible for reports relied upon by original decision-makers*” (s 28.2) but question the omission of the voice of the consumer in the review process.

The Tribunal must become more accessible to consumers if it is to be in a position to make fully informed decisions on matters coming before it. This could be done through more informal consultation procedures, to reduce cost risks to consumer organisations.

Recommendation:

- The Tribunal establish informal consultation procedures, to reduce cost risks to consumer organisations and make its processes accessible to consumers and their advocates

Please contact Denise Boyd on 03 9670 5088 or at deniseb@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE



Gerard Brody
Chief Executive Officer

Denise Boyd
Director, Policy & Campaigns