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**By email:** [andrew.leigh@australianlabor.com.au](mailto:andrew.leigh@australianlabor.com.au)

Dr Andrew Leigh  
Shadow Assistant Treasurer  
Member for Fraser  
8/1 Torrens Street  
Braddon ACT 2612

Dear Dr Leigh

### **Submission: Sharing the future**

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on *Sharing the future: Getting the policy right in the Age of the App*.

We are generally supportive of new business models that are pro-competitive and deliver good outcomes for consumers. This is tempered by the need for appropriate regulation for these business models that adequately protect consumers. The challenge is to maximise the benefits for consumers by fostering innovation, while ensuring consumer welfare is not diminished in the innovation race. This will require businesses and policy makers to look beyond the “red tape” rhetoric and provide the necessary consumer protections from the outset.

Consumer Action defines good consumer outcomes as:

- The provision of safe and fair products and services;
- Useful and accessible information which is simple, clear and consistent;
- Products and services that are easy to use and equitable;
- Efficiency that benefits consumers; and
- Clear dispute resolution processes.

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.

#### **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](mailto:info@consumeraction.org.au)  
[www.consumeraction.org.au](http://www.consumeraction.org.au)

## Public Safety and Consumer Protections

### *Basic standards and the role of regulators*

There are two key consumer protections that must be built into any regulatory framework for sharing economy businesses: clarity in legal liability and effective dispute resolution when things go wrong.

There are some interesting approaches to apply some element of regulatory consistency, for example the collaborative design approach in California to establish rules for transport network companies.<sup>1</sup> This allows new entrants to compete with existing operators, but attempts to provide consumer confidence that the business is safe to use.

But what if the apartment rented on Air BNB doesn't fit the description? Is the consumer's claim against the home owner or Air BNB? And where does the consumer go to resolve the dispute if the online platform won't engage?

At the moment, it is unclear who is liable, and will probably depend on the situation. These platforms are functioning as intermediaries, or "matching platforms" and are not the direct service providers. The service the platforms provide is the "matching service". This may allow them to escape liability from any claim relating to the substantive service.

Nevertheless, the platforms are profiting from the matching service, and enabling contact between a consumer and a provider that would, in all likelihood, not have been possible otherwise. For consumers to have confidence, platforms need to take responsibility for consumer claims and remedies available under the Australian Consumer Law. This should include any conduct that is likely to mislead or deceive posted by the service provider on a platform as well as breaches of consumer guarantees. Platforms should not be able to avoid responsibility given their crucial role in establishing the service proposition.

In other areas of law, policy makers have seen fit to impose liability on intermediaries. For example, in the consumer credit sector, brokers are now regulated and are required to obtain an Australian Credit Licence for credit assistance they provide.<sup>2</sup> This regulation was considered necessary following many years of the industry not being regulated—consumers had very limited avenue for redress given the lender would avoid liability due to the conduct of the broker.<sup>3</sup>

The platforms should be required to provide effective dispute resolution forums, either by joining an existing industry scheme, or by establishing a new one. They should also be required to establish their own internal dispute resolution functions to resolve disputes between consumers and service providers. For example, the platform might establish a robust way to resolve disputes between 'sellers' and 'buyers', in line with the current benchmarks for consumer

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<sup>1</sup> California Public Utilities Commission, 'CPUC establishes rules for transport network companies', 19 September 2013, available: <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.PDF>.

<sup>2</sup> National Consumer Credit Protection Act 2009 (Cth).

<sup>3</sup> See, eg, ASIC and Consumer Credit Legal Centre NSW, 'A report to ASIC on the finance and mortgage broking industry', 2003, available at: <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-19-a-report-to-asic-on-the-finance-and-mortgage-broking-industry/>

dispute resolution schemes: accessibility, independence, fairness, accountability, efficiency and effectiveness.<sup>4</sup>

In providing access to justice, the establishment of consumer dispute resolution schemes has been one of the most significant advances in consumer protection of the past 30 years. Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn.

The machineries of industry ombudsman schemes are relevant when considering appropriate dispute resolution in the sharing economy. Ombudsman schemes contain a number of useful features which contributes to strong justice outcomes and consumer confidence, including:

- industry ombudsman schemes are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;
- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;
- the ombudsman scheme process provides flexible solutions to disputes but also has ‘teeth’ because the Ombudsmen can make findings binding upon the trader;
- Ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source; and
- Ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers’ interests

#### *Public ratings systems as a mechanism for regulating service quality*

The use of rating systems can help establish the necessary trust in these business models. However, they need to be robust and not open to abuse. The ACCC has provided some minimum compliance guidance for on online reviews which platforms should embrace.<sup>5</sup>

## **Competition**

New technologies and services can unlock significant opportunities for consumers. They can provide consumers with greater choice in products and services that help them meet their lifestyle needs, and increased competition can drive down the cost of products and services. For example, in the energy market, smart meters have underpinned the development of new tariff structures that can help people control their energy expenditure, and new products are entering the market that can help people generate and store their own energy, regulate their thermal comfort or lower their environmental impact. New technologies and services can also break traditional monopolies and provide better services at lower cost.

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<sup>4</sup> Commonwealth Consumer Affairs Advisory Council, Benchmarks for Industry Dispute Resolution Schemes, March 2015, available at: <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/benchmarks-ind-cust-dispute-reso>

<sup>5</sup> ACCC, Online reviews: guide for business and review platforms, 2014, available at: <https://www.accc.gov.au/system/files/Online%20reviews%E2%80%94a%20guide%20for%20business%20and%20review%20platforms.pdf>

However evolution in products and services in a modern economy can also create significant challenges for consumers. An increase in choice can provide better outcomes for those people that are empowered to search for the right option for them, and access and understand complex product information prior to making a decision, and for those consumers who are able to advocate for their own interests in the case of a dispute. For other consumers however, greater market complexity significantly increases the chances of making poor decisions, when faced with inconsistent and difficult to find product information, an overwhelming array of choices, poor regulation and unclear avenues for recourse in the case of a dispute. It is critical to the success of reforms that unlock consumer choice, and in doing so introduce market complexity, that consumer protections keep pace with market development. The consumer experience must be at the heart of reforms, with good consumer outcomes and trust prioritised over market benefit.

### **Federal/state coordination**

It is critical that regulators do not adopt a 'wait and see' approach to regulation in the face of new technologies and services. Rather, regulators and rule makers need to be out on the front foot, assessing the challenges that new business models pose to existing consumer protections, amending fundamental protections as necessary to ensure consumers can continue to get good outcomes from the market and undertaking monitoring and enforcement activities to root out poor behaviour and give consumers confidence in the market. To achieve this, regulators must be nimble, have the necessary information gathering powers, and be appropriately resourced.

### **Further regulatory issues**

The growth in data collection by business (especially credit providers) to target products and marketing brings considerable risks. Businesses involved in the sharing economy are developing sophisticated techniques to collect and use customer data. An example is peer-to-peer lending.

Target marketing of products to particular groups of consumers is not new. However, 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.<sup>6</sup>

It is often argued that this technology creates a win-win: consumers get access to products they want, and business can target their marketing and increase profits. However, the increased use of customer information has coincided with a sharp increase in levels of consumer debt. Over the last 20 years, the level of credit and charge card debt in Australia has increased from a total of around \$5 billion to almost \$50 billion. Over 70 per cent of this balance—\$35 billion—is accruing interest.<sup>7</sup>

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<sup>6</sup> 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.

<sup>7</sup> Reserve Bank of Australia, Credit and Charge Card Statistics, (as updated January 2014). Accessed via <http://www.rba.gov.au/statistics/by-subject.html>.

Our report *Profiling for Profit: A Report on Target Marketing and Profiling Practices in the Credit Industry* produced with Deakin University presented evidence that the two trends are linked. For example, research regarding the US economy found that "the drop in information costs alone explains 37 per cent of the rise in the bankruptcy rate between the years 1983 and 2004".<sup>8</sup> The report draws 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.

Our concerns about how personal information is used carries into this new online marketplace. Consumers are entitled to transparency and should be able to access their personal information held by companies. Both the recent Murray Financial System Inquiry and the Harper Competition Policy Review made recommendations about access to personal data. The Murray Inquiry recommended that the Productivity Commission be tasked with reviewing the costs and benefits of increasing access to and improving the use of data, taking into account community concerns about appropriate privacy protections.<sup>9</sup> The Harper Review recommended that governments develop a framework which allows people to access and use their own data for their own purposes and enables new markets for personal information services.<sup>10</sup> We strongly endorse these recommendations and believe that they should apply to businesses in the peer-to-peer economy.

A recent report by US organisation Data Justice concluded that the control of personal data by 'big data' companies is not just an issue of privacy, but an issue of 'economic justice'.<sup>11</sup> The report was particularly concerned about the ability of big data to enable advertisers to offer goods at different prices to different people, what economists call price discrimination, to extract the maximum price from each individual consumers. The report found that such price discrimination not only raises prices overall for consumers, but particularly hurts low-income and less technologically savvy households.

The report made three recommendations:

- a. for regulators to strengthen user control of their own data by both requiring explicit informed consent for all uses of the data and better informing users of how it's being used and how companies profit from that data;
- b. for regulators to factor control of data into merger reviews and initiate action against monopoly control of affected sectors like search advertising;
- c. for policymakers to restrict practices that harm consumers, including banning price discrimination where consumers are not informed of all discount options.

We also believe that 'big data' should be a matter for regulation if it creates risks for consumers and the market in which they are engaged. Regulatory responses should be informed by an understanding of how marketing is used and how it is received by consumers.

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<sup>8</sup> Sanchez, J M (2009) *The Role of Information in Consumer Debt and Bankruptcies*. Working Paper Number 09-04, The Federal Reserve Bank of Richmond.

<sup>9</sup> Financial System Inquiry, Final Report, recommendation 19, available at: <http://fsi.gov.au/publications/final-report/chapter-3/data-access-and-use/>.

<sup>10</sup> Competition Policy Inquiry, Final Report, recommendation 21, available at: [http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf).

<sup>11</sup> Data Justice, Taking on Big Data as an Economic Justice Issue, March 2015, available at: <http://www.datajustice.org/blog/data-justice-report-taking-big-data-economic-justice-issue>

An example may be the 2011 reforms prohibiting unsolicited credit card limit increase offers, unless the customer has consented to receiving such offers.<sup>12</sup> These provisions were designed to address the significant consumer harm caused by the impact on many consumers who are coerced into increasing their levels of debt. Vulnerability to this sort of marketing was described in depth in our 2008 research report, *Congratulations, You're Pre-Approved*.<sup>13</sup> Our recent casework experience is that banks and lenders are avoiding these reforms by offering unsolicited overdrafts on transaction accounts and extensions to existing personal loans, which raise very similar risks.

The trend is towards data analysis to identify and exploit consumer vulnerabilities, claiming that analysis is helping business to better identify consumer need and target products and services appropriately. We are witnessing the rapid expansion of online services while our regulatory system is struggling to keep up. Even if access to information about particular business information systems is unlikely to be available, it is crucial that policy makers and regulators are aware of the widespread use and application of such systems. The ability to profile customers, and target particular messages and products to them, suggests a need for regulatory focus on product design and marketing techniques in the emerging online marketplace.

Please contact Denise Boyd on 03 9670 5088 or at [deniseb@consumeraction.org.au](mailto: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

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<sup>12</sup> National Consumer Credit Protection Amendment (Home Loans and Credit Cards) Act 2011.

<sup>13</sup> Paul Harrison and Marta Massi (2008), *Congratulations, You're Pre-approved: An analysis of credit limit upselling offers*, available at: <http://consumeraction.org.au/policy-report-an-analysis-of-credit-limit-upselling-letters/>.