



Submission to  
Competition Policy Review  
Issues Paper

10 June 2014

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## About CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. As vital today as when we were founded in 1959, CHOICE continues to fight for consumers and uncover the truth.

By mobilising Australia's largest and loudest consumer movement, CHOICE fights to achieve real change on the issues that matter most to Australian consumers.

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## Executive Summary:

CHOICE welcomes the opportunity to contribute to the Federal Government's Competition Policy Review. This submission is structured in response to the *Issues Paper*, and answers a selection of consultation questions from each of the paper's six sections.

The Review's terms of reference are broad, and touch on many questions of critical importance to Australian consumers. While this submission is also wide-ranging, it is unified around a single principle - that the object of the Competition and Consumer Act is to enhance the welfare of Australians, and this is the test that any future competition policy reform agenda must meet.

With that in mind, CHOICE believes this Review is timely. 21 years on from Professor Hilmer's final report and the beginning of Australia's National Competition Policy, it benefits from significant insights and lessons learnt. Not least is a more sophisticated understanding of demand side consumer engagement, informed by behavioural economics, and its interaction with the supply side to enable genuinely competitive outcomes.

The Review addresses a competitive landscape that is being transformed by digital technologies and reshaped by competitive forces from overseas. Many existing business models are coming under pressure, while some are leveraging the advantage of incumbency, using unprecedented access to consumer data to entrench their market power. Others are resisting technological change, putting up barriers to innovation and the changing preferences of consumers.

In all of this, the potential benefits for consumers are immense, but by no means inevitable. Consumer data holds a promise of empowerment, giving rise to applications to help navigate complex markets and make everyday purchasing decisions easier. Yet much of this data is held in closed systems, unavailable to consumers in secure and shareable forms, and if anything, reinforcing the power of incumbents in industries like energy, banking and telecommunications.

Digital technologies are disrupting established relationships between supply and demand, challenging protected industries, and providing access to a greater range of products and services from overseas, many at cheaper prices. Yet in some sectors consumers face barriers to accessing these benefits, whether it is the prospect of knee-jerk changes to GST on imports, intellectual property laws that prop up entertainment monopolies, or the 'geo-blocking' that sustains international price discrimination.

There is a clear role for competition policy reform to target these barriers, harness the disruptive power of digital technologies and create the preconditions for demand-side engagement, including by retaining important consumer protections. This also suggests the need for a clear-eyed assessment of where these preconditions may not be achievable, such as in some sectors where governments currently provide essential services. After all, consumer welfare remains the objective, not competition as an end in itself.

It is also appropriate to examine whether Australia's competition laws remain fit for purpose. Here, CHOICE would urge caution in regards to measures that might favour one type or class of competitor over another. In relation to market power, the case for reform should be carefully weighed. On the other hand, there is a strong argument for removing secondary boycott provisions to the extent they impinge on consumers' access to information.

We should also not assume that every consumer protection is effective or well implemented. In assessing voluntary and mandatory industry codes, there is evidence that some codes are failing

to deliver benefits for consumers, underlining a need for reform. While we believe the ACCC generally performs well, and its role as a dual consumer and competition regulator is critical, there are also a number of powers and remedies available in overseas jurisdictions that should be considered in the Australian context. These include market studies and investigations, a super-complaints mechanism, and a prohibition on unfair trading.

Finally, there is an important institutional challenge if the potential of this Review and its recommendations are to be realised. Here, we suggest the need for an ongoing institutional structure to provide the new competition policy agenda with the momentum it will require to enhance the welfare of Australian consumers in the years ahead.

**Recommendation 1:** A future competition policy reform agenda should prioritise consumer welfare as its overarching objective and build the capacity for informed voices to assist in the decision-making process on behalf of consumers.

**Recommendation 2:** The Federal Government should not reduce the current GST low-value threshold in the absence of evidence that the benefits of doing so will outweigh the costs.

**Recommendation 3:** Competition policy should prioritise reforms that give Australian consumers greater access to a range of competitively priced goods and services from overseas, consistent with the bipartisan recommendations of *At what cost? IT pricing and the Australia tax*, the final report the Inquiry into IT Pricing. This includes repealing section 51(3) of the Competition and Consumer Act, which exempts certain conditions in copyright licenses from the anti-competitive conduct provisions of the CCA.

**Recommendation 4:** Assessment of health, safety and environmental standards should weigh not only the direct benefits for consumers, but also the capacity for well-designed regulations to enhance the competitive process by allowing consumers to navigate markets with confidence, compare products based on clear information and enjoy durable benefits.

**Recommendation 5:** The Review should recommend an institutional framework for ongoing reform of protected industries, to oversee the exposure of these industries to competitive forces and monitor future reforms that may be harmful to consumer welfare.

**Recommendation 6:** Intellectual property laws should be reformed to provide Australians with greater access to competitively priced goods and services, including through a more flexible, fair-use copyright regime.

**Recommendation 7:** The panel should investigate reforms to pharmaceutical patents consistent with the recommendations of the Pharmaceutical Patents Review.

**Recommendation 8:** The Federal Government should prioritise measures that provide consumers with access to their own consumption data as one means of improving demand-side competition.

**Recommendation 9:** The case for further reform in sectors such as health and education should assess whether the preconditions for genuine demand-side competition are achievable and whether increased competition will result in improvements to consumer welfare.

**Recommendation 10:** Any amendments to the CCA should be premised on a policy of universal application. Measures that favour one type of business over others - or that single out individual sectors - should be treated cautiously.

**Recommendation 11:** Measures that encourage private litigation under the competition provisions of the CCA should be considered, as should a prohibition on unfair trading.

**Recommendation 12:** The panel should examine the case for an effects test in relation to the misuse of market power.

**Recommendation 13:** The panel should consider a prohibition - analogous with attempted monopolisation in the United States - that captures unilateral conduct that is likely to give rise to substantial market power.

**Recommendation 14:** The panel should consider divestiture as a remedy for misuse of market power.

**Recommendation 15:** Independent reviews of ACCC merger decisions should be commissioned regularly to assess whether the objects of the law are being realised.

**Recommendation 16:** Consideration should be given to simplifying competition laws and processes to ensure they are accessible to all market participants.

**Recommendation 17:** The price signalling laws should apply universally or be removed. If retained, the price signalling laws should not be so wide as to impede consumer access to information.

**Recommendation 18:** To ensure they cannot be used to impede consumer's access to information, the secondary boycott provisions should be removed from the CCA altogether except in so far as they relate to unfair commercial actions by a competitor.

**Recommendation 19:** In relation to industry codes, there is a strong case for reforming current arrangements to promote and in some cases require best practice.

**Recommendation 20:** The existing suite of powers, penalties and remedies available to the ACCC should be retained.

**Recommendation 21:** The panel should consider ways in which the ACCC might further enhance its reporting of enforcement outcomes, including clear separation of competition and consumer protection matters and reporting of litigation actions commenced and enforceable undertakes obtained each quarter.

**Recommendation 22:** The panel should consider the merits of extending the powers and remedies available to the ACCC under the CCA to include:

- A market studies mechanism (utilising the UK model);
- Power to make a market investigation reference to an appropriate body or group;
- A super complaints mechanism; and
- Access to cy pres remedies.

**Recommendation 23:** The panel should consider the merits of amending the CCA to include a prohibition on unfair trading modelled on the US or UK approach.

**Recommendation 24:** Retain the current structure of the ACCC such that it maintains economy wide responsibility for both the competition and consumer protection provision of the CCA.

**Recommendation 25:** Maintain the connection between the ACCC and the AER.

**Recommendation 26:** Put in place a new institution with responsibility to:

- Oversee work to address recommendations regarding protected industries
- Maintain a watching brief on whether future reforms would result in anti-competitive outcomes; and
- Receive references for and conduct market investigations.

## 1. Competition policy

- What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

### Summary:

- The objective of competition policy reform should be consistent with the objective of the Competition and Consumer Act - to enhance the welfare of Australians.
- When there is insufficient emphasis on the demand-side of competition policy, this creates a risk of policy failure, with consumers unable to enjoy the benefits of competition

### Recommendation:

- A future competition policy reform agenda should prioritise consumer welfare as its overarching objective and build the capacity for informed voices to assist in the decision-making process on behalf of consumers.

In prioritising a new competition policy reform agenda for Australia, CHOICE believes it is critical that we stop and ask the question: what problem are we trying to solve? Unless we are clear about the answer to that question, we cannot determine which of the many conflicting interests engaged in the Review belong at the centre of the competition law debate and which should be seen as simply hitching an opportunistic ride.

The starting point in answering the question put must be the object of the CCA, which is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”<sup>1</sup> While there are several concepts within this phrase there is in fact but one object: to enhance the welfare of Australians. The promotion of competition and fair trading and the provision for consumer protection are simply means through which this is pursued.

We regularly hear arguments that the best thing for consumers is to advantage producers, and often one type of producer over another. This is a kind of ‘trickle-down’ theory of consumer welfare, and you see variations of it all through our public debate. That is not to say every industry claim is without merit. There may well be public good arguments for supporting farmers, for fostering Australian content or for investing in local industries, but the way to assess those objectives is not to smuggle them under the banner of ‘consumer welfare’.

CHOICE believes the key question for a new competition policy reform agenda is what does a genuinely competitive market look like, one that provides lasting benefits for consumers - how would we know it if we saw it? With this in mind, one of the key changes since the Hilmer Review, to the way we think about markets and competition, has been a greater understanding of the demand side of competition. The UK’s Office of Fair Trading provides a useful description of efficient, competitive markets, framed in terms of the relationship between supply and demand:

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<sup>1</sup> Section 2, Competition and Consumer Act 2010.

*Markets work well when there are efficient interactions on both the demand (consumer) side and the supply (firm) side. On the demand side, confident consumers activate competition by making well-informed and well-reasoned decisions which reward those firms which best satisfy their needs. On the supply side, vigorous competition provides firms with incentives to deliver what consumers want as efficiently and innovatively as possible. When both sides function well, a virtuous circle is created between consumers and competition.<sup>2</sup>*

Much of the discussion around the Competition Policy Review, and around competition law generally, focuses on the supply side, on the interactions between competitors in the marketplace. There are obviously important issues here, in particular around market power, the prospect of businesses becoming so dominant that their behaviour is not constrained by competitors or consumers.

But CHOICE believes there has been insufficient emphasis on the demand side, on what it means for consumers to make well-informed, engaged decisions, and what it is that consumers actually want. As a result we risk distorted outcomes, where an emphasis on the supply side of competition treats consumer preferences almost as an afterthought.

This risk is illustrated in a trend we return to throughout this submission, the rise of rich consumer data - or 'big' data - and its implications for both market power and consumer empowerment. At one extreme, consumer data is the new currency of competitive advantage, inviting an assessment of how it might entrench the market power of incumbents and create significant barriers to entry. At the other extreme, consumer data holds the potential to empower individuals with better information, particularly in complex markets - provided it is made accessible, meaningful and secure.

As an overarching priority, CHOICE considers that more should be done to improve consumer engagement in many processes that fall within the domain of competition law or policy. Too often, decisions are made - apparently, with the ultimate goal of advancing the interests of consumers - with little or no genuine input from consumers. For example, research which considered why so few Victorians initially took advantage of full retail contestability in the electricity sector found: "[r]emarkably, in developing policies to introduce competition to the household sector, neither the Kennett nor Bracks governments assessed Victorians' attitudes to competition".<sup>3</sup> The outcomes of this supply-side approach to competition reform are discussed in greater detail in Section Three of this submission.

While the hole created by an absence of consumer input can be readily identified in many regulatory contexts,<sup>4</sup> it can be less obvious in general competition policy. Nonetheless, as "public benefit" forms the basis of creating exceptions to the competition provisions contained in Part IV of the CCA, direct consumer input needs to be actively facilitated (as opposed to passively received). With this in mind, it is vital that any further competition policy reform

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<sup>2</sup> OFT, 'What does behavioural economics mean for competition policy?', March 2010

<sup>3</sup> Andrea Sharam, "Power failure: why Victorian households are not plugging into electricity competition" (Working paper No 9, Institute for Social Research, 2003), 2.

<sup>4</sup> See the various papers presented at the ACCC/AER Regulatory Conference 2012, Brisbane, 25-26 July 2013; available at: <http://www.accc.gov.au/about-us/conferences-events/accc/aer-regulatory-conference/accc/aer-regulatory-conference-2013>.

# choice

agenda builds the capacity for informed voices to assist in the decision-making process on behalf of consumers, whether it be general enforcement action, mergers or applications for statutory immunity.

## 2. Regulatory impediments to competition

- Are there import restrictions, bans, tariffs or similar measures that, on balance, are adversely affecting Australians?

### Summary:

- Changes to the current GST low-value threshold risk harming consumers and the competitive process more broadly, for no overall benefit.

### Recommendation:

- The Federal Government should not reduce the current GST low-value threshold in the absence of evidence that the benefits of doing so will outweigh the costs.

As a general principle, CHOICE opposes any form of import restriction, ban, tariff or similar measure, unless there is evidence that it provides public benefits that outweigh its costs. In this context, it is relevant to consider the current debate over if and how the Federal Government should reduce the GST low value threshold (LVT), which is currently \$1,000.

The threshold means that consumers and small businesses that buy products from overseas, such as from foreign-based websites, do not pay the GST or duties if the value of the product is less than \$1,000. This reflects the principle that it is uneconomic to incur greater costs in the collection of a tax than the revenue it raises.

Growing competition from foreign-based ecommerce websites is forcing domestic retailers to innovate and provide better services, products, prices and experiences to Australian consumers. This includes expanding their online presence, something many established retailers in Australia have been slow to do, although we note that domestic online retail is growing faster than overseas purchases.<sup>5</sup> If the GST were applied to all foreign online sales, the competitive landscape would shift slightly and Australian consumers would continue to benefit from the introduction of international competition to the retail industry. However, if fees and administrative burdens were introduced on top of a reduced LVT, this could significantly impact competition.

For example, if consumers were required to pay fees of up to \$14 (similar to the fee charged in the UK), fill out customs forms and wait longer for parcels as they were processed for GST liability, this would effectively create an artificial tariff, imposing costs and delays on consumers for no net economic gain. It should be noted that these impacts would extend beyond household consumers, to other entities that benefit from efficient access to competitively priced overseas goods and services, such as small business.

CHOICE recognises that the absence of GST gives foreign online websites a competitive advantage over domestic retailers. However this advantage is negligible compared to other factors. Foreign online sales represent a minor share of retail spending in Australia. According to

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<sup>5</sup> National Australia Bank, (2014), *Online Retail Sales Index: Indepth & Special report - April 2014*

research from NAB,<sup>6</sup> online retail accounts for just 6.6% of total retail sales in Australia despite rapid growth in recent years. Further, the majority (74%) of online sales in Australia take place through domestic websites, which do charge GST. As 98.6%<sup>7</sup> of online sales from foreign sites are under \$1000, the total value of online sales from overseas websites that fall below the threshold is just 1.7% of all retail sales.

Moreover, the absence of the GST on foreign online sales is not the reason Australians are purchasing online overseas. A nationally representative survey conducted by CHOICE in 2013 found that the main reasons Australian shop online relate more to convenience than price. The top reason Australians buy online is so they can shop at the times that suit them, followed closely by the convenience of getting products delivered to their door. The survey found that 68% of consumers who do buy from overseas websites to save money said they save more than 15%, while 43% said they save over 25%.<sup>8</sup> Even with the GST applied, foreign online websites will continue to be competitively priced.

In the absence of clear evidence that the benefits of reducing the threshold would outweigh the costs, including costs to consumers from collection of the GST and associated red tape, then a reduced threshold would function as anti-competitive tariff on overseas purchases, impacting consumers' cost-of-living and the economy more broadly.

## Scrapping the 'Australia tax'

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| <ul style="list-style-type: none"><li>• <b>Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?</b></li></ul> |
| <ul style="list-style-type: none"><li>• <b>Should any current restrictions on parallel importation be removed or altered in order to increase competition?</b></li></ul>   |

### Summary:

- Australian consumers pay unjustifiably higher prices for identical goods and services across various categories, including digital goods and services, clothing and cosmetics.
- Australia's competition policy framework should not support commercial strategies that sustain artificially higher prices.
- Parallel imports provide benefits to Australian consumers and are one means of reducing the impacts of international price discrimination.
- The House of Representatives Inquiry into IT Pricing made recommendations aimed at removing barriers to Australians accessing competitively priced goods and services from overseas, including by removing all parallel import restrictions under copyright law.

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<sup>6</sup> National Australia Bank, (2014), *Online Retail Sales Index: Indepth & Special report - April 2014*

<sup>7</sup> Productivity Commission, (2011), *Economic Structure and Performance of the Australian Retail Industry*.

<sup>8</sup> CHOICE conducted a comprehensive survey among 1,000 Australian consumers who personally use or have content consuming devices such as computers, tablets, and smartphones. The online survey was conducted from July 2-12 2013. The participants were recruited from the Lightspeed Research panel and the results were analysed by The Acid Test and CHOICE.

## Recommendation:

- Competition policy should prioritise reforms that give Australian consumers greater access to a range of competitively priced goods and services from overseas, consistent with the bipartisan recommendations of *At what cost? IT pricing and the Australia tax*, the final report the Inquiry into IT Pricing.
- This should include repeal of section 51(3) of the CCA, which exempts certain conditions in copyright licenses from anti-competitive conduct provisions.

Based on our investigations across a range of product categories, CHOICE believes there is a clear case for measures to address international price discrimination, which has a significant impact on Australian consumers. However, we emphasise this does not constitute a case for government regulation of prices. Rather, we support the removal of those barriers put in place by businesses that restrict Australians' access to competitively priced goods and services from overseas, thereby sustaining higher prices locally.

CHOICE has investigated a range of product categories and found abundant evidence of international price discrimination against Australian consumers. Our research conducted for the 2012 House of Representatives Inquiry into IT Pricing found that Australians pay approximately 50% more than US consumers across a selection of 200 digital products, including software, games, music downloads and computer hardware.<sup>9</sup> This corroborated similar research from CHOICE stretching back to 2008,<sup>10</sup> as well as the findings of the 2011 Productivity Commission report into the Australian retail industry.<sup>11</sup> We note it was also reflected in the final conclusions of the Inquiry into IT Pricing.<sup>12</sup>

For the purposes of this submission, CHOICE has conducted additional research on current price differences in digital products.<sup>13</sup> The table below compares the iTunes song pricing tiers and the top 10 movies from Apple's Australian and US iTunes stores. To ensure a robust comparison, the Australian prices are presented exclusive of GST, while the US prices are converted into Australian dollars.<sup>14</sup>

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<sup>9</sup> CHOICE submission, 'Inquiry into IT Pricing', 16 July 2012, accessible at <http://www.choice.com.au/media-and-news/consumer-news/news/choice-lodges-submission-on-it-price-discrimination.aspx>

<sup>10</sup> CHOICE, (2008), 'Fair play for pricing?', CHOICE Computer, May/June 2008

<sup>11</sup> Productivity Commission, (2011), *Economic Structure and Performance of the Australian Retail Industry*, no. 56, November 2011

<sup>12</sup> House of Representatives Standing Committee on Infrastructure and Communications, (2013), *At what cost? IT pricing and the Australia tax*

<sup>13</sup> Currency conversion at AUD\$1 = USD\$0.90987, all price data accessed between 28 May and 6 June 2014

<sup>14</sup> Top ten movies as per the Australian iTunes charts. All iTunes prices exclude GST.

## iTunes price comparison - Australian and the US

Product	Australian Prices	US Prices	US Prices in AUD	Difference
iTunes Song Price Tier 1	\$ 1.19	\$ 0.69	\$0.76	57%
iTunes Song Price Tier 2	\$ 1.69	\$ 0.99	\$1.09	55%
iTunes Song Price Tier 3	\$ 2.19	\$ 1.29	\$1.42	54%
Jack Ryan: Shadow Recruit	\$ 24.99	\$ 14.99	\$15.38	62%
Red Eye	\$ 17.99	\$ 14.99	\$15.38	17%
47 Ronin	\$ 24.99	\$ 14.99	\$15.38	62%
Frozen	\$ 24.99	\$ 19.99	\$20.52	22%
Her	\$ 24.99	\$ 19.99	\$20.52	22%
The Secret Life of Walter Mitty	\$ 24.99	\$ 9.99	\$10.25	144%
The Wolf of Wall Street	\$ 24.99	\$ 19.99	\$20.52	22%
The Book Thief	\$ 24.99	\$ 14.99	\$15.38	62%
Saving Mr Banks	\$ 24.99	\$ 19.99	\$20.52	22%
August: Osage County	\$ 29.99	\$ 14.99	\$15.38	95%

The price differences shown here are considerable. The following table shows similar results for new release and upcoming PS4 video game titles.

## PS4 games price comparison - Australian and the US

Product	Australian Prices	Australian Prices (exc. GST)	US Prices	US Prices in AUD	Difference
Watch_Dogs	\$79.00	\$71.82	\$59.99	\$65.93	9%
Bound By Flame	\$84.98	\$77.25	\$49.99	\$54.94	41%
Wolfenstein: The New Order	\$89.00	\$80.91	\$59.99	\$65.93	23%
The Elder Scrolls Online	\$94.00	\$85.45	\$59.99	\$61.57	39%
inFAMOUS Second Son	\$79.00	\$71.82	\$59.99	\$61.57	17%
Dynasty Warriors 8: Xtreme Legends Complete Edition	\$99.00	\$90.00	\$59.99	\$61.57	46%
Assassin's Creed Unity*	\$99.00	\$90.00	\$59.99	\$61.57	46%
Destiny*	\$88.00	\$80.00	\$59.99	\$61.57	30%
The Last of Us Remastered*	\$98.00	\$89.09	\$59.99	\$61.57	45%
Dragon Age Inquisition*	\$89.00	\$80.91	\$59.99	\$61.57	31%

\*Pre-order prices

Price discrimination is not limited to digital products, although it is a useful area of analysis because it refutes suggestions sometimes made that local products are more expensive due to unique costs of doing business in Australia.<sup>15</sup> Across other categories, CHOICE research has shown that Australians can pay up to 60%<sup>16</sup> more for clothing and up to 200%<sup>17</sup> more for cosmetics.

Significantly, our analysis suggests price discrimination occurs in the gross margin for products sold in Australia, the result of decisions by international manufacturers and copyright holders to charge more here because they believe the market will bear these costs, rather than a mark-up applied by domestic retailers or distributors to cover localised costs of doing business.<sup>18</sup> The products are more expensive before they even hit Australian shelves and supply chains, impacting Australian-based retailers as well as consumers.

While price discrimination is not particularly new to Australia, the growth of online retail has given Australian consumers access to foreign markets and increased exposure to the prices that consumers in those markets pay. This has brought welcome international competition to the retail sector, which has been shielded from such pressures much longer than some Australian industries.

While CHOICE is not suggesting that the government should intervene to regulate or otherwise restrict retail prices, we likewise do not believe that Australia's competition policy framework (or its intellectual property laws) should support commercial strategies that sustain artificially higher prices in Australia. Government policy should focus on enabling consumers and small business to benefit from the international economy in the same way large businesses are able to, and not create or protect barriers to effective competition.

Parallel imports play an important role in addressing international price discrimination. They create situations whereby over-priced Australian products compete with identical cheaper products from overseas. Companies essentially compete with themselves, driving prices lower.

Parallel imports are not illicit or counterfeit goods. They are made with the full knowledge and support of the manufacturer and intellectual property rights holder and taken to the market. Just as a company may import their inputs from markets where they are cheapest, consumers should also be able to access products from markets where they are cheapest.

The final report of the Inquiry into IT Pricing made several recommendations for addressing international price discrimination, including one specifically on parallel imports. These recommendations provide a blueprint for how the government could address these issues. Many focus on ways to increase consumer access to international markets, for example:

- Removing all parallel import restrictions under copyright law, giving Australians access to cheaper, genuine goods (recommendation 4);

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<sup>15</sup> CHOICE submission, 'Inquiry into IT Pricing', 16 July 2012, p. 26

<sup>16</sup> Sheftalovich, Z., (2014), 'Buying cheaper clothing online', CHOICE, <http://www.choice.com.au/reviews-and-tests/money/shopping-and-legal/shopping/buying-cheaper-clothing-online.aspx>, 22/04/2014

<sup>17</sup> Browne, K., (2013), 'Cost of cosmetics', CHOICE, <http://www.choice.com.au/reviews-and-tests/food-and-health/beauty-and-personal-care/cosmetics/cost-of-cosmetics.aspx>, 03/12/2013

<sup>18</sup> CHOICE submission, 'Inquiry into IT Pricing', 16 July 2012, pp. 30-32

- Reforming copyright law to give greater protection to consumers getting around ‘geo-blocks’ (recommendation 5);
- Educating consumers on their rights to get around geo-blocks, and the tools available to them (recommendation 6);
- Considering the creation of a ‘right of resale’ for digital goods, as well as restrictions on digital locks that tether consumers to particular products (recommendation 7);
- Considering an outright ban on geo-blocking if other changes don’t work (recommendation 9); and
- Considering amending the law to make terms of service that seek to enforce geo-blocking void (recommendation 10).

Obviously, several of these recommendations are relevant to Australia’s copyright law, which is addressed later in this submission. The Inquiry into IT Pricing also recommended the repeal of section 51(3) of the Competition and Consumer Act, which exempts certain conditions in copyright licenses from the anti-competitive conduct provisions of the CCA, excluding the misuse of market power provision and resale price maintenance provision. The ACCC has also advocated for the repeal of this section, arguing:

*Blanket exemption for conditions imposed in the licensing or assignment of IP is not justified. Intellectual property rights such as copyright should be subject to the same treatment under the CCA as any other property rights.*<sup>19</sup>

Section 51(3) is an area where competition policy and copyright overlap directly, and is an example of how Australia’s competition framework could be reformed to address the issue of price discrimination.

As flagged in the *Competition Policy Review Issues Paper*, “the Canadian Government has recently announced that it plans to introduce legislation to address country-specific price discrimination against Canadian consumers.”<sup>20</sup> According to the federal Canadian budget released in February 2014, the Canadian Government plans to “introduce legislation to address price discrimination that is not justified by higher operating costs in Canada, and to empower the Commissioner of Competition to enforce the new framework”<sup>21</sup>.

The budget also indicates that the Canadian Government will release further details of its proposal, but this does not appear to have occurred,<sup>22</sup> nor has any legislation been introduced to the Canadian Parliament. The absence of actual information has not prevented some debate around the proposed changes, including in the Australian press.<sup>23</sup> However, in the absence of further details, it is difficult for CHOICE to comment in any meaningful way on the proposed Canadian legislation.

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<sup>19</sup> ACCC, (2013), *ACCC submission to the ALRC Copyright and the Digital Economy Discussion Paper*

<sup>20</sup> *Competition Policy Review Issues Paper*, 14 April 2014, p. 13

<sup>21</sup> Canadian House of Commons, (2014), *The Road to Balance: Creating Jobs and Opportunities*

<sup>22</sup> The Government’s ‘Economic Action Plan’ website shows no update on the topic, <http://actionplan.gc.ca/en/initiative/cross-border-price-discrimination>

<sup>23</sup> Low, H., (2014), ‘Competition review mills pricing control’, *Australian Financial Review*, 09/05/2014

## Pro-competitive consumer protections

- Are there regulations governing the sale of goods for health and safety or environmental reasons whose purpose could be achieved in a manner more conducive to competition?

### Summary:

- Well-designed standards for health, safety and environmental protection provide important benefits for consumer welfare, often consistent with enhanced competition.
- This is borne out in CHOICE's experience of testing and investigating products in the Australian market over time.

### Recommendation:

- Assessment of health, safety and environmental standards should weigh not only the direct benefits for consumers, but also the capacity for well-designed regulations to enhance the competitive process by allowing consumers to navigate markets with confidence, compare products based on clear information and enjoy durable benefits.

Regulation of minimum standards to promote health, safety and environmental outcomes is often framed as a trade-off between the benefits of competition and the protection of consumers. However, CHOICE believes that well-designed regulations can sometimes provide substantial benefits for consumers while also enhancing the competitive process. There is long standing and widespread support for this notion. For example, Michael Porter in his seminal text *The Competitive Advantage of Nations* noted:

*It might seem that regulation of standards would be an intrusion of government into competition that undermines competitive advantage. Instead the reverse can be true ...Stringent standards for product performance, product safety, and environmental impact contribute to creating and upgrading competitive advantage.*

*Firms, like governments, are often prone to see the short-term cost of dealing with tough standards and not their longer-term benefits ...Such thinking is based on an incomplete view of how competitive advantage is created and sustained. Selling poorly performing, unsafe, or environmentally damaging products is not a route to real competitive advantage ...especially in a world where environmental sensitivity and concern for social welfare are rising in all advanced nations.<sup>24</sup>*

It is obvious that in some cases, the consequences of product failure can be so dire that requiring manufacturers or providers to meet certain standards has a clear benefit that outweighs any detriment to competition. For example, cars might well be cheaper if there were no requirement on manufacturers to make sure brakes and steering met standards of durability and reliability. But the catastrophic consequences of failure in these systems make the overall benefits of regulation clear.

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<sup>24</sup> Porter, M., *The Competitive Advantage of Nations*, Free Press, 1990. See also Averitt, N. W. and Lande, R. H. *Consumer Sovereignty: A unified theory of antitrust and consumer protection law* (1997) 65 *Antitrust Law Journal* 713; Vickers, J. *Economics for consumer policy*, British Academy Keynes Lecture, 29 October 2003; Waterson, M. *The role of consumers in competition and competition policy*, University of Warwick, Economic Research paper no. 607.

The assumption that the regulation of minimum standards automatically limits competition is not supported by the history of product regulation in Australia, including the experience of CHOICE's product testing and investigations. One clear example of regulation improving safety and consumer welfare without impairing consumer choice is strollers. There is a wide range of models available on the market with a high turnover of new models introduced by a large number of manufacturers. Strollers are available at a broad range of price points from budget to elite, and the necessity of meeting minimum local safety standards such as tether straps and specific brake pedals has in no way inhibited manufacturers from introducing new and innovative models to Australia, even where some alterations are required.

Minimum standards can also enhance competition by ensuring a level playing field for suppliers. The Therapeutic Goods Administration assesses and monitors therapeutic goods to ensure their safety, and in doing so, makes sure that suppliers who lack such integrity do not undercut suppliers who incur the costs associated with producing therapeutic goods safely. AHPRA and the National Boards ensure that medical practitioners have appropriate qualifications and provide for the removal from the profession of those who do not meet professional standards). This not only protects the safety of patients but also prevents the market becoming distorted by the entry of individuals who have not incurred the burden of training.

In sectors where failing to meet standards can have catastrophic effects, the mere provision of information is insufficient without regulations ensuring standards, safety, and accountability. Regulation may also require manufacturers to not only produce products in a certain way or to a certain standard, but to inform consumers of their product's performance against certain benchmarks. This is an example of regulation that enhances competition, for example through the introduction of energy rating labels and minimum energy efficiency standards for televisions. At a time when the energy consumption of television sets had them on course to become the single greatest energy consumer in homes - exceeding even heating - these standards provided for not only a basic efficiency level required before sale in Australia, but a clear and easily comprehensible rating telling consumers by how much any given set exceeded that minimum.

Initially resisted by suppliers,<sup>25</sup> on the grounds that minimum standards would exclude many or even most television sets from the Australian market and limit consumer choice, the GEMS rating in fact spurred competitive innovation as manufacturers used efficiency ratings to differentiate their products and compete for market share. Not only were manufacturers able to meet the minimum one-star standard, but in fact soon asked for an additional rating above the six-star maximum, and products have now become so efficient that Australia has moved to a new, stricter, tier of ratings to create a 'spread' among products tightly bunched at the very top level of energy efficiency. Throughout this entire process, the price of televisions has continued to fall and the variety available to consumers at a range of price points has remained high. In this case, regulation operated in concert with a competitive market to produce clear consumer benefits through both minimum standards and mandatory information, without restricting consumer choice.

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<sup>25</sup> For example, see 'Proposed Australian regulations could oust most plasma TVs', October 11 2007, accessible at <http://www.dailytech.com/article.aspx?newsid=9244>

## Reforming ‘protected industries’

- Are there occupational-based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

### Summary:

- There is evidence of poorly designed regulations and restrictions that reduce competition and undermine consumer welfare, for example in the taxi industry.
- In some cases, digital technologies are a powerful force to disrupt ‘protected industries’ and provide benefits for consumers, however we should not assume this is inevitable, particularly where there are restrictions on the accessibility of consumer data.

### Recommendations:

- The Review should recommend an institutional framework for ongoing reform of protected industries, to oversee the exposure of these industries to competitive forces and monitor future reforms that may be harmful to consumer welfare

CHOICE recognises that poorly designed regulations and restrictions can reduce competition and harm consumer welfare. For example, one of the most restricted and protected sectors in Australia is the taxi industry, where restrictions on the number of licenses impose an upper limit on the number of taxis, and consumer voice concern over both the availability and quality of taxi services. The high monetary value of these limited licenses has made reforming the industry very difficult, with only the Victorian Government taking the bull by the horns to date with the introduction of more licenses, improved driver conditions and qualifications, and stricter safety standards.

Despite resistance in the industry to comprehensive reforms, the development of innovative workarounds such as Uber<sup>26</sup> demonstrates that in today’s world, it is harder to maintain such disparities between service supply and demand. Digital technologies are an increasingly powerful force for disintermediation, connecting consumers directly with the products and services they want, including through peer-to-peer platforms and sharing.

CHOICE believes a key question for competition policy is to ensure this potential to transform markets is not undermined, either through poorly designed restrictions on the one hand, or through risks to important consumer protections and welfare on the other. The best way to achieve this is neither to enforce the status quo nor abandon the market to unregulated entrants, but to reform. For example, in the taxi industry, standards governing vehicle safety and driver training are clearly important. Restrictions limiting the number of new entrants to the market are not. In financial services, digital technologies are enabling new payment platforms and redefining the way in which Australians conduct their everyday banking activities. Yet this remains a market for essential products and services, with important regulations to ensure product safety and system stability.

Similarly, we should not simply assume that there is an ‘Uber’ waiting to disrupt every market. As we discuss later in this submission, in many markets, empowering consumers in this way

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<sup>26</sup> See <https://www.uber.com/>

requires access to consumption data - the type that is often locked in the closed systems of electricity providers, banks and telecommunications providers. For this reason, reforms should focus on giving consumers secure and portable access to their own consumption data, and using this to drive innovation from competitors and new entrants.

Given the complex, and changing, relationship between consumer needs and industry supply - especially in service industries - there is the need for an ongoing institutional structure with oversight of protected industries, both with a view to recommending needed reforms and with a watching brief to examine the operation of those reforms over time to make sure that they do not impair either genuine competition or community welfare. We discuss this further in response to Section Six of the Issues Paper.

## Reforming intellectual property laws

- **Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of these IP laws be achieved in a manner more conducive to competition?**

### Summary:

- The persistence of territorial licensing arrangements shows how intellectual property laws sustain artificially high prices and protect outdated business models from competition.
- Australia's rigid copyright regime denies consumers the full benefits of competition.
- Australia's patent laws require reform, particularly in regards to pharmaceuticals.

### Recommendations:

- Intellectual property laws should be reformed to provide Australians with greater access to competitively priced goods and services, including through a more flexible, fair-use copyright regime.
- The panel should investigate reforms to pharmaceutical patents consistent with the recommendations of the Pharmaceutical Patents Review.

Intellectual property affords creators and researchers monopoly rights to their content and ideas. This is, of course, for a very important reason. Intellectual property is by its nature easy for competitors to replicate. Therefore granting a monopoly for creators ensures there is an economic incentive to create, research and innovate.

However monopolies give rise obvious and well-known problems that ultimately end up impacting consumers. For this reason, limitations and exceptions apply to the monopoly of intellectual property. CHOICE believes that currently, Australia has not achieved the right balance in this regard.

Many companies operating in the entertainment industry (which obviously depends very heavily on copyright) have leveraged the considerable advantage of monopoly rights to insulate themselves against the disruptive effects of technological change, in particular from the internet. The persistence territorial licensing arrangements (limiting the distribution of content based on geographical regions) is testament to ability of the industry to resist change.

The internet has created enormous opportunity for the industry to provide their services to consumers in a more direct and flexible way. Digital content can be delivered from one side of

the globe to the other almost instantly at minimal expense. Despite this, the distribution of much popular content remains locked up in exclusive deals and distributed on a territorial basis.

The popular show *Game of Thrones* provides an interesting case study of how monopoly rights over intellectual property can adversely impact competition. The US-based cable company, HBO, owns *Game of Thrones*. In Australia, the latest season is available exclusively through Foxtel, despite the fact that the previous season was also available through two other competitors (Quickflix and iTunes). What started out as HBO's monopoly has become Foxtel's monopoly, while lawful alternatives, such as those accessible in previous years, have been cut off.

The cheapest means for Australians to watch the latest season of *Game of Thrones* is through Foxtel Play and connected online services.<sup>27</sup> Factoring in the discount offered when the new season began, Australian consumers could access the show at \$35 a month (reverting to \$50 after the promotion ended). Internationally, the cheapest option for watching *Game of Thrones* is the UK's online service Now TV, which offers the show on a subscription package costing just £4.99 a month.<sup>28</sup> Australian consumers are technically capable of accessing Now TV, but because of territorial licenses they are blocked. The practice of restricting access to online services is called geo-blocking.

Territorial licenses mean that access to shows available lawfully online, either for sale or for free, is geo-blocked because the distributor does not own the license for the Australian market. The same content is typically made available to Australians at a later date (although release windows are narrowing), on less formats and at higher prices.

The persistence of territorial licensing is one example of how monopoly rights over intellectual property are weighted too far against Australian consumers. This not only sustains higher prices, but also protects inefficient business models. As CHOICE argued in a submission on the parallel imports of CDs 16 years ago:

*These changes provide an opportunity to help the local industry to prepare for the fundamental shifts that are taking place to the notion of 'copyright'. In particular the concept of territorial or geographically exclusive rights to intellectual property will become increasingly irrelevant as more and more music consumers turn to on-line distribution.*<sup>29</sup>

CHOICE believes that Australia's competition policy framework and copyright regime should not support intellectual property restrictions that sustain price discrimination and protect outdated business models. We would suggest the recommendations of *At what cost? IT pricing and the Australia tax* are a useful starting point in seeking to address these issues. Another useful focus is the recommendations of the Australian Law Reform Commission's *Copyright and the Digital Economy* report, in particular recommendations 4 and 5 on the introduction of a more flexible, fair use copyright regime.

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<sup>27</sup> The service is restricted to certain formats. For example, you are restricted from streaming it to your TV from a laptop or tablet device. This is due to format licensing which coexists with territorial licensing.

<sup>28</sup> <http://www.nowtv.com/entertainment>

<sup>29</sup> Australian Consumers Association, (1998), *Submission to Senate Legal and Constitutional Legislation Committee: In Support of Parallel Imports of CDs*

Many innovations arising in overseas jurisdictions such as the United States could not have developed in Australia due to our copyright laws, for example the establishment of Google.<sup>30</sup> Many basic functions of Internet Service Providers also breach local laws<sup>31</sup>, and cloud services operate in legal limbo.<sup>32</sup>

The rigidity of copyright laws means Australia is typically slow to address new technologies. For example, taping television shows on a VHS for personal use was not legal in Australia until 2007. This was 31 years after the first VHS player was released in Japan, 23 years after the US courts determined this activity to be 'fair use', and 20 years after VRC market penetration exceeded 50% of Australian households.<sup>33</sup> But because the amendments refer to 'videotapes', DVDs and other digital formats (including online services) are excluded, despite DVD market penetration reaching 83% in 2006<sup>34</sup> when the amendments went before the Federal Parliament.

Australia's existing ad-hoc approach to copyright is format and platform specific, meaning that every time a new technology is developed, the limitations and rights afforded under copyright have to be redefined. Fair use by contrast is based broad principles that in essence ask if a use is 'fair', and if it damages the market for the content being used. It therefore protects the legitimate economic interests of rights holders and content creators, while at the same time providing flexibility for innovation and research. It is no accident that the US's fair use system has facilitated the rise of both Hollywood and Silicon Valley.

CHOICE also believes there is a case for reforming intellectual property restrictions around patent laws, particularly in regard to pharmaceuticals. This issue was recently analysed in detail by the Pharmaceutical Patents Review, which identified several failings in the current system and made recommendations on how to address them.<sup>35</sup> Australia's laws allow the patents on some pharmaceuticals to be extended to an effective patent term of up to 15 years. However this is susceptible to evergreening - a practice where companies seek to "indirectly extend the life of patent protection, beyond its natural monopoly"<sup>36</sup>. According to the Review:

*It is probable that less than rigorous patent standards have in the past helped evergreening through the grant of follow-on patents that are not sufficiently inventive.*<sup>37</sup>

CHOICE believes the artificial extension of a company's monopoly rights has obvious implications for both competition and consumer welfare. We therefore recommend that the Review consider the work already done by Pharmaceutical Patents Review and its recommendations.

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<sup>30</sup> Google, (2012), *ALRC Review - Copyright and the Digital Economy: Google submission*

<sup>31</sup> For example see iiNet's submission to the ALRC inquiry, iiNet, (2012), *Response to the ALRC's Issues Paper, Copyright and the Digital Economy*

<sup>32</sup> When you store copyrighted content on a cloud service you are essentially creating a copy of the content and holding it in a device that is not yours. It is likely that this would breach our copyright laws, even for content you are allowed to make copies of (such as songs).

<sup>33</sup> <http://www.screenaustralia.gov.au/research/statistics/archvidauvcr.aspx>

<sup>34</sup> <http://www.screenaustralia.gov.au/research/statistics/archnmcomphome.aspx>

<sup>35</sup> Harris, T., Nicol, D., Gruen, N., (2013), *Pharmaceutical Patents Review Report*

<sup>36</sup> Rimmer, M., (2014), *The High Price of Drug Patents: Australia, Patent Law, Pharmaceutical Drugs and the Trans-Pacific Partnership*

<sup>37</sup> Harris, T., Nicol, D., Gruen, N., (2013), *Pharmaceutical Patents Review Report*

## 3. Government-provided goods and services and competitive neutrality

- Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?
- What are the competition policy reform priorities in sectors such as utilities, transport and telecommunications?

### Summary:

- The experience of deregulating retail electricity markets shows the importance of the demand-side in achieving genuine competition.
- Competition can be undermined where there is a lack of consumer protection and engagement, particularly in complex markets.

### Recommendation:

- The Federal Government should prioritise measures that provide consumers with access to their own consumption data as one means of improving demand-side competition.

CHOICE believes that further reforms should focus on improving the conditions under which engaged consumers are more likely to make informed decisions and navigate markets with confidence. Deregulation of retail electricity markets provides an example where increased, and indeed vigorous, contestability on the supply side has produced mixed results for consumers.

CHOICE's research has shown for the last two years running, rising electricity costs were the number one cost of living concern for Australian households. Despite this high level of anxiety, our 2012 nationally representative survey of electricity consumers found that:<sup>38</sup>

- One third of respondents who recently joined their electricity retailer said they had tried to compare providers but had found it was too hard to work out the best choice;
- Only about half of those who recently joined their electricity retailer were confident they had made the best choice; and
- 29 per cent said they didn't bother comparing providers as they are all about the same in terms of what they offer.

On the basis of this research, CHOICE observed in our 2013 submission to the Australian Energy Market Commission's Review of Competition in the Retail Electricity and Natural Gas Markets in NSW that:

*[I]t is an open question as to whether price deregulation, in the form it has so far been undertaken in Australia's retail electricity and gas markets, is achieving genuine competition with net benefits for consumers. For example, in the Victorian market, often held up as the model for pursuing deregulation in other jurisdictions, there is a*

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<sup>38</sup> CHOICE, 'Energy retailers' marketing tactics', updated 23 April 2013, accessible at <http://www.choice.com.au/reviews-and-tests/household/energy-and-water/saving-energy/energy-retailer-marketing.aspx>

*lack of understanding regarding the net impact of retail price deregulation on consumers. While there has been considerable ‘switching’ activity, there are concerns about marketing efforts and retail costs, and CHOICE believes there is a need for more information about the actual impacts on consumers.<sup>39</sup>*

CHOICE would also note recent research indicating it is questionable whether full deregulation in Victoria has achieved price outcomes any different to other jurisdictions where varying degrees of regulatory control have remained in place.<sup>40</sup> While this is not presented as an argument for re-regulation, it does suggest that what we have seen in retail electricity markets is a demand-side failure of the competitive process, characterised by:

- Extreme information asymmetry between electricity retailers and their customers - anyone who has tried interpreting an electricity bill would understand this;
- A lack of meaningfully differentiated products that meet consumers’ needs, and difficulty comparing products on price and quality, especially when retailers are able to lock consumers into long-term contracts and raise the price at any time;
- A lack of transparency, for example around exit fees or the practice of some retailers only informing customers about price rises after they have already consumed energy at the higher rate; and
- Perhaps unsurprisingly, given everything else, a lack of consumer engagement, with so much product switching driven by negative experiences rather than positive alternatives.

## **Demand-side competition reform through open data**

Learning the lessons of electricity deregulation means recognising that demand-side consumer engagement is not the result of a genuinely competitive market, but one of its prerequisites. This requires adequate consumer protections, including around product transparency, and also reducing information asymmetry and complexity. One of the most powerful means to achieve this is by providing consumers with access the data that is collected about them by the suppliers of products and services.

The UK Government is three years into its ‘midata’ program, aimed at stimulating economic growth and innovation by allowing “consumers to access their data in a safe and secure way and make better decisions reflecting their personal wants and needs.”<sup>41</sup> It has introduced legislation that would mandate data access in the ‘core’ sectors of energy supply, credit cards, transaction accounts and mobile phones, and setting out principles for future interventions in ‘non-core’ sectors if required.<sup>42</sup> The United States Government’s Green Button initiative is giving millions of US utility customers access to their electricity data in a portable and sharable format.<sup>43</sup> This is

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<sup>39</sup> CHOICE, Submission to AEMC Review of Competition in the Retail Electricity and Natural Gas Markets in NSW, 8 February 2013, accessible at <http://www.choice.com.au/-/media/Files/Consumer%20Action/Energy/Submission%20to%20AEMC%20review%20of%20competition%20in%20NSW%20Issues%20Paper.ashx>

<sup>40</sup> Gavin Dufty, St Vincent de Paul Society and May Mauseth Johnston, Alviss Consulting, The National Energy Market - Is there a devil in the retail?, December 2013, p. 19, accessible at [http://www.vinnies.org.au/icms\\_docs/178601\\_National\\_Energy\\_Market\\_-\\_Is\\_there\\_devil\\_in\\_the\\_retail.pdf](http://www.vinnies.org.au/icms_docs/178601_National_Energy_Market_-_Is_there_devil_in_the_retail.pdf)

<sup>41</sup> See <https://www.gov.uk/government/news/the-midata-vision-of-consumer-empowerment>

<sup>42</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/43392/12-1283-midata-government-response-to-2012-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43392/12-1283-midata-government-response-to-2012-consultation.pdf) p. 6

part of a growing ‘smart disclosure’ agenda that aims to “increase market transparency and empower consumers facing complex choices in domains such as health, education, energy and personal finance.”

In Australia, the obvious starting point is electricity smart meters, which are collecting unprecedented amounts of information about household energy consumption. This has the potential to overcome the massive information asymmetry between energy retailers and their customers. It also can also provide opportunities for third-party innovators and price-based competition. However, as we discuss in relation to ‘protected industries’ in Section Two of this submission, fulfilling the potential for technological innovation to assist consumer engagement is not inevitable. It requires the removal of barriers to competition in order to establish preconditions for innovation, which in the case of the retail energy market are:

- Providing consumers with access to their own data in a secure and portable format;
- Enabling access to information on retail energy offers in a comparable form; and
- Promoting the market conditions under which third-parties can develop solutions, such as apps that match individual data with information in retail offers.

While it is not necessary that government act as the provider of data, or the creator of comparison tools and similar services, there is a role for intervention to remove barriers that prevent data from being shared, and to give consumers confidence that it can be accessed securely. Such a reform agenda would also help address emerging competition issues around consumer data and market power, as discussed in Section Five of this submission. For example, if we allow energy retailers to put up walled gardens around smart meter data, preventing its portability and shareability, this will simply reinforce the market power of incumbents, and justify perceptions that smart meters have cost households a lot of money for few if any benefits.

Unlocking the benefits of open data means allowing consumers to share this information in a useful, secure format. It means identifying the barriers to making this data available, and taking targeted action to remove these barriers and drive genuine competition. This will promote the shift from a focus on supply-side contestability to meaningful competition by empowering consumers to make informed decisions - the basic precondition of a genuinely competitive market.

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<sup>43</sup> See <http://www.data.gov/energy/page/welcome-green-button>

## 4. Potential reforms in other sectors

- Will more competition among providers serve the interests of consumers of health, education and other services?

### Summary:

- Some barriers to achieving genuine competition cannot be overcome simply by increasing the number of suppliers, removing barriers to entry and providing unmediated data.

### Recommendation:

- The case for further reform in sectors such as health and education should assess whether the preconditions for genuine demand-side competition are achievable and whether increased competition will result in improvements to consumer welfare.

CHOICE believes that competition-related reform should not be viewed as an end in itself, but rather, assessed by the degree to which it improves consumer welfare. This highlights the importance of a demand-side view of competition, whereby engaged consumers create incentives for businesses to innovate and compete on the merits. In a genuinely competitive market, where consumer preferences are not being met, this should give rise to opportunities for competitors and for new entrants, provided the barriers to entry in the market are sufficiently low.

However, there are some specific barriers to meaningful competition that cannot be overcome simply by increasing the number of suppliers, or by removing regulations or standards which provide for minimum levels of product quality or service delivery. These barriers include inelastic demand, where the essential nature of the good or service means that demand varies little regardless of price, highly complex products or packages, and products which are difficult to assess for quality in advance or where there is little significant difference in quality.

Government-provided goods and services typically exhibit a number of these characteristics. While this is not an argument against further competition-related reform, it does indicate the need to ensure the preconditions for genuine competition are achievable, including on the demand-side, if reforms are to benefit consumers.

Many of us are familiar with the range of factors that we take into consideration when contemplating the purchase of a new car. Although we may give different weight to fuel efficiency, acceleration speed, passenger capacity and boot-space, they are all meaningful, comparable, and comprehensible. However, few of us are equally familiar with, or confident in our judgement of, the factors which we might take into consideration when choosing an educational institution, or a brain surgeon. Data on class sizes in the case of the former, or mortality rates in the case of the latter, certainly constitute information, but information which might lead to very different conclusions depending on other factors, such as the number of auxiliary and support staff, or the relative severity of the surgeon's cases.

When introducing competition between providers in sectors where it has not previously existed, promoting consumer engagement must be about more than simply providing data. The more complex, and less tangible, that the service provided is, the more difficult it is for consumers to evaluate the choices available to them.

# choice

In this kind of situation, marketing and perceived value can become key decision drivers - as, for example, was seen in the tertiary education sector in the early 2000s, when universities were allowed to raise their fees by 25%. Without the information to judge the true quality of a degree from any given institution, prospective students associated high price with high quality so strongly that lower fees correlated with a fall in enrolments - which promptly recovered when the affected institution raised fees in line with other providers, without any change in the degree provided.<sup>44</sup>

If competition policy is intended to improve Australians' welfare by motivating suppliers to provide goods and services at a range of price points, in an efficient way, with sufficient variety to meet differing consumer needs, it would be a perverse outcome for competition to drive prices upwards without improving efficiency or quality. However, it is easy to see a similar situation arising in any sector where the only easily comprehensible information available to indicate value to consumers is price.

This highlights the importance of better information on factors that matter to consumers, in forms that they can use, in any extension of competition within health and education. This will require government to ensure that suppliers make base data available, in usable formats, especially where walling-off proprietary data would otherwise provide a financial advantage.

The greatest consideration in relation to health and education is, however, the community expectation of a guarantee of essential services, at a minimum standard, where there may be no market advantage to providing them. Government providers already face challenges providing high quality health and education services in many areas of Australia, including many remote areas but also some parts of our major cities. This is due to a range of factors, including limited demand for services due to low population density, and challenges in supply (for example difficulties attracting and retaining staff). Increasing competition in these sectors would arguably exacerbate these problems. Community reaction to telecommunication service provision failures in rural areas, sub-par care or safety in aged homes, and poor medical practice, has repeatedly demonstrated that Australians have expectations of trust and reliability that may not be met if there is a radical shift in the level of competition in the health and education sectors.

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<sup>44</sup> See <http://www.smh.com.au/business/why-competition-means-university-fees-will-rise-20140530-399pd.html>

## 5. Competition laws

- Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

### Summary:

- With some minor exceptions, current competition laws appear to be working well.
- That said, there is scope to encourage more competition cases to be brought (whether by the ACCC or private parties).

### Recommendations:

- Any amendments to the CCA should be premised on a policy of universal application.
- Measures that favour one type of business over others - or that single out individual sectors - should be treated cautiously.
- Measures that encourage private litigation under the competition provisions of the CCA should be considered, as should a prohibition on unfair trading (discussed later in this submission).

In CHOICE's opinion, the current competition laws - particularly as embodied in Part IV of the CCA - generally work well. There is limited evidence to indicate that the laws are deficient or that they are being interpreted inappropriately. While we consider moves to encourage more competition cases should be considered (as discussed below), analysis of the cases does not suggest that the relatively low level of litigation that we currently see is due to the law as written. This issue will be considered in more detail below, particularly in the context of section 46.

We consider that any further amendments to the CCA should be premised on a policy of universal application. The extension of the CCA to previously protected sectors following the Hilmer Review was a welcome development, and has contributed positively to the improvement of competition within the Australian economy. Changes designed to address market failure in particular industries - rather than throughout the economy more generally - should be regarded cautiously.

Similarly, "solutions" that are designed to favour certain types of competitors over others should not be implemented. Taking the grocery sector as an example, CHOICE accepts that the major supermarket chains appear to have substantial market power and that this market power seems to be increasing.<sup>45</sup> Nonetheless, legislating "choice", for example by way of market caps,<sup>46</sup> undermines consumer sovereignty and in fact removes choice. It also leads to market distortions that are likely to result in inefficiencies.

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<sup>45</sup> *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339; see more recently Alexandra Merrett and Rhonda Smith, "The Australian grocery sector: structurally irredeemable?" (paper presented at Supermarket Power in Australia: A Public Symposium, Melbourne, 1 August 2013).

<sup>46</sup> See, for example, the Private Member's bill put forward by Bob Katter in the last parliament: Reducing Supermarket Dominance Bill 2013 (introduced on 17 June 2013): [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r5097](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5097). The bill lapsed when parliament was dissolved for last year's election.

We would also observe that changes to the economy are challenging policy makers across all fields. In the case of competition policy, technology is making anti-competitive conduct in emerging markets hard to police. Market definition is difficult and there is limited scope to prevent unilateral conduct that creates substantial market power (as against relying on such market power).

The increasing prevalence of consumer data will also inevitably give rise to competition problems: while in some cases such data can lead to better informed (and thus empowered) consumers, large-scale data collection also has the potential to create barriers to entry in certain markets. As digital technologies have dramatically reduced the transaction costs of collecting and processing consumer data, its value to business has exponentially increased. The capacity to overlay data sets from different products and services has given rise to applications that in the past would have been unthinkable. In one recent example, a Woolworths spokesperson described the ‘overlay’ of car insurance accident data with supermarket rewards data to target insurance products based on what people eat:

*Because, you see, customers who drink lots of milk and eat lots of red meat are very, very good car insurance risks versus those who eat lots of pasta and rice, fill up their petrol at night, and drink spirits. What that means is we're able to tailor an insurance offer that targets those really good insurance risk customers.<sup>47</sup>*

In one sense, tailoring products to the needs of individual consumers is not a problem, nor is the advent of significant new entrants to the banking and insurance markets. Yet we can easily imagine circumstances where a lack of access to data would present insurmountable barriers to entry to challengers, or create vastly uneven playing fields for incumbents.<sup>48</sup> It is fair to say that our current competition laws would not have envisaged the exponential value of consumer data that would arise from a major player in supermarkets leveraging its operations into fuel, then into insurance, and then acquiring a 50 per cent stake in a major data analytics company.<sup>49</sup> Part of the solution to these emerging supply-side competition issues may be in demand-side reforms around giving consumers access to their own data, as we discuss in more detail at Section Two of this submission.

There is no doubt that there are many sectors of the Australian economy in which the degree of competition is sub-optimal. There is reason to consider that market power distorts competitive outcomes in areas such as groceries, banking and utilities. Particularly in the grocery sector, there have been ongoing complaints concerning anti-competitive conduct over decades. To that end, it is worth considering the ACCC’s recent unconscionable conduct action against Coles.<sup>50</sup> The impugned conduct appears, in many respects, similar to that which formed the basis of the

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<sup>47</sup> Woolworths Ltd director of group retail services, Penny Winn, accessed at <http://www.smh.com.au/digital-life/consumer-security/supermarket-spies-big-retail-has-you-in-its-sights-20130914-2trko.html> on 16 September, 2013

<sup>48</sup> For a discussion of the challenges this poses to the competition landscape, see Kathryn Edghill, ‘Big data and competition law’, 8 October 2013, accessed at

[http://www.cio.com.au/article/528524/big\\_data\\_competition\\_law/](http://www.cio.com.au/article/528524/big_data_competition_law/) on 3 February 2014

<sup>49</sup> See [http://www.afr.com/p/business/companies/quantum\\_leap\\_for\\_woolworths\\_GVE7EDP9KOkqhdeH5rLw3I](http://www.afr.com/p/business/companies/quantum_leap_for_woolworths_GVE7EDP9KOkqhdeH5rLw3I)

<sup>50</sup> See ACCC, ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers, Media Release No. 102/14 (5 May 2014); available at <http://www.accc.gov.au/media-release/accc-takes-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers>.

section 46 finding in the Safeway case.<sup>51</sup> Nonetheless, the ACCC - perhaps encouraged by the recent Full Court decision in Lux<sup>52</sup> - has brought the action under the unconscionable conduct provisions of the Australian Consumer Law. CHOICE welcomes this innovative and strategic approach, which is likely to deliver more effective remedies more quickly than could be achieved via section 46. (Safeway famously took nine years from the time of filing until final judgment.)

Nonetheless, the prohibition against unconscionable conduct is not - and cannot be - an adequate substitute for cases brought under Part IV. Many section 46 cases cannot be squeezed within the tight confines of the unconscionable conduct prohibition. Some of the most prominent section 46 cases in which a contravention was established would be unlikely to succeed as an unconscionable conduct action; these include NT Power,<sup>53</sup> Baxter Healthcare<sup>54</sup> and even Queensland Wire itself.<sup>55</sup> For those section 46 cases that can fall within the scope of unconscionability, there would still be the issue of relief. Given that the conduct would need to be framed somewhat differently, different remedies would follow. Such remedies are less likely to address the market failure, which led to the misuse of market power; they are also less likely to act as a general deterrent, given the substantially lower nature of the penalties available to the Court.

In CHOICE's view, therefore, measures should be considered to encourage the rate of private litigation under the competition provisions of the CCA. When undertaking the first major review of competition policy in Australia, the Hilmer Committee envisaged that the general conduct rules in Part IV would be enforced via private action "in most cases".<sup>56</sup> Unlike the position in the United States, where private actions outnumber those by regulators at a rate of 10:1,<sup>57</sup> this has not really occurred.<sup>58</sup> Yet, as Maureen Brunt noted in 1994, "more significant judgments on the merits [in competition cases] have stemmed from private than from public actions".<sup>59</sup> For example, three of the most significant High Court decisions concerning section 46 stem from private actions: Queensland Wire,<sup>60</sup> Melway<sup>61</sup> and NT Power.<sup>62</sup> Both the United Kingdom<sup>63</sup> and the

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<sup>51</sup> *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339.

<sup>52</sup> *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

<sup>53</sup> *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

<sup>54</sup> *ACCC v Baxter Healthcare Pty Ltd & Ors (No 2)* (2008) 170 FCR 16.

<sup>55</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

<sup>56</sup> Independent Committee of Inquiry, *National Competition Policy* (1993), at 335.

<sup>57</sup> See generally Steven C Salop and Lawrence J White, "Economic analysis of private antitrust litigation" (1986) 74 *Georgetown Law Journal* 1001. They note (at 1003) that, since the 1980s, the ratio of private-to-public antitrust cases in the United States has "declined" to 10:1. For a more recent analysis of the role of private litigation in the United States, see Joshua P Davis and Robert H Lande, "Defying conventional wisdom: the case for private antitrust enforcement" (2013) 48 *Georgia Law Review* 1.

<sup>58</sup> Alexandra Merrett, *The assessment and regulation of market power in Australia: an institutional approach* (Lambert Academic Publishing, 2013), 96-97.

<sup>59</sup> Maureen Brunt, "The Australian antitrust law after 20 years - a stocktake" (1994) 9 *Review of Industrial Organisation* 483, 485.

<sup>60</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

<sup>61</sup> *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1.

<sup>62</sup> *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

European Commission<sup>64</sup> have recently taken steps to encourage the private litigation of competition law matters.

These efforts recognise that private parties may often be well-placed to anticipate long-term harm to a market. Their understanding of their own industry provides insight to the strategic possibilities and consequences of particular conduct. CHOICE urges the Review Panel to consider ways in which competition proceedings can be expedited and rendered less expensive; further means of encouraging private litigation should also be considered. Elsewhere, these measures have included the creation of fast-track procedures for simpler competition cases,<sup>65</sup> as well as relief from costs for applicants and mechanisms that foster the early resolution of cases.<sup>66</sup> Additionally, as we discuss later in this section of the submission, in relation to remedies or powers in overseas jurisdictions, we believe the panel should consider the merits of a prohibition on unfair trading. This would apply more broadly and capture conduct that is outside the unconscionability regime.

## Misuse of market power

- **Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?**

### Summary:

- A review of the cases demonstrates that section 46 is generally operating effectively.
- The main problem concerns timing - a firm can engage in unilateral conduct that creates substantial market power, but does not rely on substantial market power.

### Recommendations:

- The panel should examine the case for an effects test.
- Consideration should be given to devising a prohibition - analogous with attempted monopolisation in the United States - that captures unilateral conduct that is likely to give rise to substantial market power.
- Divestiture should be considered as a remedy for misuse of market power.
- Independent reviews of ACCC merger decisions should be commissioned regularly to assess whether the objects of the law are being realised.

A detailed analysis of cases over the past 15 years suggests that there may not be systemic difficulty in proving a section 46 case before the Courts. Cases tend to fail because substantial market power cannot be established (as in 20% of superior court cases), or more commonly, because there was no use of such market power (as in 40% of superior court cases in which

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<sup>63</sup> For a discussion of recent reforms, see Nikos Dimopoulos et al, "United Kingdom: private antitrust litigation" in Global Competition Review, *The European Antitrust Review 2014*; available at: <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2129/united-kingdom-private-antitrust-litigation/>

<sup>64</sup> Commission of the European Communities, *White paper on damages actions for breach of the EC antitrust rules* (COM (2008) 165 final).

<sup>65</sup> Dimopoulos et al, above.

<sup>66</sup> EC, *White Paper* (2008), above, 9-10.

substantial market power had been found).<sup>67</sup> There has been just one case (a first instance decision) that failed only by reason of an inability to establish a proscribed purpose: *RP Data*<sup>68</sup> - but a close reading of this case suggests that it was an appropriate outcome. We are, however, conscious that there may well be matters involving evidence of misuse of market power that are not making it before the courts, because of the way that section 46 is currently framed. We therefore encourage the panel to consider whether a positive case can be made regarding the need for, or utility of, an effects test.

The cases that have been run reveal a structural problem in relation to timing - that is, the point at which section 46 is triggered. This was observed by McHugh J in the *Boral* case, when he noted that “one of the difficulties in forcing a ‘predatory pricing’ claim into the straightjacket of section 46 is that its terms may fail to catch conduct that ultimately has anti-competitive consequences”.<sup>69</sup> In the United States, attempts to obtain substantial market power are illegal - this is attempted monopolisation within the terms of section 2 of the Sherman Act. Such an approach would address the “gap” identified by McHugh J in *Boral*, where a firm engages in unilateral conduct that is likely to result in it obtaining substantial market power. Consideration should be given to devising a prohibition that captures unilateral conduct that is likely to give rise to substantial market power.

While CHOICE is generally supportive of the legislative framework surrounding section 46, we observe:

- There may be a case for introducing divestiture as a remedy available to the Courts if a misuse of market power is established. Sometimes, even substantial penalties can seem to be a license fee for profitable anti-competitive conduct<sup>70</sup> and the other remedies currently available appear ill-equipped to deliver the structural solutions necessary to rectify market failure;
- Section 46 has never been (and is not intended to be) an antidote to substantial market power in itself. For example, monopoly pricing is entirely legal. This approach is premised on the view that markets are self-correcting: in time, monopoly profits will attract new entry and competition will re-emerge. In some sectors, however, there are reasons to doubt whether this is occurring. Accordingly CHOICE asks the Review Panel to consider whether additional measures should be put in place to aid and accelerate the “self-”correcting process by which markets become more competitive over time; and

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<sup>67</sup> Rachel Trindade, Alexandra Merrett and Rhonda Smith, “The grass is always greener? The effects vs purpose debate resumes” (2013) 14 *The State of Competition*, 7; available at <http://thestateofcompetition.com.au/newsletter-archive/>.

<sup>68</sup> *RP Data Limited v State of Queensland* [2007] FCA 1639.

<sup>69</sup> *Boral Besser Masonry v Australian Competition and Consumer Commission* (2003) 215 CLR 374, at [319].

<sup>70</sup> See for example the findings of the Victorian Taxi Industry Inquiry in the report *Customers First: Safety, Service, Choice* (September 2012; available at <http://www.taxiindustryinquiry.vic.gov.au/final-report-customers-first>). While noting that Cabcharge had received “the highest ever penalty for misuse of market power” [at 122], it observes in passing “serious concerns remain about the effectiveness of competition due to ‘upstream’ market power held by Cabcharge. Cabcharge’s strong position in the taxi-specific payment instruments market... **and its ongoing refusal to allow competitors to process Cabcharge cards** reduces the size of the market for Cabcharge’s competitors in payments processing” [at 213; emphasis added]. See also at 193: “no party has been able to obtain access to process Cabcharge’s payment instruments”. Both these statements post-date the ACCC’s successful claim that Cabcharge has misused its market power in refusing such access (see *ACCC v Cabcharge Australia Limited* [2010] FCA 1261); as is clear from the Taxi Industry Inquiry, however, there was no discernible change to Cabcharge’s conduct following the Court decision.

- Similarly, given that market power appears to be at least somewhat problematic in the Australian economy, there may be some need to examine the current approach to assessing mergers. To this end, CHOICE notes that - contrary to some other jurisdictions<sup>71</sup> - there is no systematic formal review of ACCC merger decisions, whether in general or on a sector-by-sector basis. In CHOICE's view, such reviews should be conducted regularly, and independently of the ACCC.

## Making competition law accessible

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| <ul style="list-style-type: none"><li>• Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?</li></ul> |
| <ul style="list-style-type: none"><li>• Are there other measures that would support small and medium sized business participation in markets?</li></ul>  |

### Summary:

- Measures that favour one type of business over others should be regarded with suspicion.

### Recommendation:

- Consideration should be given to simplifying competition laws and processes to ensure they are accessible to all market participants.

CHOICE recognises the contribution that small and medium-sized businesses make to the Australian economy as a whole. Nonetheless, we are concerned about measures that actively favour particular types of businesses, as such measures can pre-empt the role of consumers in selecting the best means of fulfilling their requirements. Such market distortions can result in inefficiencies. That said, we recognise that the sheer complexity of the competition law framework disadvantages those less able to obtain qualified legal advice. Accordingly CHOICE welcomes reforms that would result in a simplification of the law and/or enable processes - such as notification, authorisation and merger clearances - to be made more accessible to smaller players.

## Price signalling

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| <ul style="list-style-type: none"><li>• Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?</li></ul> |
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### Summary:

- As a general principle, competition laws should have uniform application.

### Recommendations:

- The price signalling laws should apply universally or be removed.
- If retained, the price signalling laws should not be so wide as to impede consumer access to information.

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<sup>71</sup> See for example Buccirosi et al, *Ex-post review of merger control decisions* (December 2006); available at [http://ec.europa.eu/competition/mergers/studies\\_reports/lear.pdf](http://ec.europa.eu/competition/mergers/studies_reports/lear.pdf).

As a general principle, CHOICE believes that if a law is intended to redress a particular competition problem, that law should have uniform application. For this reason, we have reservations about the sector-specific application of Div 1A of Part IV of the CCA. Furthermore, we have concerns about the manner in which the price signalling laws work, with the affected sectors being a matter of ministerial discretion, without parliamentary oversight or any need for expert input. In CHOICE's view, the price signalling laws should apply universally or be removed.

We suggest that any extension of price signalling laws should give consideration to ensuring they do not undermine the role of third-party aggregator websites, many of which play a vital role in informing and engaging consumers, thereby contributing to a healthy state of competition.

## Secondary boycotts

- **Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?**

### Summary:

- As a general rule citizens individually and collectively have the right to undertake non-violent activity to communicate their opinions.
- In their current form, the provisions of the CCA on secondary boycotts do not protect consumers' welfare, which is the Act's objective.

### Recommendations:

- To ensure they cannot be used to impede consumers' access to information, the secondary boycott provisions should be removed from the CCA altogether except in so far as they relate to unfair commercial actions by a competitor.

A secondary boycott - where a party engages with others in order to hinder or prevent a business from dealing with a third party - is prohibited by section 45D of the Act if the conduct would have the effect of causing substantial loss or damage to the business of the third person. Boycotts that "substantially relate" to environmental protection or consumer protection are exempted from the prohibition.

The exemption for environmental protection has been the subject of recent public debate. Proponents of free speech have joined environmentalists in arguing for the maintenance of the exemption<sup>72</sup> while some commercial interests and political supporters have complained of unfair actions causing loss to producers.

CHOICE urges the Review to develop a policy position in relation to secondary boycotts based on the following principles:

- Consumer welfare is paramount;
- The consumer has a right to purchase or not purchase products based on any criteria they think are relevant;

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<sup>72</sup> C Berg "Freedom of Speech means freedom to boycott" 24 September 2013 <http://www.abc.net.au/news/2013-09-24/berg-freedom-of-speech-means-freedom-to-boycott/4977410>; S Breheny "A restriction on secondary boycotts is a restriction on free speech." 4 April 2014 <http://www.theguardian.com/commentisfree/2014/apr/04/a-restriction-on-secondary-boycotts-is-a-restriction-on-free-speech>

- The consumer has a right to any information about a product or service that they consider may be relevant to their particular decision to buy;
- As a general rule citizens individually and collectively have the right to undertake non-violent activity to communicate their opinions. Encouraging or facilitating (as opposed to compelling) consumers to individually or collectively prefer or avoid a product is covered within that right; and
- While the right to free speech is not absolute, any limitations on speech connected with boycotts of products and services should not exceed the limitations that apply to speech in relation to other political and ethical matters including those that apply to people seeking election to political office.

It is not clear why the exemption from the prohibition on secondary boycotts contained in s45DD (3) is limited to consumer protection and environmental protection. For example, there is no obvious reason why a boycott of products that involve animal cruelty should not be equally protected.<sup>73</sup>

Some have expressed concerns that inaccurate information has been presented to potential customers of a business with the purpose of influencing their decision to buy. CHOICE supports effective mechanisms to ensure that information provided to consumers is accurate, whether that information is provided by a business selling a product or a third party. There may well be ways to encourage both to observe higher standards of accuracy, however doing so would need to avoid two risks:

- Impinging on the right to free speech in unjustified ways;<sup>74</sup> and
- Creating further ways to silence critics and stifle public debate by use of unjustified threats of legal action.<sup>75</sup>

As Breheny notes, firms are generally well placed to ensure that their customers have access to their side of the story on a contentious issue. In our assessment, the problem of “greenwashing”, where firms overstate or falsely claim that they are acting positively in the interests of the environment,<sup>76</sup> is far more common and more likely to cause a net detriment to consumer welfare than the possibility that environmental activists will deceive consumers.

We understand that one of the original intentions of the secondary boycotts provisions was to prohibit certain “secondary” domestic industrial actions. We are not sure that this prohibition belongs in the competition law. If there are policy reasons why such a prohibition is justified, then it should be contained in and limited to the law regarding industrial disputes.

If the Review chooses not to recommend the removal of these provisions from the CCA, we suggest the limitation on secondary boycotts should be narrowed so that it only applies to actions which ‘prevent’ and not those which ‘hinder’ (that is, the words “hinders or” should be

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<sup>73</sup> <https://www.voiceless.org.au/content/govt-plans-reform-secondary-boycott-law>

<sup>74</sup> It is difficult to see why we would put up with inaccurate information from people seeking election to political office (as we do in the name of free speech) but not do so in relation to discussion of the ethical and political issues connected with products

<sup>75</sup> Providing that a business seeking to silence a critic on the grounds that their criticism is misleading and deceptive must pay the legal costs of the challenged party may be part of the solution to this problem.

<sup>76</sup> G Pearse *Big Brands and Carbon Scams* (2012) <http://www.blackincbooks.com/books/greenwash>

deleted from section 45D (1) of the Act). In addition, the exemption for “environmental protection” should be replaced with an exemption for “any ethical or political concern” (that is, the exemption in section 45DD (3) (a) of the CCA should apply to conduct if “the dominant purpose for which the conduct is engaged in is substantially related to an ethical or political concern or consumer protection”).

## The code framework

- **Is the code framework leading to a better marketplace, having regard both to the aims of the rules and the regulatory burden they could create?**

### Summary:

- Voluntary codes provide many potential benefits for consumers, and much would be gained from higher standards for code development, approval, monitoring and enforcement and review.
- Without reform, voluntary codes risk failing to deliver consumer benefits while standing in the way of alternative responses to pressing problems, for example legislation or mandatory codes.
- Mandatory codes are a useful alternative form of secondary legislation and would also benefit from promotion of best practice in their development, approval and review processes.

### Recommendations:

- There is a strong case for reforming current arrangements to promote and in some cases require best practice including:
  - Consolidation of existing best practice guidance;
  - Creating greater awareness of best practice;
  - Creating incentives for proponents of voluntary codes to comply with best practice as adapted to their particular circumstances; and
  - Amending the authorisation process in relation to codes to require the decision-maker to consider the adequacy of the code as a response to the underlying problem.

### Overview

The word code has many legal meanings. Mandatory codes have the force of law. Some are in fact legislation (e.g. the National Credit Code), while others, including the four Mandatory Codes prescribed under the CCA, are a form of subordinate legislation. Others are voluntary, in the sense that no market participant is required to adopt them. In relation to voluntary codes:

- Some may require authorisation under the current provisions of the CCA;
- Some may be entitled to approval by a regulator as a voluntary code; and
- Many remain entirely voluntary with greater or lesser degrees of informal oversight by and/or input from regulators.

Development of a voluntary code can raise competition problems and require authorisation (for example the Medicines Australia Code). Codes can also be seen as solutions to competition problems or perceived competition problems.<sup>77</sup>

## The Role of Voluntary Industry Codes of Practice

In the absence of efficient well-functioning markets or appropriate alternative forms of regulation, “industry codes” have the potential to play an important part in promoting consumer welfare, the ultimate aim of competition policy and consumer protection law.

There are potential benefits in developing a code of practice in appropriate circumstances. These have been listed elsewhere<sup>78</sup> but include potentially faster responses to problems in the face of a busy regulatory agenda, their potential for more rapid review and adjustment in the light of changing circumstances, their capacity to be applied by informal dispute resolution processes to low-value disputes without the cost or legalism of courts, and greater engagement and ‘ownership’ of the solution by industry - or at least its dominant members. Industry members can seek to gain positive reputational or other benefits as well as subject themselves to the core code restrictions designed to avoid consumer detriment.

There are specific circumstances where a code of practice may be a superior outcome to regulation or no action. There are also circumstances where codes of conduct do not enhance consumer welfare.

The biggest problem for consumers with voluntary codes is that they can be proposed or developed in lieu of a mandatory response to a problem where such a response would provide a more effective and efficient result. This risk can be overcome only if we can develop ways to ensure that voluntary codes of practice are developed in accordance with best practice, including the requirement that they are fit for purpose. This will require the articulation of that best practice (which needs to be flexible to be relevant to diverse circumstances) and the creation of adequate incentives for adoption of that best practice.

In the real world, legislators sometimes get cold feet in the face of objections by politically powerful groups to needed reform. One response is to propose a code or similar as a less intrusive (and sometimes less effective) alternative to required legislation. The decision by the previous government to allow financial planners to avoid the opt-in provisions of the Future of Financial Advice reforms if they developed an adequate ASIC approved code is one example. The increased visibility of appropriate best practice guidelines will help legislators decide when a code is and is not an appropriate alternative, and to have confidence that a code is in fact more likely to deliver the desired outcome.

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<sup>77</sup> In 2003 for example, in the face of allegations by smash repairers of breaches of the TPA by insurers, the ACCC determined that: “...there is scope for greater transparency in dealing between insurers, smash repairs and consumers including dispute resolution procedures and the entitlement of consumers to a reasonable level of choice in repairer without being penalised.” The ACCC recommended that those industries develop a code of practice as an alternative to legislation (ACCC 2003). Cited: Executive Counsel Australia, *A Review of the Motor Vehicle Insurance and Repair Industry Code of Conduct 2013*, accessible at <http://www.abrcode.com.au/forms/MVIRI%20-%20Code%20of%20Conduct%20%20ECA%20Review%20FINAL%20Dec%2020%202013.pdf>; cf ACCC 2003 ‘Smash repairers/ insurance issues paper published’, accessible at <http://www.accc.gov.au/media-release/smash-repairers/insurance-issues-paper-published>

<sup>78</sup> For example the Final Report of the Self Regulation Task Force, *Industry Self Regulation in Consumer Markets 2000* [http://archive.treasury.gov.au/documents/1131/HTML/docshell.asp?URL=01\\_executive\\_summary.asp](http://archive.treasury.gov.au/documents/1131/HTML/docshell.asp?URL=01_executive_summary.asp)

There is a potential risk that some stakeholders, in particular some classes of consumers or consumers on the whole, will not have their interests adequately represented in a code development process. This risk exists equally in relation to both the operation of market forces and the development of legislation, and is thus not an argument against voluntary (or mandatory) codes per se. Nevertheless best practice requires development processes that obviate or reduce this risk.

## The Effectiveness of the Code Framework

The Competition Policy Review *Issues Paper* asks, “[i]s the code framework leading to a better marketplace, having regard both to the aims of the rules and the regulatory burden they could create?”<sup>79</sup>

In relation to the CCA, the ‘code framework’ that the Review has in mind appears to comprise the provisions for mandatory codes, the provisions enabling a voluntary code to be prescribed, and the authorisation provisions.

The Terms of Reference of the Review refer explicitly to the types of codes contemplated by the CCA (i.e. mandatory codes such as the Unit Pricing Code), prescribed voluntary codes (of which there are none) and authorised voluntary codes (such as the Medicines Australia Code of Conduct).

CHOICE suggests that the Review should also pay regard to the arrangements for development and approval of codes in other key national industries, including financial services, telecommunications and energy (including effective code processes in some jurisdictions prior to energy being regulated nationally) for two reasons:

- There are provisions or practices used in the financial services, energy and telecommunications industries (at least) that are better than those used under the CCA; and
- There is a case for more consistency in operation across different industries.

The code framework thus overlaps with competition policy rather than forming a part of it. Put another way, competition policy needs to play a part in supporting an effective code framework, and conversely the code framework needs to ensure that it does not conflict with competition policy aims, while doing more than merely promoting competition.

## The problem

The stark problem is that in Australia we have perhaps hundreds of industry codes (likely no-one could name them all)<sup>80</sup> and we do not know whether on balance they are effective or not. We do know that a good few of them are either completely ineffective or could do better.

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<sup>79</sup> *Competition Policy Review Issues Paper*, 14 April 2014, p. 39

<sup>80</sup> It is hard to find information about what voluntary codes have been developed. It is not even very easy to find out how many codes of practices relevant to consumers have been authorised by the ACCC. There is a public register of authorisations however there is no obvious way to separately view industry codes of practice within that list. The ACCC should be encouraged to list voluntary codes that impact on the relationship between consumers and businesses on its website with a link to a page managed by the Code Administration Committee listing membership of the code. This list should include all those that have been authorised. The ACCC should encourage other code sponsors to

The Medicines Australia Code of Conduct is and has for many years been a completely inadequate response to the corrupting influence of hidden payments to medical practitioners. The Australian Direct Marketing Code of Conduct was authorised in 2006 despite being criticised as lowering standards of consumer protection.<sup>81</sup>

Every time a code is established it imposes costs on industry and thus, normally, on consumers. If the code is not effective in promoting consumer welfare for example by lifting standards generally, avoiding anti-competitive or other detrimental conduct or providing a remedy to harmed consumers, then those costs are a net public detriment.

## Possible solutions

### *Authorisation*

The ACCC has no formal role in the review of voluntary codes of practice. Where a code requires authorisation, the ACCC must determine only whether or not the code has a net public benefit and thus may be authorised. It does not have a role in determining whether the provisions of the code could be better nor whether the development process followed in respect of the code was likely to have provided a well-considered outcome that balances various competing considerations to create the greatest public benefit.

The Medicines Australia Code is a case in point. The pharmaceutical marketing system is rife with market-distorting payments that operate to the significant disadvantage of consumers in the health system.

The Medicines Australia Code of Practice was established to address some of these concerns or at least appear to address them. The Code, now in its 17th edition, has been authorised by the ACCC and its predecessor the TPC on numerous occasions including most recently in 2007, 2010 and 2012. The Code has been updated by Medicines Australia and submitted to the ACCC for authorisation every five, three or two years. On each occasion, the ACCC has received submissions as to why, despite some improvements added each time by Medicines Australia, the Code is not good enough.

The process itself<sup>82</sup> and the abuse of the process by the industry applicant<sup>83</sup> has been criticised in submissions in response to Medicines Australia's authorisation application. However the ACCC has no power to consider what would be the most optimal code nor compel Medicines Australia to ensure the most optimal code is submitted. It merely determines whether the code as submitted has a net benefit. Similar criticism has been made of the authorisation of the

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provide it with information to enable their codes to be listed as well. This would be made easier if code proponents and/or administration bodies were required to register codes.

<sup>81</sup> For example, see <http://www.accc.gov.au/media-release/accc-grants-authorisation-for-australian-direct-marketing-associations-code-of>

<sup>82</sup> CHOICE pre draft determination submission

<http://registers.accc.gov.au/content/trimFile.phtml?trimFileTitle=D12+115022.pdf&trimFileFromVersionId=1094773&trimFileName=D12+115022.pdf>

<sup>83</sup> Professor Gavin Mooney, Submission on draft determination

<http://registers.accc.gov.au/content/trimFile.phtml?trimFileTitle=D12+161917.pdf&trimFileFromVersionId=1094773&trimFileName=D12+161917.pdf>

Australian Direct Marketing Code of Practice in 2007.<sup>84</sup> We suggest that the normal authorisation test is not the best way for competition laws to handle the authorisation of potentially anti-competitive codes of conduct.

### ***Prescribed voluntary codes***

Provisions to create a regime for enforcement of prescribed codes of conduct between businesses and between businesses and consumers were added to the TPA/CCA in 1998<sup>85</sup>. To date, despite a proliferation of codes that apply to the relationship between consumers and businesses, no codes have been prescribed. No codes have been approved under the broadly equivalent s1101A of the ASIC Act as no code proponent has applied for approval.<sup>86</sup> This suggests that there may be insufficient incentives for code proponents to seek prescription or authorisation. We note that 22 codes have been ‘registered’ under the somewhat different provisions of the Telecommunications Act 1997 where different incentives apply.<sup>87</sup>

It should be noted that prescription or authorisation is not an end in itself. In the case of ASIC, authorisation is a means to promote and require code proponents to comply with best practice as set out in ASIC Guidance on Code Development Regulatory Guide 183. RG 183 sets out generally effective code development and review processes. What is required is a way to create incentives for adoption of best practice.

### ***Promoting best practise in code development, approval, implementation and review***

Many codes do not require authorisation as they do not impact on competition. Authorisation is effectively a back door route to oversight of code development and content. It would be preferable if there were a more formal way to ensure or encourage adequate stakeholder engagement in the development of codes, and the development of codes that met best practice in relation to their content, administration, enforcement and review.

Given the very diverse range of instruments and activities that may fall within any definition of a voluntary industry code, any mandatory elements of such a system would need to be carefully crafted. At the very least they would need to be limited to codes that regulate the relationship between producers/sellers and consumers and possibly small business end-users. They would also need to generally exclude the independent development of product and service standards and other information tools.

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<sup>84</sup> Consumer Action Law Centre, *Defining “public benefit” - Social and Environmental Considerations in Part VII of the Trade Practices Act 1974 (Cth)*, 2007, p. 26

<sup>85</sup> ACCC submission to the Productivity Commission Inquiry to Consumer Protection 2007 p 16, [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0019/89002/sub080.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0019/89002/sub080.pdf)

<sup>86</sup> ASIC’s website site lists eight industry codes of practice relevant to consumers of financial services on its web site, seven developed by industry groups, and one, the ePayments Code, by ASIC. <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Codes-of-practice>

<sup>87</sup> See <http://www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-codes>. In 2008 CHOICE and Galexia noted “On at least two occasions ACMA has encouraged the industry to develop a code on a specific issue - this has included threats to develop a mandatory standard. Industry has responded by developing or amending a code of conduct on both occasions” Consumer Protection in the Communications Industry: Moving to best practice - Issues Paper (2008) [http://www.galexia.com/public/research/assets/telecom\\_codes\\_20080430/gc301\\_telecom\\_code\\_submission\\_public-2\\_2\\_.html](http://www.galexia.com/public/research/assets/telecom_codes_20080430/gc301_telecom_code_submission_public-2_2_.html)

We would however caution against doing nothing, as a plague of useless codes would impose real costs on the economy. We suggest a two-stage process. First, undertake the work required to identify and promote best practice across all industries. This requires a review and coordination of the various ways in which code development is monitored and encouraged by at least the ACCC, ASIC, ACMA, identification of specific problems that apply in various situations and development of agreed best practice. Second, empower the ACCC to 'call out' failures to meet best practice. Whether this - effectively a 'name and shame' remedy - is sufficient should be assessed after some years of operation. To address the risk of no action being taken to address a market failure where a code could be the right solution, consideration could be given to providing the regulator with a market studies power to identify matters that should be the subject of stronger consumer protection, rather than waiting for industry to develop codes on their own.<sup>88</sup>

## Issues to consider in Best Practice Guidance

Up until now we have been discussing the particular issues of voluntary codes. Developing an improved, economy-wide approach to best practice is a key part of our proposed solution to problems that affect voluntary codes. It should be noted however that processes typically used for mandatory code development also vary from excellent to poor, and would benefit from a similar best-practice approach, as would equivalent regulatory options such as standards developed by the regulator (ACMA) under the Telecommunications Act.

Connolly and Vaile identify four existing key 'best practice guides' for the development of codes of conduct.<sup>89</sup> CHOICE believes that overall the ASIC RG 183 best captures best practice however there are other provisions required or used in practice in developing other codes that may be desirable additions.

The Telecommunications Act (s117) specifies a number of stakeholder groups that must be consulted in developing a code to be registered under that Act, including the public and at least one body or association that represents the interests of consumers. We understand the regulator's practice has been to require a certificate from the most appropriate consumer group that it has been consulted. We also understand that the practice in the telecommunications industry (and in some other situations including a proposed code for financial planning) has been for the regulator to ensure that the proponent industry group has provided resources to assist consumer groups to provide appropriate input. Various reviews of code development in particular industries have also identified problems that need to be addressed and which may be addressed in our view through best practice guidance.<sup>90</sup>

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<sup>88</sup> See CHOICE/Galexia, *Consumer Protection in the Communications Industry: Moving to best practice - Issues Paper*, (2008) and CHOICE, *Supplementary Submission to the Productivity Commission Review of Consumer Policy Framework*, March 2008, pages 4-6

<sup>89</sup> ACCC, *Guidelines for developing effective voluntary industry codes of conduct* (2005); ACMA, *Developing Telecommunications Codes for Registration: A Guide* (2003); ASIC *Regulatory Guide 183 - Approval of financial services sector codes of conduct* (2007); and Office of the Australian Information Commissioner, *Privacy Code Development Guide* (September 2001).

<sup>90</sup> Examples include Chris Connolly and David Vaile, *Drowning in Codes An Analysis of codes of conduct applying to online activities in Australia*, Cyberspace Law and Policy Centre, UNSW; Galexia/CHOICE, 2008, *Consumer Protection in the Communications Industry: Moving to best practice; Report of the Taskforce on Industry Self Regulation*, 2000 (particularly Chapter 6: 'Good practice and cost-effective self-regulation methods' and Chapter 5 in relation to situations where self regulation including voluntary codes are not appropriate).

## **Mandatory codes**

It is not clear that the regulatory burden created by a mandatory code is significantly different to any other delegated legislation. The existence of mandatory code provisions in the CCA does not raise any problems per se, although valid criticism of the content of some of the four codes has been made.

The Unit Pricing Code has been routinely criticised by consumers as being insufficiently precise to achieve its aims. While we agree with those criticisms, this is essentially a difference of opinion over effective policy outcomes and/or an example of an industry using its greater lobbying strength to thwart the desired consumer outcome. This problem does not relate to the form of the subsidiary regulation. It would be equally present if the government of the day had chosen to create regulations to similar effect.

Some of the other codes have been criticised as being too vague. We believe that this is a function of inadequate code development processes and that our recommendations in relation to code development outlined here should equally be applied to mandatory codes.

## **Detailed recommendations**

Code guidance should require that a code can only be an alternative way to solve a market problem where it meets the following conditions:

- Likely substantial coverage of market participants;
- Adequate code development, approval and review processes;
- Adequate compliance monitoring and enforcement processes; and
- Compliance with other elements of best practice guidance as appropriate to the circumstances of the code.

Code guidance - or at least the core approach - should be consistent across industries. The ACCC, ASIC, ACMA and AER should work together and with any other agencies that promote or approve consumer-facing codes to develop a set of principles underpinning their approach and their industry guidance. All of those approaches should refer to the circumstances in which ACCC authorisation should be required.

In any event, the ACCC guidance to voluntary codes should be reviewed to include best practice drawing on RG 183, the ACMA practice which supports resourcing of consumer input and certification by relevant consumer groups that they have been adequately consulted, and any other identified best practice.

A comparative investigation into the experience of the development, approval, implementation and review of voluntary codes in the financial services, telecommunications, energy and general consumer sectors should be undertaken. The purpose is to learn which approaches have produced the most consumer welfare most effectively and efficiently.

There should be one place (online) where a consumer or their advisors can locate all non-legislative codes that may impact on their consumer issues, particularly where they have a potential complaint. The ACCC should be funded to maintain a register for this purpose.

The ACCC should be empowered to identify and challenge particular codes that play a significant role in the economy or purport to address a problem that involves considerable consumer

detriment but do not adequately comply with agreed best practice. After code proponents and others are given an opportunity to have their views considered, the ACCC should be entitled to name a code as failing to comply with best practice in significant ways.

Consideration should also be given to providing the ACCC with a market studies power to identify matters that should be the subject of stronger consumer protection, rather than waiting for industry to develop codes on their own (there is a further discussion of market studies and investigations later in this section).

Where an industry code of conduct or similar proposed agreement requires authorisation then the ACCC should:

- Not authorise the code if it fails the current authorisation test;
- Be empowered to issue specific guidance as to the process for developing, operating and enforcing the proposed code consistent with guidelines that it would publish from time to time; and
- Impose such conditions on the authorisation of the code as are required to ensure that the code provides an adequate response to the key problems in the relevant industry related to the subject matter that the code is dealing with, including requirements to alter the provisions of the code having regard to the process for developing the code, the nature of the harm that the code proposes to address and the views of stakeholders.

The mandatory code provisions of the CCA provide a useful path to subsidiary regulation that is capable of being more efficient than alternatives in some circumstances and should be retained. Mandatory codes should be subject to the best practice code development and approval processes identified above.

## Enforcement powers, penalties and remedies

- Are the enforcement powers, penalties and remedies, including for private enforcement, effective in furthering the objectives of the CCA?

### Summary:

- Available evidence suggests current enforcement powers, penalties and remedies are appropriate, and that the ACCC uses this toolkit effectively.
- At present, there is limited data to compare the effectiveness of regulators or to track their performance over time.

### Recommendations:

- Retain the existing suite of powers, penalties and remedies available to the ACCC.
- Consider ways in which the ACCC might further enhance its reporting of enforcement outcomes, including clear separation of competition and consumer protection matters and reporting of litigation actions commenced and enforceable undertakes obtained each quarter.

The issue of private enforcement is dealt with separately, as is the issue of code enforceability and enforcement. This section focuses on the role of the regulator in taking enforcement action, the effectiveness of current powers, penalties and remedies and the alignment of functions and powers with the objectives of the CCA.

Again we should remind ourselves of the object of the CCA, which is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.”<sup>91</sup> This places the welfare of Australians as the necessary output of the promotion of competition, not benefits to business or simply competition for competition’s sake. Thus the yardstick against which to measure the effectiveness of powers, penalties and remedies is their capacity to contribute to that welfare outcome.

The CCA also contains various provisions that inherently recognise that welfare doesn’t automatically flow or is not maximised by competition alone. Prime examples are the provisions that envisage the notification or authorisation of conduct that would otherwise infringe competition laws, where the public benefit outweighs the anti-competitive detriment.<sup>92</sup>

Thus it is fair to say that the Act recognises that the ACCC requires a range of tools in its armoury to effectively address market issues, whether they arise on the supply or demand side of the market, and to deliver the outcome of enhanced welfare.

As the *Issues Paper* notes, there have already been a number of reviews of the ACCC and the (then) Trade Practices Act - both public and private. It is not necessary to rehearse the relevant outcomes of the public reviews (which are summarised in the *Issues Paper*).<sup>93</sup> It is worth noting however that the overwhelming trend has been to refine or expand the powers of the regulator rather than diminish them.

Of course regulatory effectiveness is about much more than the powers and remedies available to the regulator. A broad set of powers and tools that enable a graduated and effective response to issues arising in markets is a necessary but not sufficient pre-condition of effectiveness.

Much has been written about the ingredients of effective regulation and regulators.<sup>94</sup> However, relatively little has focused on enforcement performance specifically. This is clearly central given the ultimate role of any regulator is to enforce the laws within its remit. That role in turn encompasses a range of functions, from the provision of information to - and education of - market participants (on both the supply and demand side), through to the issue of court proceedings.

While many regulators regularly utilise the more ‘light touch’ elements of their regulatory toolkit, their effectiveness is undermined and their voice muted where they do not take action at the ‘pointy end’ where appropriate.

Two reports that examine the question of enforcement effectiveness are *Good Practice in Consumer Protection Enforcement*, published by CHOICE in 2008,<sup>95</sup> and *Regulator Watch - the enforcement performance of Australia’s consumer protection regulators*, published by the

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<sup>91</sup> Section 2, Competition and Consumer Act 2010.

<sup>92</sup> Part VII, CCA.

<sup>93</sup> At p.28.

<sup>94</sup> See for example the work of Richard Macrory, John Braithwaite, Malcolm Sparrow, Philip Hampton and Christine Parker.

<sup>95</sup> K Halliday, T Lozano and G Renouf (2008) *Good Practice in Consumer Protection Enforcement: A Review of 12 Consumer Protection Regulators*, CHOICE

Consumer Action Law Centre in 2013.<sup>96</sup> Whilst both reports ostensibly focus on consumer protection enforcement, each notes that a range of enforcement that may not traditionally be considered ‘consumer protection’ has consumer protective outcomes, including competition enforcement.<sup>97</sup>

The CHOICE report seeks to establish a framework for good practice in enforcement, noting that whilst much has been written about good practice regulation in general, little of it focuses on enforcement by regulators. The report then discusses how consumer protection regulators perform against this framework. A summary of the CHOICE enforcement framework appears at Appendix 1. That model examines enforcement from the perspective of capacity, effectiveness and accountability and sets out a number of elements necessary for each. In the case of enforcement capacity, the elements are: powers; an enforcement policy (addressing specified particulars); and resources. In the case of enforcement effectiveness, the elements are: monitoring; targeting; and the achievement of actual enforcement outcomes. Elements of accountability are transparency and consultation.<sup>98</sup>

The Consumer Action report seeks to assess the element of enforcement effectiveness with a particular focus on targeting and enforcement outcomes. In doing so, it adopts the CHOICE enforcement framework.

Both reports place the ACCC at or near the top of performance rankings.<sup>99</sup> For example, *Regulator Watch* rates the ACCC as only one of two agencies whose enforcement is ‘trending up’ and its reporting of activities as ‘fair’. The ACCC also performs highest in the areas of enforcement culture and development of an enforcement policy. These achievements suggest significant reasons to leave the fundamentals of the agency in place, though as noted below, there are areas in which current powers and remedies could be enhanced.

Of course there is always some scope for improvement and one area in which all regulators, including the ACCC, can improve is in reporting of enforcement activity. At present it is not possible to compare the performance of one regulator against another and not necessarily possible to track performance over time within a particular regulator due to variations in data reported. The potential gains from better and more aligned reporting are significant. If regulators published all the information that we believe is necessary it would be possible to:

- Identify the quantity and nature of enforcement for each regulator;
- Identify trends in enforcement by each regulator across time;
- Compare the total number of enforcement actions (ideally weighted by type) to the total number of consumer complaints;
- Determine the rate of enforcement actions having regard to the population of the State or Territory; and
- Draw some detailed comparative conclusions between regulators.<sup>100</sup>

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<sup>96</sup> *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, a Report by Gordon Renouf, Teena Balgi and the Consumer Action Law Centre, March 2013

<sup>97</sup> See for example, *Regulator Watch*, p. 30

<sup>98</sup> CHOICE, *Good Practice in Consumer Protection Enforcement*, p. 17

<sup>99</sup> See for example, *Regulator Watch*, pp. 15-17, 157.

<sup>100</sup> *Regulator Watch* at 14.

In particular, consistent reporting over time regarding the types of actions undertaken would provide a means to assess more easily the balance between the competition and consumer protection enforcement undertaken by the ACCC. Whilst this submission does not take the position that there is presently an imbalance in the ACCC's enforcement attention, such views have been expressed. Further, improving enforcement reporting may provide evidence to inform this debate and the means to allay any concerns regarding the balance between these types of work.

Ultimately in considering the role of the regulator it is suggested that many commentators mistake free markets for free enterprise. To parse Ross Gittins in an old, but still relevant *Sydney Morning Herald* article, with the latter businesses are free to do as they wish whereas in the former they are not free to act in a way that harms competition.<sup>101</sup> The ACCC's role in maintaining free markets is crucial and has been well executed.

## Remedies and powers from overseas jurisdictions

- |   |
|---|
| <ul style="list-style-type: none"><li>• The Panel is interested in whether there are other remedies or powers (for example, in overseas jurisdictions) that should be considered in the Australian context.</li></ul>   |
| <ul style="list-style-type: none"><li>• Are there issues in key markets that raise competition concerns not addressed by existing anti-competitive conduct laws? If so, in which ways might they be addressed through competition-related policies?</li></ul> |

### Summary:

- There are a number of remedies and powers available in comparable overseas jurisdictions that warrant consideration, in particular market studies and investigations powers; super complaints powers; unfair trading prohibitions; and cy pres remedies.
- While elements of these powers have application in consumer policy, this reflects the interplay of consumer protection and competition outcomes, and it is appropriate to consider them in the context of this review.

### Recommendations:

- The powers and remedies available to the ACCC under the CCA should be extended to include:
  - A market studies mechanism (utilising the UK model);
  - Power to make a market investigation reference to an appropriate body or group (see discussion and recommendations in Section Six below);
  - A super complaints mechanism; and
  - Access to cy pres remedies.
- Amend the CCA to include a prohibition on unfair trading modelled on the US or UK approach.

### Market studies and investigations powers

Market studies and investigations powers enable consideration of issues arising in a market in way that is different from that arising in enforcement and mergers, which focus necessarily on

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<sup>101</sup> Ross Gittins, Allan Fels: 'Economic rationalist hero of the decade' *Sydney Morning Herald*, 15 July 2003.

an individual firm or group of firms, albeit from the perspective of their impact on competition in a market. They exist in different forms in the US and the UK.

As the *Issues Paper* notes, a benefit of market studies is that they enable the examination of issues that may not be captured by existing laws and rules. They are particularly well suited to a perspective that considers not only supply side issues, including structure, but also how competition is functioning on the demand side - the capacity of consumers to activate competition and any barriers, including information asymmetries and search and switching costs. They also offer a clear platform to consider issues of behavioural economics and consumer behaviour in markets.

In the UK, market studies were brought into being by the (then) Office of Fair Trading, pursuant to its function of obtaining, compiling and reviewing information about matters relating to its functions in the UK under the Enterprise Act 2002. The OFT's approach was outlined in guidance issued by the Office. Key elements include:

- Studies may take the form of a short preliminary review, a short study or a full study;<sup>102</sup>
- Actions that may result from a market study include:
  - Publishing information to help consumers;
  - Encouraging firms to take voluntary action or adopt a code of conduct (see discussion of codes earlier in this section);
  - Making recommendations to government or other regulators;
  - Taking enforcement action for breach of the competition or consumer protection law;
  - Making a market investigation reference to the Competition Commission; or
  - A decision to take no further action.<sup>103</sup>
- Studies may result from a super complaint (discussed below).

As described above, market studies link with a related but separate mechanism - that of market investigations. Market investigations are a more formal mechanism, explicitly provided for in the Enterprise Act 2002. When first enacted, these were conducted by the (then) Competition Commission. They are now the purview of the Competition and Markets Authority.<sup>104</sup> The Enterprise and Regulatory Reform Act 2013 makes provision for the CMA to make market investigations references to what are called CM groups - groups that may be convened by the CMA from time to time and which act independently of the CMA Board. The grounds for making a market investigation reference have remained the same since enactment of the enterprise Act 2002, namely where the referring body:

*...has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.*<sup>105</sup>

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<sup>102</sup> See Office of Fair Trading, *Guidance on the OFT approach: Market studies*, November 2004 at 5-10.

<sup>103</sup> See Office of Fair Trading, *Guidance on the OFT approach: Market studies*, November 2004 at 13.

<sup>104</sup> Following the abolition of the Office of Fair Trading in 2014, market studies are now also theoretically within the purview of the Competition and Markets Authority. It remains to be seen whether this mechanism will be used by the CMA in addition to its more formal market investigation power.

<sup>105</sup> s.131 *Enterprise Act 2002*.

Like market studies, market investigations are not limited to the consideration of supply side features. Demand side features such as information asymmetry, switching and search costs have also been important elements. A number of significant investigations have focused on demand side features and followed a reference by the OFT arising out of a market study they have conducted, including payment protection insurance, extended warranties on domestic electrical goods and Northern Irish personal banking services.

Once a market investigation has been conducted, where adverse effects on competition have been found, the CMA is required to take reasonable and practical action to mitigate, remedy or prevent the detriment to consumers so far as they have resulted from, or may be expected to result from, the adverse effects found.<sup>106</sup>

US laws do not provide for market studies and investigations in a manner as explicit as the UK framework. However, the Federal Trade Commission has been vested with the capacity to initiate what are called “rule making proceedings” where it has identified widespread, unfair or deceptive conduct that is not covered by existing laws or requires an industry-wide response.<sup>107</sup> The FTC conducts formal hearings to which interested parties can make submissions, following which a rule may be enacted by the FTC. In this way it can gain insight into a problem affecting a market or substantial portion of a market, rather than being limited to proceedings that focus on individual actors within a market.

On balance, it is considered the UK approach is preferable in that it fits more comfortably with the existing Australian regulatory framework for competition. Rule-making powers for the ACCC would be a significant new area of responsibility, and would likely have quasi-regulatory effect. In contrast, market studies fit neatly with the existing ACCC role of conducting market inquiries in the context of mergers and broader market investigations when the subject of a Ministerial reference.

If the UK regime was adopted in Australia, the question would arise as to which body the ACCC could make references for a market investigation. This is discussed in Section Six below.

## Super complaints

Super complaint mechanisms can be a useful companion tool to market studies and investigations powers, or can exist as a stand-alone mechanism. Again with a genesis in the UK, super complaints confer a right on specified consumer (or small business) organisations to make a ‘super complaint’ to the relevant regulator, with the regulator being obliged to respond to that complaint within a specified period of time. In order to constitute a super complaint, a reference must relate to widespread concern or conduct in a market and must meet other (quite significant) thresholds in relation to information provision.

In the UK, the ability to make a super complaint is created by section 11 of the Enterprise Act 2002, which provides that: a super complaint may be made where:

*...any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers.*

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<sup>106</sup> ss.138, 159-161 *Enterprise Act 2002*.

<sup>107</sup> S.18(b) ; 15 USC s.57a(b)(3) *Federal Trade Commission Act*;

Only consumer organisations designated by the Secretary of State can make a super complaint. Once made, the CMA is obliged to respond to the complaint within 90 days by:

- publishing a response stating how it proposes to deal with the complaint, and in particular-*
- (a) whether it has decided to take any action, or to take no action, in response to the complaint, and*
  - (b) if it has decided to take action, what action it proposes to take.*<sup>108</sup>

Action in response to a super complaint may include enforcement action; launching a market study; making a market investigation reference; referral to a relevant industry specific regulator; or making a finding (and providing reasons) that no further action is warranted.<sup>109</sup> It is clear that the super complaints regime has become an important element of the UK competition framework, again reflecting the view that competition and consumer protection regulation are properly viewed as two sides of the same coin.

Super complaints were considered as part of the Productivity Commission's Review of Australia's consumer policy framework, which reported in 2010. At that time, the PC declined to recommend their introduction into the Australian context. It is notable however that at least one institution that argued they were not necessary has since voluntarily adopted such a mechanism. The NSW Office of Fair Trading and CHOICE have entered into a Memorandum of Understanding that trials a super complaints mechanism akin to that in the UK. Under this trial arrangement, Fair Trading has 90 days from receipt of the complaint to research and assess the issue, and respond publicly on actions.<sup>110</sup>

CHOICE has so far lodged two super-complaints - the first on commercial electricity switching sites in NSW<sup>111</sup>, and the second in relation to potentially misleading credence claims in marketing of free-range eggs.<sup>112</sup> It is notable that in relation to both these issues, while there is evidence of clear impacts on NSW consumers, the most effective avenues for further action may be at a national level. In fact NSW Fair Trading responded on the issue of free-range eggs by initiating the push for a nationally consistent and enforceable information standard under the Australian Consumer Law, requiring the agreement of jurisdictions across Australia.<sup>113</sup>

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<sup>108</sup> s.11 (2) *Enterprise Act 2002*

<sup>109</sup> Office of Fair Trading, *Super-complaints: Guidance for designated consumer bodies*, July 2003 at 9.

<sup>110</sup> CHOICE, 'Super complaints under way', 9 June 2011, accessible at <http://www.choice.com.au/media-and-news/consumer-news/news/super-complaints--launch.aspx>

<sup>111</sup> CHOICE, 'CHOICE lodges super-complaint', 8 March 2012, accessible at <http://www.choice.com.au/media-and-news/consumer-news/news/supercomplaint-on-electricity-switching-sites.aspx>

<sup>112</sup> CHOICE, 'Shoppers shell out for free-range duds', 30 September 2013, accessible at <http://www.choice.com.au/consumer-action/food-labelling/ethical-labelling/shoppers-shell-out-for-free-range-duds.aspx>

<sup>113</sup> *NSW Fair Trading response to CHOICE super complaint on free-range egg claims in NSW*, 7 December 2013, accessible at [http://www.fairtrading.nsw.gov.au/biz\\_res/ftweb/pdfs/About\\_us/Response\\_to\\_choice\\_super\\_complaint\\_on\\_free-range\\_egg\\_claims.pdf](http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Response_to_choice_super_complaint_on_free-range_egg_claims.pdf)

In the UK, only organisations representing the interests of individual consumers are able to make super complaints,<sup>114</sup> however there is no reason that the framework could not extend to agencies representing small businesses.

## Unfair trading prohibition

Examples of general prohibitions against unfair trading can be found in the European Union, the UK and the US. Whilst on their face a form of consumer protection regulation, each of these jurisdictions clearly views the prohibition as having competition elements and benefits. For example, the FTC Policy Statement on Unfairness noted in relation to unfairness proceedings taken by the Commission:

*They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behaviour that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.*

And

*...these practices undermine an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market.*<sup>115</sup>

Similarly in proceedings pursuant to the unfairness provisions, the US Supreme Court noted:

*A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought...to involve the kind of unfairness at which the statute was aimed.*<sup>116</sup>

The prohibition is contained in section 5(a) of the Federal Trade Commission Act:

*Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*

The EU Unfair Commercial Practices Directive is similarly focused on unfair conduct that “materially distorts the economic behaviour of consumers,” which is in turn defined to mean “using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, causing the consumer to take a transactional decision that they would not otherwise have taken.”<sup>117</sup> The UK implementation of the EU Directive occurs in the Consumer Protection from Unfair Trading Regulations 2007.

Whilst there is clearly some overlap with the notions embodied in Australian prohibitions against unconscionable conduct, the unfair trading prohibitions apply more broadly and capture conduct that is outside the unconscionability regime. Unconscionability provisions tend to be focused on

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<sup>114</sup> ss. 11(5) and 11(9)(a) *Enterprise Act 2002*

<sup>115</sup> Federal Trade Commission, *Policy Statement on Unfairness*, Letter to Senators Ford and Danworth, Chairman and Ranking Minority Member, Consumer Subcommittee, Committee on Commerce, Science and Transportation, 17 Dec 1980.

<sup>116</sup> *FTC v. R.F. Keppel & Bro. Inc.* (1934) 291 US 304 at 313.

<sup>117</sup> See Art 2(e) Directive 2005/29/EC *Unfair Commercial Practices Directive*.

individual transactions and on procedural elements within a particular transaction. They are less suited to considering a course of conduct or business model that sets out to exploit particularly vulnerable groups.<sup>118</sup>

Such a prohibition could also provide a useful remedy to Akerloff's market for lemons problem, where bad products crowd out the good.<sup>119</sup> It is arguable that payday lending and motor vehicle leasing and sale companies such as Motor Finance Wizard are current examples within the Australian marketplace. Regulators have been challenged in effectively addressing consumer detriment arising from these types of trading models utilising existing CCA provisions or their equivalents in the ASIC Act.

## Cy pres remedies

Cy pres is an equitable remedy that enables a court to make orders for compensation "as near as possible." The remedy developed in response to situations where it may be difficult or uneconomic to identify all people who have suffered loss as a result of particular conduct but it is nevertheless appropriate that the wrongdoer pay some form of restitution rather than retain the gains made by unlawful conduct.

Recent examples of cy pres remedies have tended to arise in settlements rather than through court orders. Thus for example:

- In the settlement of a hearing of a licensing objection under the former state credit licensing regime, Home Finance Corporation paid \$10 million to set up a Community Legal Centre to advocate on behalf of Victorian consumers. HFC was found to have represented that a credit insurance product was mandatory when its purchase was voluntary. It was not possible or economic to identify all the consumers who would not otherwise have bought the insurance product so the cy pres remedy was adopted instead.
- At the time of introduction of the GST, a national video rental company entered into an enforceable undertaking in relation to price rises from \$6 to \$7 for new release videos that were attributed to GST. It was not economic to refund the affected consumers the \$1 so it was agreed that funds would instead be paid towards a consumer educative purpose.

The codification of cy pres remedies has also been the subject of consideration by the Victorian Law Reform Commission which recommended that courts be given express power to order such remedies (initially in the context of class actions).<sup>120</sup> The VLRC proposed the following guidelines for the application of cy pres remedies:

- That there has been a proven contravention of the law;
- A financial or other pecuniary advantage (unjust enrichment) has accrued to the person;
- A loss suffered by others is able to be quantified; and

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<sup>118</sup> See for example Consumer Action Law Centre, *The consumer protection provisions of the Trade Practices Act 1974- Keeping Australia up to date*, May 2008 at 130-131.

<sup>119</sup> Akerloff, G., A., *The market for "lemons": quality uncertainty and the market mechanism* (1970) 84:3 Quarterly Journal of Economics 488.

<sup>120</sup> Victorian Law Reform Commission, *Civil Justice Enquiry: Summary of draft civil justice reform proposals as at 28 June 2007: Exposure draft for comment*, June 2007 at 43-47.

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- It is not possible, practicable or cost-effective to identify and compensate some or all of those who have suffered the loss.<sup>121</sup>

The existence of such a remedy accords strongly with the object of the CCA in that it redirects a welfare gain to the class of people who have suffered the welfare loss, as well as providing a means to disgorge inappropriate and distorting welfare gains by a supplier.

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<sup>121</sup> Ibid.

## 6. Administration of competition policy

- Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

### Summary:

- There are strong arguments for the ACCC retaining its present remit over both competition and consumer matters, and the retaining the connection between the AER and the ACCC.
- The history of competition policy in Australia suggests that in order for a new competition policy agenda to be effective, it will require a dedicated and ongoing institutional structure.

### Recommendations:

- Retain the current structure of the ACCC such that it maintains economy-wide responsibility for both the competition and consumer protection provision of the CCA;
- Maintain the connection between the ACCC and the AER; and
- Put in place a new institution with responsibility to:
  - Oversee the progress of work to address recommendations regarding protected industries;
  - Maintain a watching brief on whether future reforms would result in anti-competitive outcomes; and
  - Receive references for and conduct market investigations.

### The case for a joined-up regulator

The competition and consumer protection provisions of the CCA both have pro-competitive elements. An agency with responsibility for enforcement of both the traditional competition and consumer protection provisions is best placed to observe and foster this interaction. If these responsibilities are separated, there is a risk that competition work will become overly supply-side-focused without observation of demand side effects. Similarly there is a risk that consumer protection enforcement will not be considered from a competition perspective but only focus on demand-side impacts.

A joined up agency is also best placed to see and understand the importance of the demand side in competition - not just as passive recipients of competition, but as a critical element to achieving it. In the words of a former head of the Trade Practices Commission, Ron Bannerman, “[c]onsumers not only benefit from competition *they activate it*”<sup>122</sup> [emphasis added].

These issues were considered by the Productivity Commission in its Review of Consumer Policy, which reported in 2010. In the context of considering which regulatory agency should be given enforcement responsibility for new consumer protection laws recommended by that inquiry, the Commission had the following to say in favour of a ‘joined up’ competition and consumer protection regulator:

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<sup>122</sup> Ron Bannerman, *TPC Annual Report 1983-84*, AGPS Canberra 1984 at 184.

*The current combination of competition and consumer policy within the ACCC has several important benefits.*

- *It helps to ensure that the ACCC is mindful of the benefits of competition for consumers when enforcing consumer policy (and hence is wary of action that may lessen competition). Indeed, as noted in chapter 3, competitive markets are the first line of defence for consumers against bad business behaviour and will often be more effective than consumer laws in delivering good outcomes for them.*
- *Enforcement can sometimes be greatly assisted by knowledge of competitive pressures in different markets; uncompetitive markets will generally require a greater consumer policy focus.*
- *Consumer policy expertise helps to ensure that the end goal of competition policy (higher welfare for consumers) is not overlooked. As the Chairman of the ACCC, Graeme Samuel, recently stated: The nature of competition laws as an aspect of consumer policy is illustrated by the fact that many competition matters involve direct consideration of consumer issues. (2007, p. 11)*
- *Competition reform often entails the establishment of parallel consumer protection measures (such as industry codes and ombudsmen). Indeed, the recognition of these complementarities long pre-dates the establishment of the ACCC: they were also reflected in the development of the TPA, which combined both consumer and competition laws.<sup>123</sup>*

Historically the UK has taken the ‘joined up’ approach, vesting competition and consumer protection responsibilities in the Office of Fair Trading. Until 2013 there also existed a Competition Commission, which had a policy oversight role in relation to competition. It also received references from the OFT when market studies identified serious deficiencies in the way that a market was operating where such deficiencies could not be remedied by education, enforcement or provision of information.

In 2013, the Enterprise and Regulatory Reform Act 2013 introduced significant changes to market regulatory agencies - abolishing the Office of Fair Trading, vesting certain of its consumer protection responsibilities with the Citizen’s Advice Bureaux and Local Trading Standards bodies, and leaving others without regulatory oversight. OFT’s competition responsibilities were vested in the Competition and Markets Authority, which also absorbed the work of the Competition Commission.

Enacted as part of the UK Government’s cost-cutting measures, the changes have attracted significant criticism, with concern being expressed that they will diminish consumer protection, and may have limited value as cost saving measures and may better be represented as cost-shifting.<sup>124</sup> For example a commentator for Consumer Focus noted, “We cost the taxpayer in our core grant about £6m a year. Just last week we won a return to consumers of over £70m from the energy companies.”

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<sup>123</sup> Productivity Commission 2008, *Review of Australia’s Consumer Policy Framework, Final Report*, Canberra Box 4.7 at 69.

<sup>124</sup> See for example ‘Consumers ‘could suffer’ as quango is axed’ and ‘Office of Fair Trading merged’, *The Telegraph*, 9 October 2010.

In addition to these considerations, both the *Issues Paper* and the *Regulator Watch* report discussed above emphasise the importance of regulatory culture in achieving effective outcomes. It is suggested that the appropriate type of enforcement culture is more likely to evolve in a regulator with a broad economy-wide remit, such as the ACCC. This remit not only guards against dangers of regulatory capture (significantly exacerbated in an industry-specific regulator), it also puts the agency in a position to observe the approach taken to similar issues in different markets - good or bad.

These matters are strong arguments that favour the ACCC retaining its present remit over both competition and consumer matters. These matters are also arguments for the retention of the connection between the AER and the ACCC.

## **The Australian Energy Regulator**

The history of regulatory enforcement action by state based energy regulators is not strong. This is in part explained by the inadequacy of enforcement powers - for example they have limited tools to address relatively small breaches or the regulatory framework. However, this is not the complete answer. It also appears that cultural issues have impacted on the 'enforcement readiness' of these agencies. In contrast, the ACCC has a long and strong history of enforcement action. The relationship between the AER and the ACCC places the AER in a strong position to observe and in turn be affected by this culture. Separation would remove this possibility to the detriment of the energy market and consumer welfare.

In addition to these cultural arguments, there are also simple arguments of cost. Removal of the AER or separation of the functions of the ACCC - and therefore the creation of new regulatory agencies - would create additional costs, with potential duplication of what are presently shared 'backroom' functions; potential areas of jurisdictional overlap or interest and a fragmenting of what is currently a shared pool of knowledge and experience.

The Consumer Action Law Centre made the following comments when the notion of ACCC/AER separation was last raised:

*There are parallels in the work of the two regulators - both the ACCC and AER monitor monopoly markets, protect consumers from poor business practices, and promote competition, so having them work closely together means they can share market knowledge, draw on a great pool of experience and share resources.*

*There are also obvious cost savings - existing arrangements mean not only sharing of staffing, but that the AER has offices in Adelaide, Brisbane, Canberra, Sydney and Melbourne.'*

*...when regulators focus narrowly on one industry, they 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 consumers.*

## **Administration of the competition framework**

As foreshadowed above, in addition to the recommendations regarding the role of the ACCC, there is a need to consider whether a further agency may be required for administration of the competition framework. CHOICE agrees that a renewed national competition policy should - to

the extent possible - be self-sustaining. A cornerstone to ensuring this is a strong policy body, able to conduct the sectoral reviews that will be necessary and to recommend (where appropriate) removal of regulations that are protectionist, redundant or unnecessarily inconsistent when viewed nationally. This includes a focus on regulations that exist now, but also anti-competitive regulations that may be introduced in the future. CHOICE therefore notes with concern the recent budget arrangements, which have seen the secretariat of the National Competition Council (NCC) pass over to the ACCC.<sup>125</sup>

The reforms of National Competition Policy would not have been implemented nearly so effectively without the NCC. If it is indeed “now time for ‘Hilmer Mark II’”,<sup>126</sup> there will be a need for an overseer of policy implementation that sits outside both the ACCC and Treasury (the most likely inheritors of such a role in the absence of the NCC). As noted above, CHOICE strongly supports the ACCC’s role as an enforcer of both competition and consumer law. Nonetheless, it is not the appropriate body to undertake the type of policy work completed by the NCC in the wake of the Hilmer Review: while, for example, police are well placed to contribute to policy debates, they should not be the facilitator of such debates. Nor would the Productivity Commission or Treasury be equipped to perform the role of the NCC secretariat. This secretariat was charged with a specific policy agenda and, in the immediate years following the National Competition Policy, undertook a substantial workload in a timely and efficient manner. The successful implementation of the National Competition Policy was due, in no small part, to the effective operation of the NCC. The National Competition Council was formed to progress the reforms identified by the Hilmer Review and adopted by the Council of Australian Governments.

It is CHOICE’s view that a body will be required to take forward recommendations of the present Review. In the absence of a national body with this role, there is a risk that sectoral reforms are advanced in an ad hoc manner. The reforms to the Victorian taxi industry, some of which have been designed to overcome the market power of Cabcharge,<sup>127</sup> are an example. As demonstrated by the Cabcharge section 46 case, its market power (and misuse thereof) is a nation-wide issue. Indeed, the Victorian Taxi Industry Inquiry observed:

*this issue is best addressed by the Australian Competition and Consumer Commission... and the Reserve Bank of Australia... in their roles of overseeing and enforcing regulation of anti-competition behaviour in payment systems markets...*<sup>128</sup>

In light of the recommendations made elsewhere in this submission, three roles are suggested for such a body:

- Oversight of progress of work to address recommendations regarding protected industries;
- A watching brief on whether future reforms would result in anti-competitive outcomes; and
- Powers to undertake market investigations pursuant to references from the ACCC.

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<sup>125</sup> See *Australian Government, Budget Paper No 2: budget measures 2014/15*, available at [http://www.budget.gov.au/2014-15/content/bp2/html/bp2\\_expense-22.htm](http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-22.htm) (search “NCC”); and NCC, “NCC - change of approach to provision of secretariat services”, <http://ncc.gov.au/images/uploads/NCCSecretariatServices-001.pdf>.

<sup>126</sup> Competition Policy Review, *Issues Paper*, 14 April 2014, p. iii.

<sup>127</sup> ACCC v Cabcharge Australia Limited [2010] FCA 1261.

<sup>128</sup> Victorian Taxi Industry Inquiry, above, 208; see also at 214.

## 7. Appendix 1

### CHOICE Good Practice Enforcement Model<sup>129</sup>

Overview of the Good Practice Model		
CAPACITY	Power	The regulatory agency should have statutory enforcement options that: <ol style="list-style-type: none"> <li>1. have a sufficient range (including criminal prosecutions, civil proceedings and administrative actions),</li> <li>2. provide flexibility,</li> <li>3. are adequate in scope, and</li> <li>4. provide appropriate remedies.</li> </ol>
	Policy	The regulatory agency should publish an enforcement policy that focuses on minimising the risk of consumers suffering non-trivial harm. The published policy should set out: <ol style="list-style-type: none"> <li>1. the purpose of the policy,</li> <li>2. the regulator’s jurisdiction and available enforcement options,</li> <li>3. the regulator’s compliance and enforcement strategy,</li> <li>4. the principles and approaches underlying the policy,</li> <li>5. the process of prioritisation of enforcement matters, and</li> <li>6. how the regulator uses its discretion.</li> </ol>
	Resources	The regulatory agency should allocate adequate resources to consumer protection enforcement. It should have a designated unit for enforcement and compliance.
EFFECTIVENESS	Monitoring	The regulatory agency should use a range of mechanisms to monitor business compliance. It should use the information collected in planning and implementing its enforcement operations. It should also monitor its own performance, including reflecting on whether its enforcement activities are effective in building compliance through behaviour change.
	Targeting	The regulatory agency should apply its consumer protection enforcement resources to areas of high consumer risk. It should select the type of enforcement option most likely to deter unlawful behaviour, taking into account the likely extent of potential impact on consumers, that is, ensuring the enforcement action is proportional to the risk and level of harm. The regulatory agency should periodically review the success and impact of its targeting.
	Enforcement Outcomes	The regulatory agency should obtain a sufficient number of enforcement outcomes in areas of high risk to consumers. It should deter breaches of consumer protection laws through enforcement actions most likely to promote compliance.
ACCOUNTABILITY	Transparency	The regulatory agency should provide comprehensive information on its enforcement decision making process and publish its enforcement outcomes in a manner that facilitates comparative analysis.
	Consultation	The regulatory agency should: <ol style="list-style-type: none"> <li>1. adequately resource its consultative processes,</li> <li>2. have a range of different consumer consultation strategies, including a formal consultative structure,</li> <li>3. have a wide range of consultation targets, and</li> <li>4. be genuine and responsive to input from the consultation process.</li> </ol>

<sup>129</sup> K Halliday, T Lozano and G Renouf (2008) *Good Practice in Consumer Protection Enforcement: A Review of 12 Consumer Protection Regulators*, CHOICE

## 8. Appendix 2

### Regulator Watch recommendations<sup>130</sup>

#### Recommendation 1: Increase the quantity of enforcement work

There is room for all consumer protection regulators to increase the amount of enforcement work that they undertake. There is significant need for an increase in activity on the part of QLD, NT, ACT, NSW and Vic and possibly WA. In doing so they should consider the following:

- Regulators should ensure that they are undertaking enforcement action in a strategic way designed to achieve particular articulated outcomes in the marketplace
- Increasing enforcement work is not just about increasing the total number of enforcement actions, but, subject to the demands of the articulated strategy, regulators should increase actions across the regulatory pyramid and in particular ensure that there are sufficient actions at the 'pointy end' of the pyramid to have a real deterrent effect on businesses that may otherwise fail to comply.
- Increasing enforcement action includes taking on litigation where it is necessary to test the law. Governments and the community have an interest in the law being tested to ensure that it meets policy objectives. If it is demonstrated to be adequate this avoids the need for debate and inquiry on the imposition of further regulation.
- To facilitate an increase in enforcement work regulators should have regard to the issues of regulatory agency culture set out in Section 5 of this report.
- To actually deliver the required increase in enforcement work regulators need to consider the barriers that they are currently facing in doing so and work to overcome them, whether they relate to internal culture, lack of necessary skills, fear of media criticism, lack of resources allocated to enforcement or other matters.

#### Recommendation 2: Report better on enforcement work

With the exception of ASIC and the ACCC, who should seek to maintain current high standards, all consumer protection regulators should significantly improve the way they report on their enforcement work to the community, so that consumers and businesses can be sure that they are performing a good job. This is particularly critical for ACT, NT, QLD, SA and Tas. In particular: comprehensive; frequent and timely; consistent; and accessible.

Regulators should use a consistent and as far as possible standard set of reporting indicators to enhance the ability of the community to compare regulatory performance across jurisdictions.

All regulators should report on litigation commenced. Litigation commenced rather than litigation resolved is a more useful and up-to-date indicator of how proactive a regulator has been in any given year.

Regulators should clearly separate reporting on their consumer protection enforcement from any other jurisdictions that they are also responsible for.

Regulators should report the number of each of the main types of enforcement action per agreed amount of population (for example per 100,000 adults).

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<sup>130</sup> *Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators*, a Report by Gordon Renouf, Teena Balgi and the Consumer Action Law Centre, March 2013

Regulators should quantify and report on their budget allocation and the staffing resources allocated to enforcement.

Regulators should report in a timely fashion. Ideally regulators would provide period and year to date reports on their web site or at least report each 6 months as ASIC has now started to do. In any event regulators should report within 3-4 months of the end of the relevant period.

## Further Recommendations

### Recommendation 3: Vulnerable and disadvantaged consumers as witnesses

That government, regulators and consumer organisations work with courts and policy makers to ensure that the interests of vulnerable and disadvantaged consumers benefit from CP enforcement including:

- Regulators should develop processes to better support witnesses noting the suggestions at Section 5 of this report.
- Regulators should work with Courts, policy makers and consumer organisations to explore the use of alternative forms of evidence to prove breaches of the law and/or losses incurred by consumers as a result of those breaches including tendency or coincidence evidence and appropriately robust survey evidence.

### Recommendation 4: Use of the media

Regulators should make systemic use of the media to increase the deterrence value of their enforcement actions and to gain maximum educative value from enforcement outcomes. Government, regulators and consumer organisations should educate the media about the role of regulators and enforcement, including challenging the media's understanding that regulators must always win in court.

### Recommendation 5: Reporting to consumer organisations

Regulators should set up improved systems to regularly and routinely report to consumer organisations on outcomes of complaints made by or through those organisations.

### Recommendation 6: Model litigant policy

Regulators and the governments to which they are accountable should ensure that the model litigant policy does not interfere with regulators' ability to use their enforcement powers to protect consumers and where appropriate to test the law.