

Consumers SA submission to Competition Policy Review

Thank you for giving Consumers SA an extension of time within which to complete this submission to the Competition Policy Review.

The Association notes that the review's remit is wide and that the Review Panel is open to comment on any regulation or practice that can have an effect on competition.

This submission begins with some general comments that address the matters raised in the first part of the Review's Issues Paper under the heading: "Competition policy: why competition matters".

The remaining parts of our submission were prepared separately by two members of the Association and are attached as Part A: Consumers and the Digital Age and Part B: Specific Competition Principles.

The object of the Competition and Consumer Act is to enhance the welfare of Australians through the promotion of competition and fair trading and the provision of consumer protection. Competition is not an end in itself.

Governments properly intervene in the marketplace to perfect markets: to improve them and to reduce anticompetitive elements, for example by dealing with externalities and information asymmetry.

The Issues Paper speaks (at para 1.12) of: "...regulations or policies that can have the effect of limiting competition even though their purpose is to achieve another policy objective. For example, some types of work are restricted to individuals with certain qualifications on health and safety grounds, or to ensure a minimum level of quality or reliability".

The Association believes that these are not matters that should be dismissed lightly especially when it is considered that, before passing regulations that may restrict competition, and to maintain them beyond their automatic expiry, governments must demonstrate that the public benefits of those regulations outweigh the restrictions on competition that they impose.

In answering whether there are "any unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered", the key word is: "unwarranted".

As acknowledged in the Issues Paper, regulations identified in the course of the inquiry – particularly those identified by interested parties who stand to benefit from their repeal - must be shown, "*on balance*", to "adversely affect Australians".

The public interest – including in the protection of consumer rights - must be weighed in the balance.

PART A: Consumers and the digital age

Background

Consumers are increasingly using smartphones, tablets and computers to access information on websites and 'apps' for the purposes of comparing goods and services. CSA contends that competition will be enhanced by encouraging the gathering, distillation and dissemination of meaningful comparative data through:

- driving down the cost of hardware
- driving down the cost of access to information networks
- encouraging the development of comparison tools

Smartphones are already ubiquitous, due to their multi-functionality and portability. Consumers use them to make and receive phone calls, listen to music, follow social media, access the internet, play games, take photos, etc. Consumers are increasingly using smartphones to assist them in their purchasing decisions both in store and out.

While the cost and conditions of procuring hardware/software and access to networks are of continuing importance for consumers, the development of comparison tools and the provision of meaningful data are now the key issues. At the moment the field for both is fragmented and sparsely populated. Retailers are only now becoming aware that the development of omni-channel experiences for their customers is critical. The omni-channel experience is the online form of the total shopping experience where the customer can, say, swipe the product barcode in store and be presented with *and interact with* bundled information (ie, consumer determinants) including the price, product specifications, product reviews, loyalty information, warranty information, delivery options and refund/return policies.

Such advances, however, will still only present one company's range of products. To enhance competition, the real power in the hands of consumers (and that which is emerging) should be the ability quickly and meaningfully to

compare these factors across sector-based types, makes, models and retailers.

Research

According to Shopatronⁱ, over half of smartphone consumers in the United States consult their phones for shopping. Consumers are mainly looking to compare prices but also want some extras, like product reviews. About 38% of shoppers on their phones in stores are looking for product information, and for those looking at electronics that number rises to 50%.

According to the survey, 38% of mobile shoppers are using their phones to find useful product information. Whether that information is a consumer review or product specifications, mobile shoppers want more detail than what they can find on the box.

Aside from these comparisons, smartphone shoppers most often use their devices to search for promotional offers. According to a study by Google,ⁱⁱ 39% of shoppers will use a smartphone to find such offers. Groupon is an example of this type of search facility.

Cost of hardware/software

CSA suggests that a focus of the review should be on driving down costs to consumers of procuring hardware and software. To that end, CSA encourages the review to explore the possibility of legislation to inhibit international price discrimination, along with other anti-competitive practices in this market that are identified.

Network access

Access to networks is also of continuing concern. CSA welcomes any initiative to reduce access costs including in the markets in which providers themselves do business. To that end, CSA welcomes the recent decision by

the ACCC to regulate the price telecommunications service providers charge each other for text messages.

Development of comparison tools

The gathering, distillation and dissemination of meaningful comparison information is of most concern to this section of the submission. As it is already affecting consumer decision making and is likely to dominate in future, the area is worthy of concerted policy development.

Information gathering

Comparison decisions are only as good as the data on which they are based. As noted above, consumers are not only seeking data on price but also other determinants such as product specifications (or ingredients), product reviews (including possible defects), loyalty information, warranty information, delivery options and refund/return policies. Ideally, such data should be communicated via parties that are not the retailer. GroceryWatch failed because it relied on the retailers themselves reporting. However, while CSA does not dismiss the IT issues that were blamed, it should be possible for retailers in a wide range of fields to submit price and other information to a collection agency.

A model based on consumer reporting is unlikely to operate efficiently outside a discussion forum.

A market for data collection services and reporting services by third parties could be encouraged. This would most probably operate in conjunction with a distillation service in which the salient features of the product or service are set out.

Information distillation

A critical issue for consumers is the distillation (we are loath to term it 'manipulation') of the massive amount of information available, even for a

single type of product, into a meaningful form to enable comparison. CSA encourages the review to persist with initiatives to compare single-factor determinants such as the traffic light system comparing ingredients in foods.

More far-reaching is the presentation of relevant information allowing comparisons of a range of determinant factors relating to a type of product because of the sorts of questions that consumers are liable to put together. Consumers are increasingly framing multi-faceted inquiries, and competition will be enhanced if they can get information that will allow them to adjust their tolerances to determinant factors before making the decision to purchase. Because of the fact that technology has hastened the speed of information processing *by consumers themselves*, ingredients (for example) is now only one factor that is in the mix. If firms are to be competitive they will have to satisfy increasingly sophisticated real-time questioning. As well as factoring in the consumer determinants already outlined (price, specs, etc), this form of online questioning will have to be capable of dealing with both product and brand aversions as well.

More daunting again is the comparison of a range of factors across a range of products. Online search engines are being developed to answer the everyday questions of consumers, previously best asked face-to-face of a knowledgeable source: 'What is the best method or product to achieve an optimum consumer outcome?'

Information dissemination

CSA urges the review to explore the development of a variety of information delivery channels. We believe, however, that the immediate future is in the smartphone app and, for the more rigorous and thorough consumer exercises, the website. The latter is more suited to more expensive purchases to which consumers are likely to devote more time and consideration.

Apps and websites are, in the main, currently developed by small businesses. CSA encourages the review to design and promote a competition policy that

would best provide for the development of a range of information delivery systems.

Other matters

Delivery

Competition in delivery mechanisms – the potential collapse of Australia Post and household letter delivery may take away a traditional means of communication. Online purchase and in-store delivery is fast becoming a preferred option

Secret commissions

Information providers may form undisclosed links with surveyed businesses.

Privacy concerns

Privacy concerns affect the information gathering stage. Any data mining process should be transparent.

Advertising should not appear as news

Already websites blur divisions between informational and commercial material.

Product literacy – especially financial literacy

ASIC has done much to promote consumer understanding of financial products; its chart on reverse mortgages should deter all but the most foolhardy consumer.

Disadvantaged households

All technology comes at a cost and the aim of assisting the most disadvantaged consumers faces the hurdle of the financial barriers to access to the technology; but already some relief is provided by Centrelink subsidies and services of local government libraries.

Contractual rules

Current laws as to formation of a contract and provision of information by suppliers are heavily weighted to paper interaction, including the dispatch of booklets serving only to increase landfill demands. All these rules require reconsideration.

Interaction of business and consumers

Technology not only provides a new ability to communicate with consumers but it allows consumers to respond; part of that capacity seems to require some obligation to respond.

Examples of current comparison tools

Examples of comparison tools that are currently available for the Australian consumer are as follows:

- MotorMouth (fuel)
- staticICE (technology)
- myshopping.com.au
- Trivago (travel and accommodation)
- comparethemarket.com.au (insurance)
- iselect (health insurance)
- RipeNearMe (neighbourhood food)

Examples of comparison tools that are currently available for consumers in the United States are as follows:

- BuyVia
- RedLaser
- TheFind
- ShopSavvy
- ShopAdvisor
- PriceGrabber
- ScanLife
- Consumr
- Smoop

PART B Specific Competition Principles

1. Exercise of market power

Competition requires the ability of sufficient market participants to be able to provide their goods or services without significant disadvantage. The Consumers association of South Australia (CSA considers) that the Australian market place has a special problem of markets where a small number of providers control a significant market share (approximately 75%). Traditionally some tolerance has been given to dominant participants to allow them to compete with entrants from overseas but today's market substantially operates on an international basis.

Current restrictions on dominant market participants emphasise the intent, purpose or effect of dominant participants. CSA has considerable reservations about the current rules as to misuse of market power as concentration has been on an overly legalistic analysis of the meaning of key words whose significance seems confined to the formal expression by drafters of the provisions. Furthermore the current test is based on a rather artificial approach that a large market participant should stop behaving in the way that has earned it success when it comes into contact with a small competitor. CSA considers that rules should be enacted to govern the relationship between the dominant parties and others in that market. From a consumer perspective the purpose of such rules from is not only to prevent collaboration between dominant participants but to allow for small participants who can provide, for example, specialised products that are beyond large-scale operations such as foods suitable for those with rare dietary needs.

Rather CSA contends that it would be preferable to identify the types of behaviour that have been regarded as amounting to misuse as part of a relationship between dominant participants and others. Thus acts which should be considered for identification as unlawful or perhaps prima facie unlawful include denying supply to small competitors on terms matching those otherwise available in the market; undercutting specials on offer by small competitors; offering discounts from one business for another business unconnected other than by common ownership; take-overs of small businesses in times of peculiar market conditions. The focus thus turns from the intent of the large market participant to the types of protection desired for small competitors.

2. Default policies and limits on the availability of favourable terms.

Most advertising and market analysis concentrate on the terms on which goods and services are provided in favourable circumstances, so that offers are available to "approved applicants". Moreover the consequences of consumer inability to meet ongoing commitments are rarely specified in detail. Advertising does not make reference to the conditions on which benefits such

as extended payments are available. For disadvantaged consumers understanding of these issues does impact on purchase decisions. When is credit history really history? It has been estimated even before recent tightening of credit reporting rules that up to a third of a population would not qualify as approved applicants and are denied "three years interest free".

Provision of credit is an area where economic sense dictates that the poor pay more. Social disparities are increased and non-approved persons are forced towards suppliers offering a more lenient approach but at increased prices. It is true that the increased price reflects the greater risk of providing credit to the less well off but consideration of assisting such persons is deserved. Extension of market intervention needs to be supported. Small steps such as Centrelink's provision of \$1,000 pension advances and support for different credit services both inside and beyond the major banks assist market participation. One undesirable development during the financial crisis was the loss of many small mortgage providers.

Ability to participate in the market becomes more acute as essential services are supplied by private enterprise. It is meaningless to say that one firm's electricity prices are \$5 per month cheaper if that firm acts much more quickly to terminate supply or imposes large default fees. The energy regulator has recognised the need for suppliers to offer extended payment terms and adopt hardship policies. Similar obligations apply to credit providers and should be contemplated more generally. At the same time the operation of default terms as penalties continues to require close scrutiny.

It is understandable that suppliers are reluctant to set out default terms in the context of advertising as they introducing discouraging issues. But least relevant terms and policies should be readily ascertainable and again technological advances increase the ability to do so. Already disclosure of dispute resolution mechanisms is being developed. Finally it is surely unacceptable to forbid penalty default rates but allow large discounts for on time payment, particularly when the loss of a discount is compounded by a default charge.

3. Access to comparative data.

In making purchase decisions, consumers have long relied on their own investigations and the content of advertising material. Third party comparisons have been provided by specialist advisors particularly in the finance and real estate areas with a significant role for non-commercial financial counsellors; regulation of commercial providers has increased in recent times.

Comparative publication by independent parties in Australia has been provided particularly by Choice which is governed by private non-commercial interest groups and has been largely self-financing. More recently the technology discussed elsewhere in this submission has seen the growth of commercial services, particularly through the use of telephone. Overall such services increase consumer information and the main issues for regulation

are to ensure proper disclosure of the range of compared products and any inducements or rewards for services such as completion of contracts. Government has had a significant role in the regulation of advertising and today penalties for breach have reached a substantial level. But government also holds a great deal of information whose release would assist consumer decision-making. On the whole governments have been too reluctant to make public the information that they hold. Whilst confidentiality may be a desirable aspect of consent undertakings of alleged transgressors, no such protection can be asserted in favour of those who have been the subject of convictions. Furthermore information without identification of individual transgressors must be made public in many cases; for example the public should be aware of the level of complaints in relation to the installation of solar panels and the particular problems with invertors. Again technology assists such disclosure.

In many areas market participants are required to abide by a code of conduct and report annually on performance. These reports are often simply collected without further action whereas much material is available for consumer guidance and performance review should be encouraged. Reporting occurs in the energy area and these reports provide, for example, comparisons of each participant's disconnection rates.

Consumer agencies have details of relative sources of complaints; they have been reluctant to release such material but appropriate conditions for release should be considered.

Similarly follow up of product recalls is spasmodic. Recent media reports on electric blankets indicated that something of the order of 20% of recalled blankets were in fact returned and that defective blankets were linked to some house fires. Similarly response to automotive product recalls have been far from widespread and often inability to follow up is used as an excuse when detailed records do exist and can be called upon to assist the process.. In this instance, consumer choice impacts upon third parties. In addition this result reflects reliance on the appearance of action rather than thorough enforcement, and emphasises the need to make existing processes work properly rather than extending the appearance of action through further regulation.

In some cases governments can provide official comparisons of product features. Analysis of energy prices has been provided by the energy regulator; the energy field probably receives special attention because of its emerging deregulation. However technology offers opportunities for official agencies to provide more data to consumers.

Attention should be directed to the presentation of information in forms that are readily usable by consumers; too much information is overloading and almost as detrimental as insufficient information.

4. Research and Tertiary educational institutions

Research in tertiary educational institutions is increasingly dependent upon private enterprise for its funding. This reliance provides some increase in the relevance of research to the commercial needs of our society but does make research dependent on commercial demands. Some assessment of the impact of the relationship needs to be undertaken. At the general level, dependence on applied research has the risk that conceptual underpinnings are ignored and a dependence on advances in conceptual analysis is commonly accepted as essential for applied research. Further research concentration may not reflect societal rather than commercial needs. With respect to energy supply, improved efficiency is considered by many to depend on advances in energy storage or battery performance; it is not clear that such an advance assists market participants and appropriate development may not occur.

5. Supply of services.

Interstate movement of services has only been facilitated over the past 20 years starting from the policy of mutual recognition of regulation of service providers. Uniform standards for entry into trades and professions have been developed and authorisations by regulators in one jurisdiction accepted in other jurisdictions. Much work has been devoted to a national scheme for entry requirements and performance regulation. Such a scheme not only offers greater access for consumers to suppliers from throughout the country but increases commercial efficiency through uniform standards.

For a state such as South Australia, with a limited local economy, access to services from interstate and an ability of local service providers to compete interstate is important for greater efficiency. CSA is disappointed by the failure to give effect to a national scheme; nonetheless efforts to open up the opportunities for interstate movement of services are essential. Again use of technology should assist records of performance of service providers on a national scale; it seems totally unacceptable that shoddy builders can still move from one jurisdiction to another.

6. Wholesale pricing of energy supplies

In broad terms, more than any other jurisdiction, South Australia has a problem of peak energy demand on a few days of extreme heat. A massive spike in demand occurs on a few days in a year when temperature exceeds 35 degrees for a consecutive number of days. Improvements in air conditioner performance seem to have led only to greater consumer demand. Capacity to meet this demand requires about a quarter of the total costs of electricity supply, although widespread use of solar panels may reduce this impact.

Generation of electricity in South Australia depends upon a small number of large enterprises supplemented by several specialised suppliers. The setting of energy prices depends upon a series of pricing processes in part designed to create a competitive system where there had been monopoly. However

competition is dependent on the rules governing prices. One stage in the process is the setting of prices for electricity generation. This price is set by bidding for 15 minute segments.

Evidence suggests that the price for these times has been manipulated by the withdrawal of supply by a large generator because of maintenance work. The current legislation requires that market participants act in good faith but the actions of the generators has not been challenged. Reform is needed to achieve appropriate competition.

7. Third line forcing

One use of market power is the aggregation of products to be supplied in a single transaction. All docket schemes seek to induce consumers to maximise the number of goods bought from an individual retailer. These schemes are popular and appear to offer a bonus without charge for the use of one retailer but analysis consistently shows the costs incurred through the use of such schemes outweigh the benefits.

CSA has long regarded such schemes with disfavour and indeed in South Australia the schemes are subject to regulation that has not been applied. CSA considers that consumer choice is maximised the more consumers can use different sources for individual items. It strongly opposed the petrol docket discount scheme and considers that it has been justified by the subsequent loss of competition in petrol retailing.

All loyalty schemes allow the collection, through aspects such as compulsory use of a particular card, of much data as to an individual's product preferences. Responses to inquiries as to the use of such data have been vague. CSA is concerned as to the privacy issues flowing from the lack of clear conditions for the use of the acquired knowledge of individual consumer behaviour.
