



Competition Policy Review
Submission to the Draft Report

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

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Executive Summary:

The Competition Policy Review *Draft Report* comprises a wide-ranging, ambitious suite of policy recommendations intended to enhance Australia's competition policy framework to better handle new challenges, opportunities and pressures. These include emerging industries, changing technologies, and a more nuanced understanding of demand side competition.

This submission is structured in response to the *Draft Report*, and makes comment on a selection of the Review Panel's draft recommendations. We have focused our analysis on those recommendations most likely to result in a significant impact on consumer welfare.

The *Draft Report* focuses on improving competition and consumer choice. This is a laudable goal, but consumer choice alone is not always sufficient to ensure improvements to consumer welfare. Australia's competition law framework should operate primarily to create long-term benefits for consumers, not merely seek to improve competition for its own sake.

We offer our strongest support for recommendations that place consumer welfare at the heart of reform. Removing barriers that prevent consumers from accessing the benefits of competition should be a priority for action. Similarly, existing regulations that protect particular business models, industries or incumbents should be dismantled where these are not in the long-term interests of consumers.

We reiterate the comment made in our submission to the Issues Paper: emerging industries and innovative technologies can lead to immense benefits for consumers, but these benefits are not guaranteed. Opportunities to remove unnecessary barriers to competition, strengthen the existing regulatory framework, and provide consumers with the necessary tools to engage in demand side competition must all be actively pursued.

Recommendation 1: The proposed principles should be amended to emphasise the promotion of consumer welfare when governments are funding or providing goods and services, with consumer choice to be promoted where it is likely to advance consumer welfare.

Recommendation 2: The necessity and purpose of the proposed intergovernmental agreement on human services should be reviewed and priority placed on access to services that offer consistent quality to consumers, with consumer choice only pursued if there is evidence that market conditions are likely to advance this outcome.

Recommendation 3: Regulations that restrict competition in the taxi industry should be removed.

Recommendation 4: An overarching review of intellectual property should be undertaken by an independent body.

Recommendation 5: An independent analysis of the costs and benefits to Australia of any proposed IP provisions in trade agreements should be undertaken and published before trade negotiations are concluded.

Recommendation 6: Subsection 51(3) of the *Competition and Consumer Act 2010* should be repealed.

Recommendation 7: Remaining restrictions on parallel imports should be removed.

Recommendation 8: Consumers should be able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.

Recommendation 9: Australian governments should only review regulations that have been subject to widespread criticism by multiple stakeholder groups, have not been reviewed through similar processes and, based on an initial assessment, appear to be restricting competition without delivering commensurate consumer welfare or public interest outcomes.

Recommendation 10: The draft recommendation on standards reviews should not proceed as there is no evidence of the need to review all non-government mandated standards.

Recommendation 11: The primary objective of future retail energy market reforms should be to ensure that consumers are engaged in the market and able to make decisions that reflect their best interests.

Recommendation 12: The price signalling provisions of Division 1A of the *Competition and Consumer Act 2010* should be repealed, and section 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.

Recommendation 13: Section 46 of the *Competition and Consumer Act 2010* should be amended in order to better achieve its goals and improve its policy effectiveness.

This could be achieved by amending section 46 in the way recommended by the Review Panel, but CHOICE also urges the Panel to consider options for reframing the section so that the long-term interests of consumers are the focus of the provision, rather than an element of the defence.

Recommendation 14: Secondary boycotts exemptions for consumer and environmental organisations should be maintained.

Recommendation 15: Section 83 of the *Competition and Consumer Act 2010* should be amended as recommended in the *Draft Report*.

Recommendation 16: To maximise budgetary and regulatory efficiency, existing institutions should be allocated the tasks of leading and implementing competition policy.

Recommendation 17: Evaluation of competition policy must pay greater attention to the role of consumers in activating competition.

Recommendation 18: The ACCC should be given the powers to undertake market studies.

Recommendation 19: Consumer representatives should be empowered to lodge market study requests.

Recommendation 20: Consideration should be given to tasking the Markets Group of the Commonwealth Treasury Department with future analysis of the competition policy environment.

Recommendation 21: The ACCC, encompassing the AER, should retain its current functions.

Recommendation 22: If any changes are recommended, they should ensure a consumer-centred approach to access and pricing regulation.

Recommendation 23: No changes to the ACCC governance structure should be made.

Recommendation 24: The Review Panel's Draft Recommendation 48 should be abandoned.

Recommendation 25: Measures to enhance price competition in pharmaceutical medicines should be adopted.

Recommendation 26: Government should work with industry, consumer groups and privacy and security experts to develop a consumer data scheme similar to that in operation in the UK¹, incorporating the following characteristics:

- a. Accessibility;
- b. Machine readability;
- c. Standardisation;
- d. Timeliness;
- e. Interoperability; and
- f. Privacy protection.

¹ The UK's Midata project, *Providing better information and protection for consumers*, <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/personal-data>

1. Competition principles

Summary:

- Draft Recommendation 1 calls for an agreed set of competition principles to guide the Commonwealth, state, territory and local governments in implementing those aspects of competition policy for which they are responsible.
- The Review Panel recommends broadening the agenda of the original National Competition Policy to include all government services and promote the role of choice.
- The panel proposes the application of these principles should be subject to a public interest test, meaning they should apply unless there is evidence that the costs outweigh the benefits.
- Legislation or policy restricting competition must demonstrate that it is both in the public interest, and that its objectives can only be achieved through such a restriction.

Recommendation:

- Recommendation 1: The proposed principles should be amended to emphasise the promotion of consumer welfare when governments are funding or providing goods and services, with consumer choice to be promoted where it is likely to advance consumer welfare.

CHOICE welcomes the Review Panel's proposal to introduce an updated set of national competition principles. We believe it is useful to articulate a set of principles that will guide ongoing reform across jurisdictions, unified around an objective of achieving durable consumer benefits. This will help sustain momentum in reform processes that may take several years, such as the opening up of protected industries. Given that some reforms may be subject to further inquiries and detailed investigations, such as in relation to intellectual property, a set of national principles can play an important role in ensuring there is a consistent approach to reform across multiple sectors.

We also support a strong public interest test underpinning the application of the principles, to ensure that competition is not pursued as an end in itself, but rather as a means to improve consumer welfare. This concept underpins the object of the *Competition and Consumer Act* which is:

... to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection²

As we discuss in detail in relation to human services, there are circumstances where the preconditions for effective demand-side engagement may be difficult or in some cases impossible to achieve. In all circumstances, the emphasis in the delivery of essential goods and services should be on ensuring access and quality. Where competition is a means to this end, CHOICE supports an emphasis on its promotion. However, we suggest that the proposed

² *Competition and Consumer Act 2010* (Cth) s2,
http://www.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s2.html



competition principles be amended to make clearer that competition and consumer choice are means of improving consumer welfare, rather than objectives in and of themselves.

2. Human services

Summary:

- Draft Recommendation 2 calls for Australian governments to craft an intergovernmental agreement establishing choice and competition in the field of human services.³
- The Review Panel suggests that the guiding principles should include:
 - User choice should be placed at the heart of service delivery;
 - Funding, regulation and service delivery should be separate ;
 - A diversity of providers should be encouraged, while not crowding out community and voluntary services; and
 - Innovation in service provision should be stimulated, while ensuring access to high-quality human services.
- Draft Recommendation 2 also suggests that each jurisdiction develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.

Recommendation:

- Recommendation 2: The necessity and purpose of the proposed intergovernmental agreement on human services should be reviewed and priority placed on access to services that offer consistent quality to consumers, with consumer choice only pursued if there is evidence that market conditions are likely to advance this outcome.

Every day, millions of Australians access the wide variety of services that sit under the umbrella of human services. These include health, education, disability care and support, aged care, job services, public housing, correctional services, child care, health clinics, youth centres, community housing refuges and facilities, counselling and welfare services. The *Draft Report* outlines how choice and competition have been introduced to many aspects of these services, whilst maintaining the standards demanded by the Australian community.

The Review Panel expresses a view that there remain ongoing opportunities to utilise contestability within human service markets. At the same time, the *Draft Report* articulates the unique aspects of the broad range of human service markets that in many cases may make services unsuitable for contestability.

After careful consideration of the *Draft Report*, CHOICE has come to the conclusion that this recommendation should do more to acknowledge the unique challenges of implementing contestability in the diverse human services sector. We also believe the Panel should better articulate the drivers of the long term interests of consumers and the public interest in future reforms. For this reason we adopt the following positions:

1. The necessity and purpose of an intergovernmental agreement in the field of human services has not been sufficiently established.
2. Future reform in this area should be driven by the best means of ensuring access to quality services.
3. Consumer choice should be pursued where it is a means to enhance access and quality and only if market conditions are suitable.

³ Competition Policy Review *Draft Report*, September 2014, recommendation 2, p26

The reasons for adopting these positions are outlined in detail below.

Necessity and purpose of intergovernmental agreement not sufficiently established

The *Draft Report* outlines a range of initiatives utilising choice and contestability that have taken place in the human services sector, such as the National Disability Insurance Scheme, the aged care packages and trial approaches to commissioning by various state governments. These reforms provide welcome evidence of innovation within human service sectors. The *Draft Report* finds that an intergovernmental agreement is necessary to share results and feedback from trials or pilot schemes such as those outlined above. However, we note that the report does not provide evidence that this type of knowledge sharing is not already happening through the various networks of public sector officials and professionals operating in this field.

Knowledge sharing is a vital part of the public policy process, especially where governments are sitting at the edge of innovative thinking. Intergovernmental agreements, due the inevitable formality in the way they are negotiated and implemented, have not traditionally been an effective mechanism to promote knowledge sharing between jurisdictions. CHOICE would suggest that there are more appropriate and cost-effective means of pursuing this end.

Future reform in this area should be driven by access to quality services

The Panel's draft recommendation goes on to argue that an intergovernmental agreement should establish choice and competition in human services. Our view is that choice and competition are best understood as a means to serving the public and consumer interest. This idea is best expressed in the object of the *Competition and Consumer Act* which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

The NDIS is an example of market innovation utilising consumer choice. It is the result of governments working closely with market participants and people with disabilities to solve the systemic failures of inadequate access to services. Greater user choice provided through the NDIS is a means to an end that will guarantee people living with permanent disability better access to the services they need.

It is also important to understand that much of the impetus for the establishment of the NDIS came from disability consumer groups. There was a strong desire for consumers in this sector, supported by a range of other stakeholders, for greater individual choice in the provision of disability services. There currently is no comparable push from consumer groups in any other area of human services.

Any intergovernmental agreement established in the area of human services should identify the long term interests of consumer and the public interest as its ultimate goal. In the various human services sectors the consumer and public interests will be best understood as access to quality services.

Consumer choice should be pursued only if market conditions are suitable

The *Draft Report* includes a good discussion of the informational challenges that affect many human services sectors (pages 149-151). Among the issues discussed are the impacts of:

- Consumer capacity to exercise choice;

- One-off (rather than repeat or ongoing) transactions;
- High switching costs;
- Implications of provider failure; and
- Consequences of poor decisions.

Given the diversity of the human services sector, the importance of each of these factors will vary significantly depending on which area of services we are talking about. The decision about which GP to visit is a relatively low-risk decision, with low or no switching costs. The decision about which residential aged care service to enter is, in contrast, a virtually irreversible decision with significant financial impacts, often made in a period of crisis. It is therefore important to assess the value of pursuing consumer choice and the suitability of market conditions on a sector-by-sector basis.

Consumer choice will not always advance the consumer and public interest in a given human services sector, for example in the case of catastrophic events. While well designed information can aid decision making, it will never perfectly solve information asymmetries that exist in complex human service sectors. And the consumer detriment that arises from high switching costs cannot be addressed by informational solutions. The logical conclusion of this discussion is to acknowledge the limitations of choice in many areas of human services.

The guiding principles for future reform of human services should be amended to put access and quality at the heart of future reforms and identify consumer choice and contestability as a means to achieve these goals only if market conditions are suitable. The guiding principles should also acknowledge that the application of choice and competition to a human service market may not be appropriate depending on factors such as ability to switch, capacity to consent and information limitations.

3. Taxis

Summary:

- Draft Recommendation 6 in the *Draft Report* calls for the removal of regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest.⁴
- Competition policy should promote competitive outcomes, rather than protect particular industries or incumbents within an industry.
- Current regulations that restrict competition in the taxi industry lead to higher prices and do not benefit consumers.
- CHOICE supports Draft Recommendation 6.

Recommendation:

- Recommendation 3: Regulations that restrict competition in the taxi industry should be removed.

Australia's competition policy framework should aim to increase consumer welfare by promoting genuine competition; it should not favour or protect particular industries or incumbents at the expense of consumers. As the Review Panel points out in its *Draft Report*, the current regulatory regime for taxis requires reform in order to achieve this aim. The current system raises costs for consumers, primarily to benefit incumbents. Restrictions on the number of licences issued should be eased, and barriers preventing emerging services from competing with taxis and hire cars should be removed.

As we stated in our submission to the Issues Paper, a new competition policy reform agenda needs to consider what a genuinely competitive market looks like. The UK's Office of Fair Trading has noted that facilitating demand side engagement leads to competitive outcomes and gains in consumer welfare, with "confident consumers activat[ing] competition by making well-informed and well-reasoned decisions which reward those firms which best satisfy their needs."⁵

Emerging industries that connect consumers directly with drivers place a greater emphasis on demand side engagement. New technologies empower consumers to exercise choice and make informed, reasoned decisions. Barriers preventing these services developing fully should be removed where they exist primarily to protect incumbents.

CHOICE agrees that the regulation of taxi services should be focused on ensuring minimum standards for the benefit of consumers, rather than restricting competition.

⁴ Competition Policy Review *Draft Report*, September 2014, recommendation 6, p30

⁵ OFT, March 2010, 'What does behavioural economics mean for competition policy?'

4. Intellectual property and international price discrimination

Summary:

- The Review Panel recommended in its *Draft Report* that:
 - An overarching review of intellectual property (IP) be undertaken by an independent body, such as the Productivity Commission;⁶
 - Analysis of the costs and benefits to Australia of any proposed IP provisions in trade agreements be undertaken and published prior to the conclusion of negotiations;⁷
 - Subsection 51(3) of the *Competition and Consumer Act 2010* be repealed;⁸
 - Remaining restrictions on parallel imports be removed;⁹ and
 - Consumers be able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.¹⁰
- The Review Panel also offered support for the recommendations made by the House of Representatives Inquiry into IT Pricing, aimed at removing barriers to Australians accessing competitively priced goods and services from overseas.¹¹
- These recommendations offer useful mechanisms for increasing consumer welfare through improved competition. CHOICE offers strong support for the recommendations.

Recommendation:

- Recommendation 4: An overarching review of intellectual property should be undertaken by an independent body.
- Recommendation 5: An independent analysis of the costs and benefits to Australia of any proposed IP provisions in trade agreements should be undertaken and published before trade negotiations are concluded.
- Recommendation 6: Subsection 51(3) of the *Competition and Consumer Act 2010* should be repealed.
- Recommendation 7: Remaining restrictions on parallel imports should be removed.
- Recommendation 8: Consumers should be able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.

Intellectual property

Overarching review of Australia's intellectual property framework

In our submission to the Issues Paper, CHOICE presented the view that Australia has not got the balance right between protecting intellectual property (IP) rights and promoting competitive

⁶ Competition Policy Review *Draft Report*, September 2014, recommendation 7, p31

⁷ Ibid

⁸ Ibid, recommendation 8, p31

⁹ Ibid, recommendation 9, p32

¹⁰ Ibid, recommendation 26, p45

¹¹ Ibid, boxed text p216

outcomes. We reiterate: the system currently favours rights holders substantially over consumers, and this can lead to anti-competitive outcomes. We agree with the Review Panel's conclusion in the *Draft Report* that our IP rights system should be a priority area for review.

Australia's competition policy framework and copyright regime should not support IP restrictions that sustain price discrimination and protect out-dated businesses that refuse to innovate. We support Draft Recommendation 7, that an overarching review of IP be undertaken by an independent body, and further suggest that this review specifically consider the recommendations of the Australian Law Reform Commission's Copyright and the Digital Economy report. In particular, a review of IP law should examine opportunities to introduce a flexible, fair use copyright regime.

International trade agreements

CHOICE agrees with the Review Panel's finding in Draft Recommendation 7 that commitments regarding the extent of IP protection in Australia should be based on the best interests of Australians.

Copyright provisions included in international trade agreements can lead to negative impacts on Australians. Negotiating parties cannot always be relied upon to take into account the interplay between the provisions of an agreement and the application of Australian domestic law. For instance, the Trans-Pacific Partnership Agreement is currently being negotiated between Australia and 11 other countries.¹² Once finalised, it might include a provision criminalising certain minor copyright infringements that are currently civil offences in Australian law.¹³ While theoretically all signatories sign the same document, the way this provision is applied will differ depending on the surrounding IP framework in each country. In the US, the fair use defence will limit the impact of the provision. In Australia, however, no such defence is available, meaning that private, largely harmless acts will now incur criminal penalties. In this way, Australia may become subject to a harsher, more restrictive IP regime that is more stifling to innovation and competition than other signatories to the same agreement.

To help avoid these kinds of unintended consequences, it would be useful to conduct and publish an independent, transparent cost/benefit analysis of proposed IP provisions prior to the conclusion of negotiations. CHOICE strongly supports this element of Draft Recommendation 7.

Repeal of subsection 51(3) of the *Competition and Consumer Act 2010*

Subsection 51(3) of the *Competition and Consumer Act 2010* (CCA) 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.

Draft Recommendation 8 echoes the Inquiry into IT Pricing in recommending the repeal of section 51(3) of the CCA.¹⁴ This section exempts certain conditions in copyright licenses from the

¹² DFAT, undated, 'Trans-Pacific Partnership Agreement Overview', <http://www.dfat.gov.au/fta/tpp/tpp-overview.pdf>

¹³ Wikileaks, 16 October 2014, 'Updated Secret Trans-Pacific Partnership Agreement (TPP) - IP Chapter (second publication)', <https://wikileaks.org/tpp-ip2/>

¹⁴ House of Representatives Standing Committee on Infrastructure and Communications, July 2013, 'At what cost? IT pricing and the Australia tax', recommendation 8,

anti-competitive conduct provisions of the CCA, excluding the misuse of market power provision and resale price maintenance provision.

CHOICE supported the IT Pricing Review's recommendation in the first instance, and again called for the repeal of subsection 51(3) in our submission to the Issues Paper. We continue to support this recommendation on the basis that competition law should apply equally across sectors. IP rights should be treated under the CCA in the same fashion as other property rights.

Parallel imports

Parallel imports provide benefits to Australian consumers and are one means of reducing the impacts of international price discrimination. They create situations where Australian consumers are able to exercise the choice to purchase legitimate products at more competitive prices.

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. CHOICE supports the Review Panel's recommendation to remove remaining restrictions on parallel imports.

Some submissions raised concerns in relation to health and safety. For example, the Australian Motor Industry Federation noted its apprehensions about lifting restrictions on the large-scale importation of second-hand passenger vehicles into Australia. In response to these concerns, we refer to the statements made in CHOICE's recent submission to the 2014 Review of the *Motor Vehicle Standards Act 1989*.¹⁵ It is vital that consumers have confidence in the goods they purchase, particularly in relation to their safety. Removing barriers to importation, including restrictions on parallel imports, must be accompanied by stringent safety requirements. This is achievable and does not constitute a reason to keep in place barriers that impede the development of a more competitive market. CHOICE strongly supports Draft Recommendation 9, to remove remaining restrictions on parallel imports.

International price discrimination

As the Review Panel recognised, consumers are paying significantly more for identical digital products than consumers in comparable markets, such as the USA or the United Kingdom.¹⁶ These high prices are linked to the lack of competitive pressure faced by content delivery businesses in Australia, rather than higher costs such as rent, wages or transport.¹⁷

Price differentials exist for non-digital goods as well; our submission to the Issues Paper noted clothing and cosmetics are particularly expensive in Australia in comparison with other countries.

http://www.apf.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

¹⁵ CHOICE, 20 October 2014, 'Submission to the 2014 Review of the *Motor Vehicle Standards Act 1989*', http://www.infrastructure.gov.au/vehicles/mv_standards_act/files/Sub119_CHOICE.pdf

¹⁶ CHOICE, 10 June 2014, 'Submission to Competition Policy Review Issues Paper', <http://competitionpolicyreview.gov.au/files/2014/06/CHOICE.pdf> and CHOICE, 26 May 2011, 'Submission to Productivity Commission - Inquiry into the Economic Structure and Performance of the Australian Retail Industry', http://www.pc.gov.au/_data/assets/pdf_file/0009/109746/sub082.pdf

¹⁷ House of Representatives Standing Committee on Infrastructure and Communications, July 2013, 'At what Cost? IT pricing and the Australia Tax', http://www.apf.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

Technological measures that allow suppliers to discriminate against Australian consumers (such as through the identification of IP addresses) are anti-competitive where they support significant price differences for Australian consumers.¹⁸

Australia's competition policy framework should not support commercial strategies that sustain artificially higher prices. However, we agree with the Review Panel's view that this does not constitute a case for government regulation of prices. Rather, we support the Review Panel's call for 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.

This can be achieved in part by:

- implementing Draft Recommendation 9 to remove remaining restrictions on parallel imports;
- enabling consumers to take legal steps to circumvent geoblocks, as recommended in Draft Recommendation 26; and
- implementing the endorsed recommendations made by the House of Representatives Inquiry into IT Pricing.

Giving consumers more confidence to circumvent online geoblocks would provide immediate benefits. Recent CHOICE research has found that approximately 340,000 Australian households currently access overseas-based subscription service Netflix, despite the presence of geoblocks and the fact that the company does not advertise in Australia.¹⁹ Approximately 428,000 households are likely to use Netflix in the next 12 months. The fact that a significant number of Australians are going out of their way to pay for Netflix when the service does not officially operate or promote itself here points to a long-standing lack of competition in the domestic content market. Much recent activity in this market has been attributed to Netflix's growth and possible entry - ranging from Foxtel's pricing changes²⁰ to the launch of new streaming services seeking to tie up exclusive rights²¹ - underlining the benefits that competition from an international market can provide.

Reform in this area has strong public support, with 38% of CHOICE survey respondents of the strong belief that they should not be blocked from accessing TV shows and movies from legitimate overseas websites. Based on the experience of the current market, it is clear that clarifying consumers' rights to to circumvent geoblocks will result in cheaper prices and more access to content for all Australians.

¹⁸ CHOICE, 16 July 2012, 'Submission to House Standing Committee on Infrastructure and Communications Inquiry into IT Pricing', http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/subs.htm

¹⁹ CHOICE, November 2014, 'Digital consumers - attitudes and trends'. Please note that we have assumed each respondent represents one household only, and together our sample represents all Australian households. We have surveyed those aged 18-65yrs only (however household figures are based on 'total' households in Australia: <https://aifs.gov.au/institute/info/charts/households/index.html>).

²⁰ For example, see <http://mumbrella.com.au/foxtel-boss-flags-major-changes-tackle-threat-streaming-rivals-249430>

²¹ For example, see <http://www.businessspectator.com.au/article/2014/8/28/technology/can-streamco-turn-tide-netflix>



CHOICE also offers strong support to the other recommendations listed above, as they represent a clear pathway towards consumer welfare gains through the promotion of robust, international competition.

5. Regulations review

Summary:

- The Review Panel's Draft Recommendation 11 proposes that all Australian governments review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.²²
- Draft Recommendation 11 requires resources that are not commensurate with the problem it is attempting to solve.
- Competition is a means to an end (improved consumer welfare). Any review of regulation should prioritise consumer or public outcomes, with restrictions on competition as a secondary consideration.
- If the Review Panel recommends a review of regulation this should be as targeted as possible to reduce costs on all parties involved.

Recommendation:

- Recommendation 9: Australian governments should only review regulations that have been subject to widespread criticism by multiple stakeholder groups, have not been reviewed through similar processes and, based on an initial assessment, appear to be restricting competition without delivering commensurate consumer welfare or public interest outcomes.

Draft Recommendation 11 is not proportionate to the issue it is attempting to address and should be amended to better target regulations that fail to deliver public benefits.

The *Draft Report* has failed to adequately consider benefits of regulation or the current rigorous processes required to establish and administer regulation. A small number of industry organisations provided the evidence that underpins this proposal in the *Draft Report*. CHOICE is concerned that claims that specific regulations impede competition are being taken at face value without an adequate assessment of consumer benefits (see Box A).²³

²² Competition Policy Review *Draft Report*, September 2014, recommendation 11, p34

²³ Re: metrology markings, see Competition Policy Review *Draft Report*, September 2014, p100. Based on comments provided in Australian Food and Grocery Council, 2014, 'Submission to the Competition Review Interim Report', Attachment 5, p231.

Re: claims that the current system is overly prescriptive, see Australian Food and Grocery Council submissions to the Commission of Audit <http://www.ncoa.gov.au/docs/submission-australian-food-and-grocery-council.pdf> and to consultations by the National Measurement Institute on a review of the provisions of the International Organisation of Legal Metrology (OIML) Recommendation R79 - Labelling Requirements for Prepackages, <http://www.measurement.gov.au/Documents/OIMLR79/AustralianFoodGroceryCouncil.pdf>

BOX A: Regulation that enhances competition and consumer outcomes

The *Draft Report* lists only a small number of cases of regulations possibly unnecessarily restricting competition. One example given was metrology markings on pre-packaged products. This is an issue that has been pursued by the Australian Food and Grocery Council (AFGC) in multiple forums, with claims that the current system is overly prescriptive about size and presentation. CHOICE strongly opposes this view. Metrology markings assist consumers in comparing products and making informed choices, which are crucial for the operation of a competitive, dynamic and innovative Australian economy. Current regulations require that quantity statements, such as the amount of cereal in a box or grams in a chocolate bar, must be on the front of a packet. This makes quantity statements easily readable and easy to compare on the supermarket shelves. Removing this requirement would result in inconsistent placement of quantity statements, removing the ability of consumers to easily compare products.

CHOICE recognises that regulation can have the effect of restricting competition in a way that can lead to poor consumer outcomes. However, the case has not been made for a new process to review all regulations. There are already numerous processes to review regulations for their effectiveness and impact on competition. For example, the Federal Government has recently:

- Committed to reducing red tape by at least \$1 billion per year;
- Implemented Department and Regulator level task-forces to review regulation and legislation to meet this goal;²⁴
- Implemented a mandatory Regulator Performance Framework to assess the way regulators administer regulation and its impact on productivity;²⁵ and
- Announced a review to encourage greater acceptance of international standards and risk assessments.²⁶

Similar processes exist at state and local levels. It is unclear why an additional review of regulation is required. The Final Report should consider how regulations are currently reviewed and how any additional process would duplicate or support that work.

The Final Report should also consider the resources required at a federal, state and local level to conduct reviews. This assessment should consider the resources required (time and financial resources) for external bodies to participate in reviews. Continual assessment of regulations will produce costs for government in establishing and running review processes and costs for industry and consumer groups as they devote time and resources to reviews. These costs must be balanced against the likely gains of any new process.

Finally, any review must adequately assess the benefits of regulation. Competition is a means to an end: improved consumer welfare. The concern should not be whether regulation is restricting competition but whether regulation is restricting competition while failing to deliver commensurate consumer or public interest outcomes. CHOICE recommends that rather than assessing whether the legislation or government policy can only be achieved by restricting competition, any review should assess whether any restriction on competition is failing to deliver appropriate consumer or public outcomes. This approach would recognise that in some

²⁴ See <https://www.cuttingredtape.gov.au/>

²⁵ See <https://www.cuttingredtape.gov.au/parl-sec/media/new-regulator-performance-framework>

²⁶ See <https://www.cuttingredtape.gov.au/form/international-standards>



cases restricting competition may not be the only option but it is the most effective option and can deliver the greatest benefit.

6. Standards review

Summary:

- Draft Recommendation 12 suggests that non-government mandated standards be reviewed according to the same process specified in Draft Recommendation 11.²⁷
- CHOICE does not support this recommendation.
- Further evidence is needed to demonstrate that a significant number of standards are unnecessarily restricting competition in order to justify the review of thousands of complex, technical documents.
- If a review is required, Standards Australia is not the appropriate body to monitor the impact of non-government mandated standards.

Recommendation:

- Recommendation 10: The draft recommendation on standards reviews should not proceed as there is no evidence of the need to review all non-government mandated standards.

The *Draft Report* does not demonstrate the need for the review of all non-government mandated standards. There are over 6,800 Australian Standards, most voluntary. The impact of standards on competition is already considered in the development process. Standards Australia requires that all Australian Standards must demonstrate positive net benefit to the community; one of the required considerations is the impact on competition.²⁸

It is unclear why Standards Australia would be the most appropriate body to review whether non-government mandated standards are unnecessarily restricting competition. Standards Australia is responsible for the development, co-ordination and accreditation of standards, not their monitoring, enforcement or the application of non-mandatory standards by industry or governments. The *Draft Report* lists examples of standards that could possibly be unnecessarily restricting competition.²⁹ However, the problems arising in the examples relate more to how standards are enforced than their development and publication. For example, the Report notes that a geosynthetic product imported from Germany that met EU standards had to be re-tested in Australia but this was a requirement set by VicRoads. Other examples given in the Report cover chemical approval processes, vehicle importation requirements and food and beverage regulation. These processes are not administered or controlled by Standards Australia although in some cases, not all, standards were crucial in the process. The conclusion that Standards Australia must review nearly 6,800 standards requires a greater weight of evidence to justify this onerous recommendation.

The scheme in Draft Recommendation 12 would add to an established, rigorous and, at times, lengthy standards development process. If the Review Panel decides to continue with this recommendation, there should be an assessment of the impact on Standards Australia and volunteers involved in standards development, in terms of both hours required to participate in reviews and financial costs.

²⁷ Competition Policy Review *Draft Report*, September 2014, recommendation 12, p34

²⁸ See www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/NetBenefit.aspx

²⁹ Competition Policy Review *Draft Report*, September 2014, p102

7. Electricity, gas and water

Summary:

- Draft Recommendation 16 proposes that state and territory governments finalise the energy reform agenda, including through:
 - Application of the National Energy Retail Law with minimal derogation by all NEM jurisdictions;
 - Deregulation of both electricity and gas retail prices; and
 - The transfer of responsibility and reliability standards to a national framework.
- The Review Panel also recommended that all governments re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:
 - Economic regulation of the sector; and
 - Harmonisation of state and territory regulations where appropriate.
- Draft Recommendation 16 also proposes that where water regulation is made national the body responsible for its implementation should be the Panel's proposed national access and pricing regulator.
- The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration.³⁰

Recommendation:

- Recommendation 11: The primary objective of future retail energy market reforms should be to ensure that consumers are engaged in the market and able to make decisions that reflect their best interests.

In our submission to the Issues Paper CHOICE asked the Review Panel to recognise and respond to the less successful aspects of national energy market reforms. Specifically we presented the case that while the deregulation of retail electricity markets has increased contestability on the supply side, it has produced mixed results for consumers. In the 2013 Australian Energy Market Commission review of retail competition CHOICE found 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 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.

We maintain that the energy reform agenda needs to focus on improving the conditions under which engaged consumers are more likely to make informed decisions and navigate markets with confidence.

³⁰ Competition Policy Review *Draft Report*, September 2014, recommendation 16, p37

The Panel's recommendations should be amended to better assess the net impact of reforms on consumers and to address ongoing energy market failures and the need for strong consumer protections.

Another frustration for observers of the national energy market reforms is the contradictory policies adopted by governments. In 2013 the Australian Competition and Consumer Commission (ACCC) opposed the proposed acquisition of the NSW government-owned Macquarie Generation by AGL because it would substantially lessen competition in the recently deregulated NSW retail electricity market. Yet the acquisition was approved by the Australian Competition Tribunal on public benefit grounds as the NSW Government pursued its privatisation agenda. A decade of competition reform was undermined with this decision, which will have lasting detrimental effects on NSW energy consumers. This process calls into further question the value of the energy reform agenda and reinforces the need to review the net impact of energy market reforms on consumers.

8. Price signalling

Summary:

- Draft Recommendation 24 suggests repealing the pricing signalling provisions of the *Competition and Consumer Act 2010* and amending section 45 to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.³¹
- CHOICE supports Draft Recommendation 24.
- The Commonwealth Consumer Affairs Advisory Council should undertake an inquiry into price signalling and consumer detriment.

Recommendation:

- Recommendation 12: The price signalling provisions of Division 1A of the *Competition and Consumer Act 2010* should be repealed, and section 45 should be extended to cover concerted practices that have the purpose, or would have or be likely to have, the effect of substantially lessening competition.

CHOICE supports Draft Recommendation 24 to repeal the price signalling provisions and amend section 45 of the CCA. As noted in the CHOICE submission to the Competition Review Issues Paper, price signalling provisions should apply universally or be removed. If retained in any way, they should not be so wide to impede consumer access to information. If implemented, the Review Panel's recommendation will allow case-by-case targeting of price signalling in all markets where the practice substantially lessens competition.

However, we believe further work is needed to explore the frequency of price signalling and the resulting detriment to Australian consumers. Price signalling has primarily been raised as an issue in regards to fuel prices and banking. It is timely for a separate body to identify instances of price signalling in these markets and beyond, and to explore any resultant consumer detriment. This work could assist in developing longer-term policy as well as legal responses to price signalling issues. CHOICE recommends that the Commonwealth Consumer Affairs Advisory Council (CCAAC) undertake research to determine the level of consumer detriment arising from price signalling and whether any additional legal or policy solutions are required.

³¹ Competition Policy Review *Draft Report*, September 2014, recommendation 24, p42

9. Unilateral conduct

Summary:

- Draft Recommendation 25 outlines a proposal to amend section 46 of the *Competition and Consumer Act 2010* in order to improve its effectiveness and ability to achieve policy goals.³²
- The suggested amendment is intended to focus more clearly on the long-term interests of consumers.
- CHOICE supports the proposed amendment as an effective means of preventing unilateral conduct that substantially harms competition and is not in the interests of consumers.

Recommendation:

- Recommendation 13: Section 46 of the *Competition and Consumer Act 2010* should be amended in order to better achieve its goals and improve its policy effectiveness.
 - This could be achieved by amending section 46 in the way recommended by the Review Panel, but CHOICE also urges the Panel to consider options for reframing the section so that the long-term interests of consumers are the focus of the provision, rather than an element of a defence.

The Review Panel is of the view that an effective unilateral anti-competitive conduct provision is essential to the proper functioning of Australia's national competition policy framework. However, the Panel also acknowledged that section 46 could be reframed to focus more clearly on the long-term interests of consumers.

CHOICE believes that this is vital. Our competition policy as a whole should be directed towards improving consumer welfare through robust competition. Section 46 is no different, and needs to be reframed in a way that promotes consumer interests in the long-term.

The misuse of market power provision of the CCA currently prohibits a corporation with a substantial degree of power in a market from taking advantage of that power in that market for a prescribed anti-competitive purpose.

Section 46 has been criticised in initial submissions to the Competition Review on the following basis:

- a. the "purpose" element of the test is directed at the impact of the conduct on individual competitors, rather than the impact of the conduct on the competitive process in the market; and
- b. the words "take advantage" are given significant weight and are considered separately to the overall operation of the section and from analysis of the competitive impact of the actual conduct.³³

³² Competition Policy Review *Draft Report*, September 2014, recommendation 25, p44

³³ Australian Competition and Consumer Commission, 25 June 2014, 'Submission to the Competition Policy Review - Reinvigorating Australia's competition policy', pp76-81 and Supplementary Submission dated 22 August 2014.

These two problems result in it being very difficult for a regulator to successfully bring an action for breach of section 46. Even where a dominant company engages in conduct for a clearly anti-competitive purpose resulting in a significant anticompetitive effect, the technical requirements of section 46 make it difficult to establish that a firm has “misused” its market power.

While cases have been brought under section 46, many matters involving anti-competitive effects have been abandoned at the investigation stage due to a lack of sufficient evidence of the ‘purpose’ element.

The Review Panel has recommended amending section 46 to apply where conduct has the “purpose or effect” of substantially lessening competition. The recommendation also includes a defence; if the alleged prohibited conduct would be a “rational business decision” by someone without market power, and would also “benefit the long-term interests of consumers”, the corporation will not be in breach.

Critics of the effects test proposal have focused on the potential for such a test to act as a disincentive to pro-competitive conduct by large businesses. For example, it is argued that a large business that conducts research on its products, leading to better products but harming less innovative competitors, will be in breach of a provision that includes an effects test. A small business doing the exact same thing would not contravene the same provision, according to critics.

However, supporters of the effects test have argued that conduct that enhances competition, like research and development or innovation, by definition cannot substantially lessen competition and will not breach the law.³⁴ In order to be found to have substantially lessened competition, a business must have first acted in an anti-competitive manner. The courts have long recognised that competition is deliberate and ruthless, and consideration of whether conduct lessens competition will be considered through this lens.

Any criticism of the proposed effects test will also need to address the defence recommended by the Review Panel. The “rational business decision” defence on its own would limit the usefulness of the provision. However, coupled with the requirement that the conduct benefit the long-term interests of consumers, the recommendation appears able to achieve pro-competitive outcomes and overcome current observed limitations. It also effectively addresses the key criticism that amending the provision to include an effects test will chill competitive conduct and stifle innovation.

The current section 46 is inconsistent with accepted competition law jurisprudence. It focuses on conduct that has the purpose of harming a competitor, rather than conduct that harms the competitive process. CHOICE believes that Australia’s competition law policy should not seek to protect particular industries or businesses, but should focus on improving the competitive process as a whole. CHOICE broadly supports the Review Panel’s proposal for amending section 46, but urges the Panel to consider reframing the provision to focus firstly on whether conduct benefits the long-term interests of consumers, rather than incorporating this element as part of a defence.

³⁴ J Walker and R Featherstone, 14 August 2014, ‘ACCC suggestion is far from novel and not anti-competitive’, The Australian Financial Review

10. Secondary boycott enforcement

Summary:

- Draft Recommendation 31 states that the ACCC should include in its annual report the number of complaints made to it in respect of secondary boycott conduct and the number of such matters investigated and resolved each year.³⁵
- The Review Panel also sought comments on whether, where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech), that activity should be encompassed by the secondary boycott prohibition.

Recommendation:

- Recommendation 14: Secondary boycotts exemptions for consumer and environmental organisations should be maintained.

CHOICE sees merit in the ACCC reporting annually on secondary boycott complaints, especially as this data appears to already be collected. (The ACCC has indicated that nine secondary boycott complaints were received between 1 July 2012 and 30 June 2014.)

The Panel has sought further views on whether an environmental or consumer group that takes action that directly impedes the lawful commercial activity of others should be encompassed by the secondary boycott prohibition. The question goes to the heart of the exemption granted to those organisations because secondary boycotts are by their very definition intended to impede lawful commercial activity.

In retaining the current framework, the Panel can be guided by these principles:

- Consumer welfare is paramount;
- The consumer has a right to purchase or not purchase products based on any criteria they think are relevant;
- The consumer has a right to any information about a product or service that they consider to 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.

Secondary boycotts are a legitimate part of the contemporary consumer market. CHOICE joins with environmental advocacy organisations to support the retention of these vital consumer rights.

³⁵ Competition Policy Review *Draft Report*, September 2014, recommendation 31, p50

11. Private actions

Summary:

- The Review Panel recommends in Draft Recommendation 37 that section 83 of the *Competition and Consumer Act 2010* be amended to include admissions of fact made by the person against whom the proceedings are brought, in addition to findings of fact made by the court.³⁶
- This amendment would facilitate more expeditious and less expensive private litigation.

Recommendation:

- Recommendation 15: Section 83 of the *Competition and Consumer Act 2010* should be amended as recommended in the *Draft Report*.

As the Review Panel explains in the *Draft Report*, section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding to be used as prima facie evidence against the corporation in another proceeding. Typically, the first proceeding is brought by the ACCC, and the second proceeding is brought by a private litigant. This should lower the costs of litigation for private litigants, as it simplifies the issues to be determined at trial.

The Review Panel notes that many ACCC actions are resolved when a corporation makes admissions of facts that establish the contravention. Decisions by the Federal Court suggest that admissions are not covered by section 83; its operation is limited to findings of fact made by the court after a contested hearing.³⁷

The Review Panel suggests amending section 83 to explicitly cover admissions of fact, in its Draft Recommendation 37. This would enhance the effectiveness of the provision by reducing the length and cost of privately initiated actions. However, we do note there is a risk that this may encourage businesses to avoid making admissions of fact in situations where they would otherwise view it as the most efficient option for dealing with ACCC litigation. Regardless, in CHOICE's view measures that facilitate private litigation under Part IV and IVB of the CCA should be considered. Private parties may be well placed to anticipate long-term harm to a market, and may have suffered adversely due to the anti-competitive conduct of a market player.

In our submission to the Issues Paper, CHOICE urged the Review Panel to consider ways in which competition proceedings can be expedited and rendered less expensive. We noted that in other jurisdictions these measures have included the creation of fast-track procedures for simpler competition cases,³⁸ as well as relief from costs for applicants and mechanisms that foster the early resolution of cases.³⁹ While we continue to raise these as options, the suggested

³⁶ Competition Policy Review *Draft Report*, September 2014, recommendation 37, p54

³⁷ Ibid, p255, citing *ACCC v Opollo Optical (Aust) Pty Ltd* [2001] FCA 1456 at [24]; *ACCC v ABB Transmission and Distribution Limited (No 2)* (2002) 190 ALR 169 at [51]; *ACCC v Leahy Petroleum*

³⁸ Commission of the European Communities, 2008, 'White paper on damages actions for breach of the EC antitrust rules' (COM (2008) 165 final)

³⁹ Ibid, pp9-10

amendment to section 83 presents a simple means of facilitating more expeditious and less expensive private litigation.

12. Establishment of the Australian Council for Competition Policy

Summary:

- The Review Panel recommends in Draft Recommendation 39 that the National Competition Council should be dissolved and the Australian Council for Competition Policy established.
 - Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda;
 - It should be established under legislation by one State and then by application in all other States and the Commonwealth;
 - It should be funded jointly by the Commonwealth, State and Territories; and
 - Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement to establish the Australian Council of Competition Policy.⁴⁰

Recommendation:

- Recommendation 16: To maximise budgetary and regulatory efficiency, existing institutions should be allocated the tasks of leading and implementing competition policy.

In our submission to the Issues Paper CHOICE stated that the reforms of the National Competition Policy (NCP) would not have been implemented nearly so effectively without the National Competition Council (NCC). We went on to argue that 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). This sentiment is echoed in the Panel's recommendation to establish a new Australian Council for Competition Policy (ACCP).

Before finalising this proposal we would urge the panel to consider two matters. Firstly, in an environment of nation-wide budget austerity, we seek further information from the Panel as to the net budget impact of the proposed institutional reforms (and how the Panel proposes to measure the impact of these institutional reforms). In the current environment it may be more appropriate to find alternative institutional arrangements to achieve the desired policy outcomes using the operational efficiencies of existing organisations (for example retaining current access pricing arrangements and granting the ACCC the market studies powers).

Secondly, we query whether the package of reforms resulting from this review will carry the same administrative and leadership challenges of the Hilmer Review. The agenda is less extensive, and the difficult challenge of expanding competition in human services may not carry the same commitments to timeframes and contingent competition payments from the Australian Government to the States and Territories.

⁴⁰ Competition Policy Review *Draft Report*, September 2014, recommendation 39, p57

Many of the Panel's recommendations that CHOICE believes offer the greatest opportunities for innovation will be dealt with outside the proposed structure (for example investigating ways to circumvent geo-blocking).

Finally, after nearly 20 years of competition policy reforms, Australian institutions have embedded the doctrine of competition policy throughout their operations, legislation and even institutional culture, suggesting that a top-down model of NCP is less necessary.

These concerns about the likely scope of the Review's recommendations are neatly summed up by the Australia Institute. The Institute concludes its submission to the Issues Paper by noting that:

Australia has now pursued a micro-reform agenda for decades and many of the easy or obvious reform initiatives have been taken up. The remaining areas are those where the application of competition policy is much more problematic or inappropriate. This submission suggests that the remaining areas are limited. However, that does not mean the absence of areas in need of reform rather the sort of reform needed is not necessarily associated with competition principles.⁴¹

Innovative, fair and competitive markets need a strong policy body, able to conduct the sectoral reviews that will be necessary and to recommend removal of regulations that are damaging to the long term interests of consumers. This includes a focus on regulations that exist now, but also potentially anti-competitive regulations that may develop in the future. Given these factors, we would welcome consideration of whether the Productivity Commission could undertake the necessary sectoral reviews commissioned by the Australian Government, as agreed by state and territory governments. This may be the most effective channel to pursue competition policy over the medium term.

⁴¹ The Australia Institute, June 2014, 'Submission to competition policy review', p26

13. Role of the Australian Council for Competition Policy

Summary:

- Draft Recommendation 40 suggests a role for the Australian Council for Competition Policy, encompassing:
 - Advocate and educator in competition policy;
 - Independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
 - Identifying potential areas of competition reform across all levels of government;
 - Making recommendations to governments on specific market design and regulatory issues, including proposed privatisations; and
 - Undertaking research into competition policy developments in Australian and overseas.⁴²

Recommendation:

- Recommendation 17: Evaluation of competition policy must pay greater attention to the role of consumers in activating competition.

The roles identified in Draft Recommendation 40 could be undertaken by Commonwealth Treasury, the Productivity Commission or the treasury department of the relevant government (in the case of proposed privatisations).

However, if the Panel goes ahead with its recommendations to establish the ACCP, we would argue that far greater attention should be dedicated to the demand side of the marketplace. Many NCP-led reforms have been hampered due to insufficient attention to the role that consumers play in activating effective competition. For this reason we would recommend additional roles to:

- Evaluate net consumer impacts of competition policy reforms;
- Make recommendations on ways to design markets to maximise consumer participation; and
- Advise on the application of behavioural economics to competition policy.

In addition we would expect that the governance arrangements would include representatives with a strong background in consumer policy.

⁴² Competition Policy Review *Draft Report*, September 2014, recommendation 40, p58

14. Market studies power

Summary:

- The Review Panel seeks comments on the issue of mandatory information gathering powers and in particular whether the Productivity Commission model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.
- The Panel recommends in Draft Recommendation 41 that the proposed Australian Council for Competition Policy have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation or to the ACCC for investigation of potential breaches of the *Competition and Consumer Act 2010*.⁴³

Recommendation:

- Recommendation 18: The ACCC should be given the powers to undertake market studies.

After careful consideration of the role of market studies (in particular their tendency to focus heavily on how consumers interact with markets) as well as the imperative for efficient market regulation, CHOICE supports the ACCC being given powers to conduct market studies.

In its overview of the 2008 Market Studies Roundtable, the Organisation for Economic Co-operation and Development (OECD) observed that market studies were a good way to develop the link between consumer policy and competition policy, and noted that market studies are “a natural vehicle to highlight the synergies from combined jurisdiction over both policy areas”.⁴⁴ The international experience overwhelmingly supports aligning market studies with the ACCC and a convincing case for its location elsewhere has not been made. The international experience further suggests that concerns about co-location of market studies within enforcement agencies can be suitably managed.

We recommend amending this proposal to grant the ACCC powers to conduct market studies.

⁴³ Competition Policy Review *Draft Report*, September 2014, recommendation 41, p58

⁴⁴ Organisation for Economic Co-operation and Development (OECD), 2008, ‘Policy Roundtables – Market Studies 2008’, p7, <http://www.oecd.org/regreform/sectors/41721965.pdf>

15. Market studies requests

Summary:

- The Review Panel recommends in Draft Recommendation 42 that:
 - All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy to undertake a competition study of a particular market or competition issue;
 - All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy; and
 - The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.⁴⁵

Recommendation:

- Recommendation 19: Consumer representatives should be empowered to lodge market study requests.

In addition to the processes recommended by the Review Panel, we would seek a commitment from the agency conducting the market studies to publish all requests received and the agency's response to that request.

Additionally, the recommendation should be amended to include consumer representatives as market participants eligible to request market studies.

The agency responsible for undertaking market studies should receive suitable funding to carry out that function.

⁴⁵ Competition Policy Review *Draft Report*, September 2014, recommendation 42, p59

16. Annual competition analysis

Summary:

- Draft Recommendation 43 states that the Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.⁴⁶

Recommendation:

- Recommendation 20: Consideration should be given to tasking the Markets Group of the Commonwealth Treasury Department with future analysis of the competition policy environment.

CHOICE supports regular analysis of developments in the competition policy environment. However, we believe this work could be undertaken on a biannual basis and completed by the Markets Group of Commonwealth Treasury. This work would usefully inform a program of sectoral analysis which we argue above could be undertaken by the Productivity Commission.

⁴⁶ Competition Policy Review *Draft Report*, September 2014, recommendation 43, p59

17. ACCC functions

Summary:

- Draft Recommendation 45 suggests that competition and consumer functions be retained with the single agency of the ACCC.⁴⁷

CHOICE lends its full support to the retention of competition and consumer functions within the ACCC. Please refer to CHOICE's submission to the *Issues Paper* for further analysis of the benefits of this recommendation.

18. Access and pricing regulator functions

Summary:

- The Review Panel recommends in Draft Recommendation 46 that the following regulatory functions be transferred from the ACCC and the NCC and be undertaken within a single national access and pricing regulator:
 - The powers given to the NCC and the ACCC under the national access regime;
 - The powers given to the NCC under the National Gas Law;
 - The functions undertaken by the Australian Energy Regulator under the National Electricity Law and the National Gas Law;
 - The telecommunications access and pricing functions of the ACCC; and
 - Price regulation and related advisory roles under the *Water Act 2007*.
- The Panel also recommends that consumer protection and competition functions should remain with the ACCC, and the access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.⁴⁸

Recommendation:

- Recommendation 21: The ACCC, encompassing the AER, should retain its current functions.
- Recommendation 22: If any changes are recommended, they should ensure a consumer-centred approach to access and pricing regulation.

We note the strong views of many consumer organisations that the AER should remain within the remit of the ACCC and endorse the arguments put forward in favour of a consumer-centred approach to access and pricing regulation.

There are many natural synergies between the AER (as the access and pricing regulator of the energy sector) and the ACCC's competition and consumer protection function. For example, as well as setting the prices charged for using energy networks, monitoring wholesale electricity and gas markets and regulating some retail energy markets, the AER's role includes:

⁴⁷ Competition Policy Review *Draft Report*, September 2014, recommendation 45, p61

⁴⁸ Competition Policy Review *Draft Report*, September 2014, recommendation 46, p62

- Approving retailers' policies for dealing with customers in hardship;
- Administering a national retailer of last resort scheme;
- Reporting on retailer performance,
- Educating consumers and small businesses about their energy rights; and
- Managing the energy price comparison website.⁴⁹

These are areas of access regulation in an essential service industry that have a very strong alignment with the ACCC's competition and consumer protection functions.

Existing price regulators have worked hard to build strong engagement with consumers and their representatives. This vital link to the end beneficiaries of access pricing should be acknowledged if any changes are recommended. At a minimum there must be a good representation of consumer expertise within the governing and decision-making bodies and a strong commitment to working with the consumer community, as can be seen in the AER's consultative approach.

The case for this reform would be more convincing if it were agreed that additional pricing functions would be referred to the national jurisdiction. In the absence of this commitment, in particular in the absence of a national framework for water reform, the case is considerably weakened. This recommendation should be revisited in five years.

⁴⁹ <http://www.aer.gov.au/about-us> accessed 7 November 2014

19. ACCC governance

Summary:

- The Review Panel, as outlined in Draft Recommendation 47, believes that incorporating a wider range of business, consumer and academic viewpoints would improve the governance of the ACCC.
- It seeks views on the best means of achieving this outcome including but not limited to, the following options:
 - Replacing the current Commission with a Board comprising executive members and non-executive members with business, consumer and academic expertise (with either an executive or non-executive Chair of the Board); or
 - Adding an Advisory Board, chaired by the Chair of the Commission, which would provide advice, including on matters of strategy, to the ACCC but would have no decision-making powers.
- The Panel also recommends strengthening the credibility of the ACCC with additional accountability to the Parliament through regular appearances before a broadly-based Parliamentary Committee.⁵⁰

Recommendation:

- Recommendation 23: No changes to the ACCC governance structure should be made.

As noted in the *Draft Report*, the Review's remit includes considering the governance structure of the ACCC and whether improvements may be made to strengthen decision making. In considering improvements to governance CHOICE had expected the Panel to more fully articulate how, if at all, the current structure is problematic. The proposals represent radical change for the organisation and have the potential to be costly. Given that the *Draft Report* finds that ACCC decision-making is "sound", and in the absence of evidence of problems with the existing arrangements it is not clear that either of the options presented by the Panel is warranted.

Some of the discussion of this issue relates to the way in which the ACCC consults with and seeks advice from market participants (including consumers and their representative bodies). CHOICE's experience as a longstanding member of the ACCC's Consumer Consultative Committee is that there is strong commitment to meaningful engagement with consumers, as well as to continual improvement. In the absence of further detail, the proposal to add an advisory board appears to duplicate consultative structures that already exist within the ACCC. It may be more appropriate that the Panel recommend an independent audit of the ACCC's consultative functions and identify potential improvements.

On the issue of additional Parliamentary accountability we note that the ACCC is already subject to considerable scrutiny, through the media as well as through Parliamentary channels. In the absence of evidence that there is a problem with the current levels of scrutiny we are not convinced that the additional measures are necessary.

⁵⁰ Competition Policy Review *Draft Report*, September 2014, recommendation 47, p63

20. Media code

Summary:

- The Review Panel uses Draft Recommendation 48 to call on the ACCC to develop a Code of Conduct for dealing with the media, in order to strengthen the perception of its impartiality in enforcing the law.⁵¹
- The Review Panel is of the view that competition policy advocacy and education is important, but this role should not be undertaken by the ACCC.
- In the absence of evidence to suggest the ACCC is not acting impartially, CHOICE recommends that the ACCC's ability to utilise the media should not be restricted.

Recommendation:

- Recommendation 24: The Review Panel's Draft Recommendation 48 should be abandoned.

The Review Panel has recommended in Draft Recommendation 48 that the ACCC establish, publish and report against a Media Code of Conduct in order to counter any perception of partiality on the part of the ACCC.

The Review Panel refers to submissions that criticise the ACCC for its use of media in a way that undermines its perceived impartiality. However, there is no evidence to support claims that the ACCC is failing to act impartially in enforcement actions.

A report on enforcement effectiveness was published by the Consumer Action Law Centre in 2013. Titled 'Regulator Watch - the enforcement performance of Australia's consumer protection regulators', the report placed the ACCC at or near the top of performance rankings.⁵² The ACCC was rated as one of only two agencies whose enforcement is 'trending up' and the report found that the ACCC's reporting was 'fair'.

CHOICE believes that public perceptions of enforcement agencies are important - consumers and businesses need to trust that the regulator is discharging its duties fairly. However, there is no evidence to indicate that the ACCC is failing to act impartially. In these circumstances, CHOICE believes that the draft recommendation represents an unnecessary burden that will not lead to increases in consumer welfare or foster more competitive markets. To the extent that there may ever be concerns about the ACCC's performance or impartiality, these can be pursued through the multiple accountability processes (including scrutiny by parliamentary committees) that apply to the ACCC.

⁵¹ Competition Policy Review *Draft Report*, September 2014, recommendation 48, p63

⁵² G Renouf, T Balgi et al, March 2013, 'Regulator Watch: The Enforcement Performance of Australian Consumer Protection Regulators', Consumer Action Law Centre

21. Pharmacies

Summary:

- The Review Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers.
- The Panel recommends in Draft Recommendation 52 that these rules be replaced with regulations to ensure access and quality of advice on pharmaceuticals that do not unduly restrict competition.⁵³
- The Panel suggests that negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to remove the location rules with appropriate transitional arrangements. CHOICE notes that:
 - Consumer interests are not adequately addressed in the Community Pharmacy Agreement; and
 - Serious consideration should be given to the Panel recommendation or alternative proposals that increase price competition while protecting the public interest.

Recommendation:

- Recommendation 25: Measures to enhance price competition in pharmaceutical medicines should be adopted.

Community pharmacies have operated under, and received funding through, successive Community Pharmacy Agreements dating back to 1991. Yet with each agreement, consumer representatives have raised concerns about whether consumer interests are being sufficiently addressed. The Consumers Health Forum has most recently raised concerns about the way in which current market arrangements may be contributing to higher pharmaceutical prices.

CHOICE research confirms high levels of anxiety about the cost of health and medical services. The October 2014 *CHOICE Consumer Pulse Survey* found that 63% of the population are concerned about the cost of pharmaceutical medicines. While this figure was down slightly on the previous quarter, pharmaceutical medicines retained top ranking as an area of cost concern among Australians.

The cost of pharmaceuticals is directly linked to the Community Pharmacy Agreement. The Australian community, both as consumers of pharmaceuticals and as taxpayers funding an essential community service, deserve a fulsome discussion about how to most efficiently and fairly fund community pharmacists for the service they provide: the equitable and safe dispensing of PBS medicines.

The Panel argues that government legislation that restricts competition (as the Community Pharmacy Agreement does) must demonstrate its public interest *and* that the objectives can only be achieved by the restriction. It is on the latter point that the Community Pharmacy Agreement has failed to convince the Panel. As negotiations commence on the sixth Community Pharmacy Agreement, CHOICE would support serious consideration of the Panel's recommendations or alternative proposals that would increase price competition while protecting the public interest.

⁵³ Competition Policy Review *Draft Report*, September 2014, recommendation 52, p69

22. Consumer data

Summary:

- Consumer data holds a promise of empowerment, giving rise to applications to help navigate complex markets and make informed purchasing decisions.
- However, much of this data is held in closed systems and is unavailable to consumers in secure and shareable formats.
- Releasing consumer-created data back to consumers creates new opportunities for demand side consumer engagement, and promotes genuinely competitive outcomes.

Recommendation:

- Recommendation 26: Government should work with industry, consumer groups and privacy and security experts to develop a consumer data scheme similar to that in operation in the UK⁵⁴, incorporating the following characteristics:
 - Accessibility;
 - Machine readability;
 - Standardisation;
 - Timeliness;
 - Interoperability; and
 - Privacy protection.

Providing consumers with relevant, accessible information about the products they consume and the way in which they do so would improve both the individual consumer experience and the overall competitiveness of the marketplace. Coupling the release of this information with the development of user-friendly comparator tools would reduce consumer confusion and simplify the ways in which individuals engage with the market.

The UK's Midata programme was launched in 2011. A voluntary scheme, it is based on the key principle that consumers' data should be released back to them in a uniform, secure, machine-readable format. The scheme aims to help consumers make meaningful comparisons about the different products on offer in four key markets: energy, bank accounts, credit cards and mobile phone plans. The value of consumer data in these sectors is substantial, as consumers often enter into lengthy contracts for products that are complex and difficult to compare.

Implementing a scheme in Australia based on Midata would benefit the competitive process by:

- a) Supporting robust demand-side competition by enabling consumers to make better informed decisions based on their personal preferences, consumption habits and needs; and
- b) Encouraging innovation and the development of a broader range of more useful products for consumers, as third parties analyse available open data and identify possibilities for new products and services.

⁵⁴ The UK's Midata project, *Providing better information and protection for consumers*, <https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/personal-data>



Simply making data available will not result in better informed consumers and more competitive markets - it is necessary that the data also be accessible and useable. The United States' "smart disclosure" policy memorandum provides some guidelines to ensure that data is not merely released, but is provided to consumers in a format that will aid their ability to make informed decisions.⁵⁵ CHOICE agrees that the characteristics of smart disclosure include accessibility, machine readability, standardisation, timeliness, interoperability and privacy protection.

Providing consumers with access to their own data in a convenient format could improve their ability to drive competition on the demand side, by rewarding those businesses that best meet their needs or preferences, and consequently encouraging the development of new products and services. CHOICE urges the Review Panel to consider opportunities to foster demand-side competition, and the potential gains that could be achieved through providing consumers with access to their data.

⁵⁵ US Office of Information and Regulatory Affairs, 8 September 2011, Memorandum for the Heads of Executive Departments and Agencies, 'Informing Consumers Through Smart Disclosure', <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf>