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Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Panel Members

Competition Policy Review Draft Report

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

Key points

- We agree that an effective competition policy must be focused on making markets work in the long term interests of consumers. However, there is a need for a much clearer statement in the competition policy principles that an effective competition policy will focus on empowering and encouraging consumers to drive competition;
- We do not support the position in the Draft Report that user choice and competition should be the overarching principles of human services delivery. Minimum quality standards, universal access to service and equity of access are of greater or equal equally as important as consumer choice;
- We have responded to a number of the Panel's recommendations regarding the consumer law, including on misuse of market power and secondary boycott provisions;
- We do not support significant changes to the governance of the ACCC; and
- We do not support the establishment of a new access and pricing regulator.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

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Competition Policy

Summary of this section

Principles of effective competition policy

- We agree that the first indicator of an effective competition policy is that it focuses on making markets work in the long term interests of consumers. However, there is a need for a much clearer statement in the competition policy principles that an effective competition policy will focus on empowering and encouraging consumers to drive competition.
- An effective competition policy should monitor the consumer experience in markets. In particular, regular monitoring should consider whether disadvantaged or vulnerable consumers can access and participate in markets
- A competition policy which empowers and encourages consumers to exert influence on markets will be based on a real understanding of how consumers make decisions; will ensure products are safe, fit for purpose and comprehensible for ordinary consumers; and will allow consumers to have disputes resolved quickly and cheaply.

Human services

- We do not support the position in the Draft Report that user choice and competition should be the overarching principles of human services delivery. While they may be desirable to offer variety and drive down prices, minimum quality standards, universal access and equity of access are of greater or equal importance in this sector.
- if human services are opened up further to competition:
    - robust consumer protections must be built in at the outset;
    - it may be useful for professionals to assist consumers to choose services on offer, but any form of commission or conflicted remuneration must be prohibited;
    - a single regulator must be given responsibility for enforcing consumer protection standards in the human services market, and must have the mandate and funding to keep pace with emerging business models;
    - a universal service obligation must be introduced to ensure that all consumers have access to an adequate level of service;
    - policy makers and governments should ensure that opening human services markets does not create a 'honeypot' which attracts predatory traders. Specific measures should be in place to limit access to lump sum benefits and social security payments.

Energy and water

- We do not agree that increased levels of competition in the energy market is translating to improved outcomes for consumers, particularly disadvantaged or vulnerable consumers.
- Harmonisation of energy laws is desirable but not if harmonisation would erode existing consumer protections, as it would in Victoria.
- We broadly support reform to strengthen independent economic regulation of

water, as well as service standards. Given water is the most fundamental of human needs, there must be priority for low-income and vulnerable consumers.

Access to data

- At a minimum, utilities, banks and telecommunications providers should give consumers access to their usage data in a usable format.
- The Panel should consider if there is any reason why large firms who hold consumer data should not be required to make individual spending data available to their consumers.

A competition policy that is fit for purpose

We broadly endorse the Panel's description on page 16 of the Draft Report of the features of a competition policy which is fit for purpose. However, we make the following remarks.

Markets that work in the long term interests of consumers

We agree that the first indicator of an effective competition policy is that it focuses on making markets work in the long term interests of consumers. As we argued in our first submission, we encourage competitive markets not because they are good in themselves but because they can provide the best outcomes for consumers.

However, we think the description of a 'fit for purpose' competition policy needs an explicit statement that an effective competition policy will actively empower and encourage consumers to participate in markets. We discuss this in more depth below.

Regulation

The Draft Report states that

> Market regulation should be as 'light touch' as possible, recognising that the costs of regulatory burdens and constraints must be offset against the expected benefits to consumers (page 17).

Regulation is not necessarily a net burden. On the contrary it can facilitate effective competition, creating savings for consumers.

All regulation is intended to promote a desirable economic and social purpose. While some regulations may be poorly designed, or become redundant over time, rendering them ineffective or inefficient and requiring removal, the wholesale elimination of regulation in the name of simply reducing costs on business is neither desirable nor feasible.

Strong regulation can play a positive role in stimulating economic growth and a well-functioning economic system. It can be an aid to competition by ensuring consumers possess all of the relevant information to assess available offers and exercise their free choice. For example, there is a significant information asymmetry in the motor vehicle market, and consumer protections are essential to support those seeking to buy make sensible decisions and be recompensed should the product they buy prove to be unfit for purpose.

Complying with ineffective and unnecessary regulation costs businesses time and money, unnecessarily restrict business activity, and is costly for the community. However, sensible and necessary discussion regarding the impact of regulation and the benefits of consumer protection is at risk of being hijacked by a view that all regulation is 'red tape' and must be cut to reduce compliance costs for business.

Business lobby groups and policy makers can be quick to 'count' the compliance costs of regulation—the staff hours and input costs required to comply. Assessing the benefits of regulation is equally essential and decision-making by modern government should require equal rigour on the benefit side of the ledger.

We also encourage the Panel to consider ways in which regulation can be developed that aligns with the interests of firms in the market. Rather than conceiving regulation as impeding competition, regulation can be developed to provide incentives to firms to educate rather than obfuscate, develop simple and intuitive product designs that align with rather than defy consumer expectations, and channel consumers to products that are suitable for their circumstances. Such regulation would be pro-competitive. Professor Laruen Williams of Loyola Law School writes of such 'performance-based' regulation, which involves setting performance standards and establishing ongoing monitoring and evaluation systems to understand the regulation's effectiveness.[1]

Access and equity

We agree that a fit for purpose competition policy will secure necessary standards of access and equity. However we think that this principle should extend more widely than ensuring consumers have access to choice in the provision of human services. An effective competition policy should be capable of monitoring the consumer experience in markets—whether consumers can assess the goods and services on offer, choose products that meet their needs, switch providers and make and resolve complaints when necessary.

This exercise should particularly be focused on assessing whether disadvantaged or vulnerable consumers can access and participate in markets. As we discuss below in relation to energy, we do not think that the full benefits of opening markets following the Hilmer review have necessarily flowed to the most vulnerable. The same can be said of financial services markets, where it is apparent that low-income Australians pay proportionately more of their income for basic financial services[2] and are more likely than not to be pushed to access high-cost fringe financiers.

Competition policy principles and the role of consumers

[1] Lauren E Willis, 'Performance-based consumer law', Loyola Law School, Legal Studies Paper No 2012-39, August 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485667.

[2] Centre for Social Impact and NAB, 'Measuring Financial Exclusion in Australia', April 2014, available at: http://cr.nab.com.au/docs/measuring_financial_exclusion_in_australia_2014_final.pdf. This research finds that for over 1.4 million low income Australians, basic banking services cost more than 15% of their income.

We broadly endorse the competition policy principles outlined in **Draft Recommendation 1**. But the principles listed at Draft Recommendation 1 still largely ignore the role of consumers in promoting competition.

The one principle which does consider consumer decision-making (regarding goods and services provided by governments) is limited to 'enabling informed choices' by consumers. There is a need for a much clearer statement in the competition policy principles that an effective competition policy will focus on how to enable and encourage consumers to drive competition. This must extend to all markets, not just where goods and services are currently provided by governments. It must also involve far more than simply providing choice or information.

As the Draft Report acknowledges, choice is not simply about being given a 'bewildering array of possibilities' (page 17). A market with a large number of choices can be just as inefficient as a market with few choices if consumers do not understand what is on offer, cannot easily compare different offers, or are not rewarded for making the effort to search, compare and switch. Our discussion below regarding the Victorian energy market (where offers change so quickly that there is little benefit for consumers in searching and comparing options) is one illustration of where a market that permits consumer choice is not producing good outcomes for consumers.

Nor is it enough to make information available to consumers and expect that they will access, read and understand the information on offer, and base decisions upon it. It is now becoming widely accepted (including by the Financial Systems Inquiry in its interim report) that disclosure of risks and features of a product is usually not enough to ensure good outcomes for consumers or efficient markets.

Page 149 of the Draft Report gives a sound explanation of why consumer choice may not always discipline markets, for example, because:

- the transaction is complex (for example, insurance);
- the transaction is a one-off (for example, entry into a retirement village); or
- switching costs are high (for example, home loans when mortgage exit fees applied).

The discussion on page 149 is in the context of human services provision, but the principles are of general application—some market factors will reduce the ability of consumers to choose the product that works best for them. We do not suggest that consumers should not have choice over their insurance provider, retirement housing or home loan. However, we use these examples to illustrate that, even in markets with no lack of choice or information, consumers can struggle to exert competitive discipline on businesses.

In a report released in July 2014, Victoria's Office of the Fire Services Levy Monitor found that competition was not working to deliver consumer outcomes in the Victorian home insurance market, despite what appeared to be a wealth of choice and 'information'.[3] In spite of the

[3] Office of Fire Services Levy Monitor, 'Enhancing the consumer experience of home insurance: Shining a light into the black box', July 2014, available at: http://www.firelevymonitor.vic.gov.au/home/news+and+information/publications/publication+shining+a+light.

comprehensive disclosure regime applying to insurance, it found that there was not transparency about premium prices, coverage or risk levels. Noting that the insurance industry was more profitable than the banking industry, the report concluded that competition was not operating effectively. It made a number of recommendations designed to improve competition by giving consumers the tools to make effective choices, including requiring insurers to explain premium prices changes when policies are up for renewal and how insurers assess an individual's risks like bushfire, flood and burglary.

A competition policy which seeks to make markets work in the long term interests of consumers must do more than provide consumer choice. It must empower and encourage consumers to exert influence on markets. A competition policy which does this will ensure that:

- regulation and policy is informed by a genuine understanding of how consumers make decisions, rather than relying on the outmoded assumption that consumers always act 'rationally';
- products on offer are comprehensible and comparable for regular consumers (not only subject matter experts);
- consumers can make complaints and have disputes resolved quickly and cheaply; and
- products on offer are safe and fit for their purpose.

Recommendation:

The Panel's final report should add to its competition policy principles that an effective competition policy will empower and encourage consumers to influence markets.

Human services

We do not support the position in the Draft Report that user choice and competition should be the overarching principles of human services delivery.

We do not think the case has been made that opening more human service provision to competition, particularly through relying on private providers, will necessarily create benefits for consumers. On the contrary, our experience advocating for consumers in the utilities market is that increasing the number of choices does not make it easier for consumers to choose a product that is right for them, and the benefits of competition do not seem to flow to vulnerable and disadvantaged consumers. We also have considerable experience in handling cases involving private colleges, where we find that opening up essential markets to competition can also invite disreputable providers to build a business model to attract government subsidies, while providing a substandard service to consumers.

The Draft Report acknowledges that choice itself is not enough in human services:

> ...choice is not the only important objective in the area of human services. Equity of access, universal service provision and minimum quality are also important in providing human services to all Australians (page 25).

Introducing more choice in human services delivery will be counter-productive if it erodes equity of access, universal service provision and minimum standards. Our experience with the energy and private vocational education and training sector suggests to us that there is a real risk that

equity and minimum standards will be eroded with a shift in emphasis to greater competition in human services.

We provide further comments below regarding:

- assistance for consumers to navigate choices;
- the role of regulators; and
- equity of access

Information for consumers and assistance to navigate choices

The Draft Report acknowledges that consumers will need assistance to navigate additional choices made available in a competitive market for human services.

> In order to choose what is right for them, consumers must be able and willing to gather and process the right information. Ideally, this information should be freely available, aggregated (e.g. on a single website), easy to interpret and access, and relevant to the user's needs...
>
> Disadvantaged individuals and groups may need greater assistance in navigating the choices they face. This can include providing information through accessible communication channels that suit individual consumers' needs (page 152).

We agree with these observations. However, it will not be enough to simply make information available for consumers—products themselves need to be safe and fit for purpose. Nor is it correct that only individuals with a particular disadvantage will need extra assistance to navigate a market for human services.

We start from the position that almost every consumer will find it difficult to understand and compare the different choices available in the provision of human services. This is not because most consumers are in some way disadvantaged or are unintelligent. It is because products like aged care, disability support and other human services are inherently complex and non-experts will have trouble understanding them.

We see the same problems currently in many markets like credit, financial services and energy where products are by their nature complex and are unfamiliar to most people. Consumers even struggle to make informed choices in relatively simple markets like grocery shopping if they are influenced by factors like country of origin, ethical treatment of animals or nutrition information. This is because most people don't completely understand the claims made on these subjects and usually cannot independently verify them.

These situations—where complexity makes it difficult for consumers to make fully informed choices create two results:

- consumers do not make fully informed choices; they make decisions based on habit, inertia or rules of thumb. That being so, they are not sending useful signals to the market, and so are not exerting competitive discipline on traders; and
- dishonest traders will take advantage of the confusion by marketing products which (unknown to consumers buying them) are unsafe, not fit for purpose or overpriced.

'Credit repair' services, funeral insurance and extended warranties all rely on this kind of consumer confusion and vulnerability to be profitable, as do many other products.

One example more closely related to human services is the growing private colleges market (that is, private providers of vocational education and training) in Victoria. While opening this market has undoubtedly created more choice for consumers, it has also created opportunities for disreputable providers to claim government training subsidies, while placing students into substandard courses.

Case study

Our client, who is on a low income and speaks English as a second language, approached a trader (**the first trader**) in 2013 to study a diploma in child care. The client attended the office of the first trader, filled out forms and completed literacy and numeracy tests. The first trader advised that the client would have to undertake work experience, which our client did. Our client undertook all the study from home.

Later in 2013, our client completed all required units and work experience, and asked the first trader for a letter confirming that he had completed the diploma. Our client needed proof of completion to gain employment. At this point, our client was advised that it was, in fact a **second trader** that provided the training, and the confirmation letter would take time to arrive. Our client continued to contact the first trader requesting the letter and, after several months, the client was told to come into the office of the first trader to pick up a diploma. However, the diploma turned out to be provided by a **third trader**, who did not seem to have anything to do with child care training. The client queried this, but was assured it would be fine.

The client sent the diploma to the Victorian Department of Education, who needed it to approve an application for our client's proposed employment. The application was refused. The client understands that the Department followed up with the second trader who said that our client had never studied with them. Nor did our client study with the third trader, who provided the diploma.

A subsidy from the Victorian Government has been paid to one of the traders, but it is not clear at this point which one received it. We are continuing to work with this client, but at this stage they do not have a diploma, and may not be able access the training subsidy for a diploma level qualification again.

The lesson for policymakers is that, where a product on offer is both complex and essential, it is not enough to offer choice or provide simple disclosure. Nor is it enough to offer tailored support to a small number of consumers with special needs. Instead, the regulatory framework must ensure that products are fair and understandable before they reach the market, and that all consumers have the necessary tools to make decisions which align with their preferences.

If consumers have access to a large number of choices in human services, we agree that there may be a role for professional advisers who can assist consumers choose services that meet their needs. We further agree with the Panel's view that 'where a purchase adviser is used, the incentives of the adviser must be aligned with those of the consumer' (p 152). One of the most effective ways to ensure the incentives of the adviser do not create a conflict with the interests of the consumer is to prohibit any form of commission or conflicted remuneration.

If new human services markets are to be opened, a new consumer protection framework must be put in place while the new market is being constructed. If it is added later in response to evidence of detriment, there will be a period of years while the framework is designed and consulted on, while legislation is drafted and debated, and while providers have a transition period to adapt to the new system. During that time, the market will not be operating efficiently, and large numbers of Australia's most vulnerable citizens will be exploited, causing losses that will for most people never be recovered.

Role of the regulator

Regulators of any more open market for human services must have a clear consumer protection focus. The early stages of the new regime for human services will see many new businesses enter the market, and different business models, marketing strategies and sales practices. Diversity and innovation from traders sounds positive, but where our clients come into contact with 'innovative' business models, we find they are more often than not innovative methods for traders to sell worthless, high cost products to the most vulnerable Australians while evading obligations under consumer protection laws.

One feature of 'innovative' business models is that they tend to operate at the fringes of regulation and so can fall between the cracks of legislation and the jurisdiction of different regulators. We have direct experience of just this instance with business models like 'vendor financier' home sales and 'credit repair' services, among others. This creates delays as regulators debate between themselves who is best placed to respond. It also leads to inconsistency as one regulator decides that it can respond to some traders but not others, usually because of slight differences in business model.

It will be crucial for one regulator to be given broad responsibility for enforcing consumer protection standards in the human services market to mitigate the risk that emerging business models are able to operate outside the jurisdictions of regulators. It is equally important for that regulator to have the mandate and funding to monitor new business models, marketing and sales practices, and address emerging problems before they are able to cause consumer detriment.

Access, equity and 'cherry-picking' profitable customers

We agree with the proposition that for-profit providers are likely to try to 'cherry-pick' lower risk or more profitable customers. Policymakers and regulators need clear plans to ensure all in the community benefit from a decent standard of service provision. Any contested market for human services should be subject to a universal service obligation to ensure that all consumers have access to an adequate level of service.

A related problem is that dishonest traders will target people who are profitable because they have access to money (perhaps because of a lump sum insurance or compensation payout, or ongoing government benefits) but are nonetheless vulnerable (because they are in urgent need of assistance and want to choose a product quickly).

Vendor financier home sales and First Home Owner Grant

Commonly marketed as 'rent to buy' for those wanting to buy a house but who are excluded from the mainstream mortgage market, a key part of the vendor financier business model

has been that the intermediaries arranging the transaction between vulnerable buyers and sellers could access the prospective buyer's first home owner's grant.[4] This grant provides some immediate financial benefit to the intermediary, and they are less likely to be concerned about whether the 'deal' is sustainable, that is, whether it is affordable and appropriate for the purchaser. The deal can also fall apart if the seller's home is subject to a mortgage and the creditor seeks to repossess where payments are not made.

Private colleges: government subsidies

Two case studies are listed above which demonstrate that private colleges can be attracted to a government subsidy without considering whether the training or course is appropriate for the consumer. More recently, 'education marketing' firms have entered the marketplace. These appear to be sharing in subsidies provided to registered training organisations and engaging in very questionable marketing strategies. As education marketing firms are separate to the training provider, education standards regulators may not have jurisdiction to handle complaints against them. In some cases, it appears that education marketing firms are engaged in unsolicited sales, promising 'free' courses where the training provider accesses students' VET-FEE-HELP entitlements.[5]

Consumer leases: government sponsored priority payment

Traders providing leases of household goods frequently enter vulnerable people into arrangements which are unaffordable for them, but manage to secure payment for providers by arranging for lease payments to be made from their social security benefits via Centrepay. Centrepay is a government sponsored payment mechanism which allows Centrelink recipients to direct some of their benefit to particular payments. It is designed to facilitate payment of essential expenditure such as utilities and rent, but lease providers (which are in reality a form of high-cost finance) take advantage of the mechanism to secure repayment.[6]

Policy makers and governments should ensure that opening human services markets does not create a 'honeypot' which attracts predatory traders. Specific measures should be in place to limit access to lump sum benefits and social security payments.

Recommendation:

Any recommendation that human services be further opened to competition at a minimum should also recommend that:

- minimum quality standards, universal access to service and equity of access are of greater or equal equally as important as consumer choice; and
- consumer protection cannot be considered as an afterthought in a human services market. It must be built in at the outset;
- a universal service obligation should be put in place to ensure that all consumers have

[4] See http://thenaysayer.net/2013/09/11/16/.

[5] See 'Acquire Learning facing ASQA scrutiny amid allegations of unethical behaviour', news.com.au, 5 November 2014, available at; http://www.news.com.au/finance/work/acquire-learning-facing-asqa-scrutiny-amid-allegations-of-unethical-behaviour/story-fnkgbb3b-1227112878300

[6] See Consumer Action submission to Independent Review of Centrepay, March 2013, available at: http://consumeraction.org.au/submission-to-the-federal-governments-independent-review-of-centrepay-centrelinks-voluntary-bill-paying-service/

access to an adequate level of service.

Electricity, Gas and Water

We do not agree that increased levels of contestability in the energy market are translating to improved outcomes for consumers. In Victoria, competition between retailers is not translating to better prices for consumers, and to the extent that lower prices are available, it is likely to only be more sophisticated consumers that access them.

The Draft Report refers to the Australian Energy Market Commission's (AEMC) 2014 review of competition to support the proposition that greater levels of deregulation in Victoria have produced better consumer outcomes (page 124). It is notable that a more recent AEMC report of price trends found that, despite the AEMC declaring Victoria's energy market the most competitive in the country (based on the number of retailers in the market and the level of switching), retailers in Victoria are making the biggest profits.[7]

The AEMC (as cited on page 124 of the Draft Report) noted that Victorian consumers could save 5-16 per cent in 2012-13 by shopping around and switching from regulated offers. This is consistent with July 2014 findings from The St Vincent de Paul Society's Tariff-Tracking project[8] that found that

> households with typical energy consumption... can save up to $715-$920 per annum (depending on their network area) if switching from the worst standing offer to the best market offer.[9]

The crucial things to recognise are that:

- to make this saving, a consumer must be engaged enough to switch from a regulated offer to a market offer; and
- even if a consumer does switch to a market offer, retailers can change the price of these offers at will (even if the consumer is locked into a fixed term contract), meaning the savings the consumer switched for can disappear.

One quarter of Victorian customers are not switching, and remain on standing offers.[10] Those consumers who, for whatever reason, are not able to engage with the market, only see changes to their price of electricity if retailers change the price of their standing offers, as retailers are free to do once every six months. According to the St Vincent de Paul Society, the six month rule seems to have been imposed on the assumption that electricity prices would always be rising, and ensuring a gap of six months between increases added protection for consumers. But in an environment where the wholesale price of electricity is actually falling, and where

[7] Australian Energy Market Commission (2014) Final Report: 2014 Retail Competition Review, p viii.
[8] May Mauseth Johnston (July 2014) *Victorian Energy Prices July 2014: An update report on the Victorian Tariff-Tracking Project*, St Vincent de Paul Society. Available from http://www.vinnies.org.au/page/Our_Impact/Incomes_Support_Cost_of_Living/Energy/VIC/
[9] Johnston (2014), p 5.
[10] Australian Energy Market Commission (2014), p viii.

retailers know that consumers on their standing tariff tend to be 'sticky' there is no incentive to adjust the retail price on standing offers in line with changing wholesale costs.[11]

The result is that no retailers changed tariffs on their standing offers between January and July 2014, and indeed two retailers have not made changes since December 2012.[12] The benefits of lower wholesale prices are not being passed onto these consumers and so cannot be said to be benefiting from the price competition that the AEMC is satisfied exists in the market. If anything the opposite is true—in a market where providers are motivated by profit, they will avoid passing savings onto consumers if they are not compelled to do so, either by regulation or effective competition for customers.

Even those Victorian consumers who do invest the time to shop around, compare offers and switch to a better deal can often find that the savings they switched for quickly disappear. According to data from the Victorian Government's My Power Planner website, Victorian consumers could choose between around 1800-2000 energy offers if they were shopping around between October 2013 and July 2014.[13] What is remarkable is that, during that 10 month period, 3,871 power offers were removed from the market and 3,831 were added. In other words, each energy offer available to Victorians changed on average almost twice in only ten months. In effect, the potential savings of 5-16 per cent noted by the AEMC could be evaporating for consumers once every five months.

Even if consumers lock into a fixed term contract, and assuming (as most people would) that the contract will also bind the retailer, consumers can find that their retailer can change their price at will, even before receiving their first bill. Based on the figures above, this means that consumers could expect perhaps 4-5 major changes to their energy contract over the course of a two year 'fixed' contract. We are not able to tell based on the data we received from My Power Planner what elements of market offers changed when offers were retired from My Power Planner and new offers were registered. It seems likely that some major element of the offer, such as price or discount applied, was changed if it was necessary to submit a new offer. Whatever the change, we think consumers could be excused for not wanting to invest their time shopping around for a better energy deal once they knew it would be changed so frequently.

Harmonisation

The Panel notes that the implementation of the National Retail Energy Law, which would harmonise regulation across jurisdictions for the sale and supply of energy is not yet finalised. The Panel further 'notes with concern' that template legislation has been changed in some jurisdictions, detracting from the purpose of harmonisation.

However, the key reason that Victoria has not yet joined the National Energy Retail Law (NERL) is that by doing so it would abandon a number of consumer protections which exist in the Victorian law but not in the NERL. The differences between the NERL and Victorian legislation are significant, and include that:

- there is no provision for a wrongful disconnection payment under the NERL;

[11] Johnston (2014), p 8.
[12] Johnston (2014) p 7.
[13] This data is from our supplementary submission to the Australian Energy Market Commission's *Draft Rule Determination: Retailer Price Variations in Market Retail Contracts*, 30 September 2014. Accessible from http://consumeraction.org.au/submission-retailer-price-variations-in-market-retail-contracts/

- the NERL permits retailers to impose late payment fees, which are detrimental to consumers in hardship, while Victorian legislation bans late payment fees; and
- there are more limited right to a payment plan under the NERL compared to the Victorian regulations.

While we agree that harmonisation has its benefits, it should not be pursued at the cost of reducing consumer protections to the lowest common denominator.

Water

We support a move to nationally consistent approach to economic regulation in the water sector. However, we have had significant concerns with the direction of reform proposed in Victoria through the review chaired by Graeme Samuel. The Victorian Government has not released the final report of that review, so it is difficult to comment on it any detail. However, the draft report appeared to us to promote a form of regulation that did not accord with best practice independent regulation and it promoted further 'competition' without detailed analysis of its impacts for consumers.

Independent economic regulation enables consideration of not only prices, but the service levels expected by the customers of water businesses. In Victoria, consumer engagement in the price setting process has enabled consumer views of service levels to be considered closely by water businesses in preparing their pricing proposals, and by the regulator in making its determination. This is appropriate, and contributes to prices being set at an efficient level that enables businesses to meet those service levels. From a consumer perspective, quality of service (particularly customer service) is just as important as an affordable price.

Much of the criticism of the regulatory system appeared to be based on an assumption that it did not prioritise efficiency as a regulatory objective. A sole focus on efficiency from the government as shareholder, and businesses' boards through more robust governance expectations, risks overlooking customer service outcomes in the drive for cost savings. Victorian consumers' experience of a focus on efficiency in the energy sector, enabled by the decision to deregulate and rely on competition in that market, has not been positive when it comes to service levels. Lack of investment in ensuring service levels—for example, investment in effective call centres with strong training and customer service cultures—has contributed to significant increases in customer complaints.

There are also suggestions that further customer choice should be a feature of reform of the water sector. We are sceptical about the potential for choice to improve outcomes in the urban water sector, although we are not opposed to consideration and investigation of the issues. Yarra Valley Water is presently undertaking a pilot in 'tariff choice' and any further reform should be based upon evidence of this and similar work. The risk is that further choice will increase the complexity facing consumers. While choice often brings benefits, it also requires people to make increasingly numerous and complex decisions. This can be difficult for consumers, particularly for those consumers with limited knowledge or capacity. Further, given that water is a relatively homogenous and unexciting product, and one which constitutes a very small proportion of household income for most people, it is not plausible to expect a high level of customer motivation to make choices.

If only a small proportion of consumers actively exercise choice (rather than, for example, staying on a 'default' option), substantial gains in productivity and innovation will not result. For this reason, it is important for policymakers to carefully evaluate the likely levels at which customers will exercise choice before proceeding with this type of reform, the implementation of which will involve substantial costs.

Any reform of the water sector must be based on robust evidence of positive outcomes, including cost benefit analysis, and undertaken in a careful and managed way. This must include strong engagement with the community as a primary stakeholder.

Recommendation:

Further reform to the energy and water sectors should be focused on promoting the interests of consumers rather than simple application of the principles of 'competition', 'efficiency' or 'national reform'.

Access to data

We support the Panel's view that there is capacity to enhance access by consumers to their usage data, and that data should be provided in a usable format (p129). However, this should extend well beyond the utilities sector.

The Panel's discussion of the UK Midata program indicates that this scheme considers energy, credit cards, transaction accounts and mobile phones to be 'core' sectors for granting more easy access to consumer data. We would consider that any market for essential services where consumers spend variable amounts over time (and so may have trouble tracking average spend) and can incur contingent costs (such as late fees or interest charges) will be made more efficient by releasing consumer spending data.

We also do not see why traders who already hold consumer data—such as the large supermarkets and other traders with loyalty programs—should not allow consumers access to their own spending data.

Competition Law

Summary of this section

- We support the extension of section 45 to cover 'concerted practices', and that this provision would apply economy wide.
- We broadly support the proposed reformulation of section 46 in Draft Recommendation 25. However, we recommend that:
    - the prohibition could be reframed to consider whether the conduct harms the long-term interests of consumers, rather than whether there is a substantial lessening of competition;
    - the consideration of whether the impugned conduct might rationally be taken by a business without substantial market power should only be an

indicator that conduct does not breach section 46. It should not be a defence in all cases.

- We support the measures to empower consumers proposed by Draft Recommendation 26.
- We support the proposal in Draft Recommendation 30 that the ACCC (rather than the Australian Competition Tribunal) be the decision maker at first instance regarding mergers.
- We agree with Draft Recommendation 31 that the ACCC should report on complaints made to it in respect of secondary boycott conduct, but we see no reason why the ACCC should not report in a similar way for complaints in all areas of law.
- We do not agree with the Panel's view that action taken by environmental or consumer groups that directly impedes the lawful commercial activity of businesses should be considered a secondary boycott. We think that this is an exceptionally broad definition of secondary boycott, and would capture legitimate advocacy activity.
- Block exemptions (as discussed in Draft Recommendation 35) will have impact on large numbers of consumers and should be subject to proper consultation processes.
- We support the proposal in Draft Recommendation 37 to extend the scope of section 83.
- We disagree with the Panel's view (on page 258) that it is inappropriate for a court to make cy-pres orders where misconduct has caused quantifiable detriment but individuals that suffered the damage are not able to be identified.
- We agree with the Panel's view that the ACCC should 'communicate clearly and promptly its reasons for not acting' on complaints made by small business, but that the same should apply to complaints made by consumer advocates

Price signalling

We support the extension of section 45 to cover 'concerted practices', and that this provision would apply economy wide. We agree that it is unsatisfactory that current 'price signalling' provisions only apply to the banking sector.

Misuse of market power

We largely support the reformulation of Competition and Consumer Act section 46 as proposed by **Draft Recommendation 25,** in particular the move from a purposive to an effects test. We submit, however, that the test of 'substantially lessening competition' can remain elusive and it is problematic should we acknowledge that competition can, but not always, promote consumer welfare.

We note the proposed defence where a firm can prove that the effect (or likely effect) of its conduct will advance the long term interests of consumers. We suggest that the prohibition could be reframed with this as the main focus—whether the conduct advances the long-term interests of consumers. We submit that this formulation would align more closely with the Panel's stated purpose that

> competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect that *harms consumer welfare* (page 206)

We have some concerns with the other element of the Panel's proposed defence, that the conduct:

> would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market

We agree with recent comments made by Rod Sims that this kind of analysis (whether a less dominant firm would do the same thing) could lead courts

> to spend countless hours determining whether a smaller company could have done the same thing, as if that matters; and to disregard the actual effect of the behaviour.[14]

We think it is quite possible that a less dominant business could take action which would improve competition in a market, but the same conduct by a dominant player could reduce competition. If it is clearly the case that the action taken by a dominant player has the purpose, effect or likely effect of substantially lessening competition (or consumer welfare), it would be absurd for that business to be able to mount a defence that the conduct does not breach section 46, because the conduct would not be anti-competitive if undertaken by a hypothetical business in a non-existent scenario.

It might be that the thought experiment of 'would this be a rational strategy if pursued by a smaller competitor?' might be a useful indicator (but not determinative) of whether or not conduct is a misuse of market power. Similar use of indicators works well in other parts of the Competition and Consumer Act (such as the unconscionable conduct and unfair contract terms provisions) and there is no reason why a similar mechanism could not be used in section 46. It may be that, in almost all cases, the presence of that indicator will lead a court to believe that the conduct is not a breach of section 46. But it should be an indicator only, and not a defence in every case.

Price discrimination

We support the measures to empower consumers proposed by **Draft Recommendation 26**, that is, removing restrictions on parallel imports and ensuring consumers can legally circumvent attempts to block access to cheaper goods.

Mergers

We support the proposal in **Draft Recommendation 30** that the ACCC (rather than the Australian Competition Tribunal) be the decision maker at first instance regarding mergers. As we discuss below, we consider the formality of the Tribunal process discourages consumers and consumer advocates from participating in merger decisions.

[14] Speech to RBB Economics Conference, Sydney, 7 November 2014. Transcript accessed at https://www.accc.gov.au/speech/bringing-more-economic-perspectives-to-competition-policy-law

Secondary Boycotts

Record keeping

We agree with **Draft Recommendation 31** that the ACCC should record the number of complaints made to it in respect of secondary boycott conduct, and report on the number of matters investigated and resolved each year. But if this is done, then we think it only makes sense for the ACCC to report the number of complaints received in all areas of law, and how they responded. While this can improve accountability, it may be quite resource intensive, so a balance will need to be struck.

Definition of secondary boycott

Page 51 of the Draft Report invites comment on the following statement:

> …where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech), a question arises whether that activity should be encompassed by the secondary boycott prohibition.

The phrase 'impedes the lawful commercial activity of others (as distinct from merely exercising free speech)' seems to us an exceptionally broad definition of secondary boycott conduct. It would appear to capture legitimate consumer advocacy activity such as:

- publishing information about what certain products are made of, or how they are made, including how workers or animals are treated;
- publishing statements about particular businesses or industries to warn consumers about problems that our clients have had with those businesses or industries;
- publishing comments or providing comments to media with the intent of raising awareness of questionable practices by certain businesses or industries and putting pressure on those businesses to voluntarily change their practice.

Each of these activities could impede the lawful commercial activity of a business if they led consumers to choose to avoid buying goods and services from that business. These comments arguably go beyond 'merely exercising free speech' as they are more than just the expression of an opinion, they are made with the purpose of allowing consumers to change their purchasing behaviour or encouraging traders to change their practices.

A prohibition that captures this kind of conduct would go well beyond what we understand to be the purpose of the secondary boycott prohibition. In the typical conception of a secondary boycott, two boycotters act in concert to effectively force a third party business to cease trading with a fourth party business. In that situation, there are two willing parties (the boycotters) and two parties who are being prevented from lawful trade.

The three examples given above are a very different situation. A consumer advocate (or more, acting in concert) is distributing information which a third party consumer may accept or reject, and the consumer is then making their own choice to trade (or not) with a fourth party business. In this situation there is nothing restraining lawful trade—a consumer is simply making a purchasing decision based on the facts before them. But this may still 'impede the lawful commercial activity of others' by encouraging consumers to avoid trading with the business.

Broadening the definition of secondary boycott in the way considered by the panel will not aid competition. On the contrary it will restrain it, by preventing consumers from having access to information that is relevant to their purchasing decisions, and so preventing consumers from efficiently signalling their preferences to the market.

Block Exemptions

We agree that exemption processes should be as streamlined as possible (as discussed in **Draft recommendation 34**). However, processes like block exemptions (covered by **Draft Recommendation 35**) create much more widespread impacts and deserve a more considered process. In these cases, there should be public consultation (and perhaps funding for consumer advocacy) to ensure that the ACCC has access to a consumer perspective.

A recent example of where an exemption was granted which in our view did not follow a proper process was ASIC's decision in 2013 to provide 'class relief' to providers of Small Amount Credit Contracts to charge fees to borrowers to cover the cost of making payment by direct debit. This exemption was rushed through shortly before the commencement of a new suite of regulation and without a credible explanation given for the amendment, despite the details of the regulation being debated in open consultations over many months beforehand.

Enforcement and remedies

Facilitating private actions

We support **Draft Recommendation 37**, which would extend section 83 to allow admissions of fact made by a corporation to be applied is separate proceedings (rather than only findings of fact made by the court.)

Cy-pres orders

We disagree with the Panel's view (on page 258) that it is inappropriate for a court to make cy-pres orders where misconduct has caused quantifiable detriment but individuals that suffered the damage are not able to be identified.

Preventing a court from making cy-pres orders seems to us detrimental to competition—it allows a business to be unjustly enriched on the arbitrary basis that individual victims cannot be identified. As argued by Albert Foer:

> The purpose of a remedy in an antitrust case is three-fold: to protect or restore competition in the market, to deter anticompetitive behavior, and to compensate victims of illegal conduct. Allowing courts to formulate broad cy pres distribution of damages has several significant benefits. First, deterrence is served because, an amount of damages having been determined, the unclaimed funds do not return to the defendant. Second, the defendant is not unjustly enriched if all potential plaintiffs do not assert a claim. Third, because the funds will be used to promote competition or dissuade the kinds of actions that constituted an antitrust violation, or will benefit society in general, class members who did not assert a claim are indirectly benefited.[15]

[15] Albert Foer (2010) 'Enhancing Competition Through the Cy Pres Remedy: Suggested Best Practices', Vol 24, No 2 *Antitrust*. Accessed from http://www.antitrustinstitute.org/sites/default/files/Spring10-FoerC_041920100953_0.pdf

We have direct experience of this mechanism being used in Australia. In the late 1980s, the Consumer Credit Legal Service in Victoria objected to the licensing of a large finance company on the ground that the company was engaging in dishonest and unfair selling practices in relation to consumer credit insurance. The circumstances of the case made it impossible to identify (for the purpose of compensation) every single consumer who may have been wronged by the finance company. The solution was to compensate consumers at large under the doctrine of cy pres. The cy pres solution resulted in the finance company paying $2.25 million into a fund to establish a centre that would advocate for, and work in the interests of, Victorian consumers. Accordingly, the Consumer Law Centre Victoria (CLCV) was established in 1992. The CLCV (which merged with CCLS to form Consumer Action in 2006) became a highly respected and influential voice in the consumer policy arena, both at a governmental level, and throughout the community generally. In 2001 it started a successful consumer litigation practice to further help it seek redress for disadvantaged consumers. This clearly demonstrates the benefits of being able to seek compensation for consumers under a cy pres mechanism.

We think cy-pres remedies are particularly appropriate in cartel cases where it can be difficult to gather proof of individual loss.

Private enforcement and small business

We agree with the Panel's view (on page 259) that, where small business makes complaints concerning competition laws, the ACCC should 'communicate clearly and promptly its reasons for not acting' if it declines to act on the complaint.

However, we suggest the same should apply in relation to complaints made to the ACCC by consumer advocates. Like small businesses, consumers and consumer advocacy organisations may face significant barriers to taking private action to enforce the competition law and so rely on the ACCC to take enforcement action on their behalf.

Recommendations:

Section 46 should be amended to use a purposive rather than effects test. However, the prohibition could be reframed to consider whether the conduct harms the long-term interests of consumers, rather than consider whether there is a substantial lessening of competition.

We continue to recommend that the provisions relating to secondary boycotts be removed from the CCA except where they involve unfair commercial practices by a competitor. Should this not be adopted, we recommend that the legislation be updated to clarify that the provisions are not intended to apply to social or political conduct that is in the public interest.

Block exemptions should be subject to robust consultation processes, including public consultation.

Courts should not be prevented from making cy pres orders in competition matters.

Competition Institutions

Summary of this section

- We have no firm view on the proposed creation of the Australian Council for Competition Policy.
- However, if such a body is established, it should:
  - consider both competition and consumer policy;
  - be structured in a way that ensures consumer interests are represented; and
  - have an explicit mandate to consider how consumers can be empowered and encouraged to participate in markets.
- We support the introduction of a market study power, but believe this power would sit well with the ACCC. Whichever body holds the market study power will need mandatory information gathering powers. Consumers and other market participants should be free to recommend market studies.
- We strongly support the ACCC continuing to perform both competition and consumer functions.
- We do not believe a case has been made to change the governance of the ACCC, and we oppose replacing the Commission with a Board. We are less concerned with the proposal to introduce a new advisory body, though if this is done it should build on existing consultative processes.
- We do not agree that there is a need for the ACCC to develop a Code of Conduct for its dealings with the media.
- We do not support the establishment of a new Access and Pricing regulator.

Australian Council for Competition Policy

We have no firm view on **Draft Recommendation 39**, the proposed creation of the Australian Council for Competition Policy (ACCP). We agree that, if significant reforms follow the Competition Policy Review, there will be value in having a central body to provide advice on priorities, coordinate action across jurisdictions and monitor progress.

However, if such a body is established we are strongly of the view that it should consider both competition and consumer policy. Competition and consumer policy are closely intertwined—competition is promoted because it benefits consumers, and much consumer protection operates to ensure consumers can exert competitive discipline on markets. It would be artificial to permit the ACCP to consider one but not the other, for the same reasons that it would be unhelpful to split the competition function from the ACCC.

We also recommend that the Panel's final report specify that the ACCP be structured in a way that ensures the long term interests of consumers are represented (for example, by requiring consumer members).

We support the current statement of the role of the proposed ACCP in **Draft Recommendation 40** except that it should also have an explicit mandate to consider how consumers can be empowered and encouraged to discipline markets.

Market study power

We support the introduction of a market study power as proposed by **Draft Recommendation 41**, though we believe that this power should sit with the ACCC rather than the proposed ACCP. We do not agree there is potential for conflict between the ACCC's investigation and enforcement responsibilities (as suggested on page 58 of the Draft Report). On the contrary, we think a regulator who is not engaged in policy and research will lose track of changes in the marketplace and become ineffective. We particularly reject the idea (attributed to the Monash Business Policy Forum on page 281 of the Draft Report) that regulators should be excluded from playing any role in policy development. While there may be others that are better placed to make policy, regulators will frequently have the most expertise on market problems and are thus well placed to provide policy advice (as the Monash Business Forum's submission acknowledges).[16]

We do not believe that, if a market study power was held by the ACCC, the market study would only ever be used as a precursor for enforcement. Enforcement action will legitimately follow a market study which uncovers unlawful conduct. But it is in the nature of a market study (which considers the operation of a market as a whole, rather than individual players) that the body conducting the study will make recommendations for reform that apply to the whole market rather than individual businesses. We expect the significant value of market studies will come from recommendations that promote consumer empowerment, or reduce some barrier to effective consumer participation in markets.

Whichever body conducts market studies, they will need mandatory information gathering powers (even if they choose not to use them in most cases). The ACCC's recent investigation of alleged unconscionable conduct by Coles shows how useful these powers can be. In this investigation, the ACCC used their mandatory information gathering powers as a way to ensure Coles could not identify the suppliers that had volunteered information to the ACCC at an earlier stage in the investigation.[17]

We support **Draft Recommendation 42**, that parties other than governments (including consumers) should be able to request market studies. It may also be worth considering whether there is value in establishing an additional channel for complaints similar to a 'super complaint' mechanism which would require the relevant agency to investigate the complaint, as long as it met certain requirements.[18]

Recommendations:

If a body like the proposed ACCP is established it should:

- consider both competition and consumer policy;
- be structured in a way that ensures consumer interests are represented; and
- have an explicit mandate to consider how consumers can be empowered and encouraged to discipline markets.

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

[17] *ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers*, ACCC media release, 5 May 2014.

[18] We discussed the super complaint process in more detail in our submission to the Issues Paper.

We support the introduction of a market studies power, but we believe that this power should sit with the ACCC rather than the proposed ACCP.

ACCC

Competition and Consumer functions

We strongly support **Draft Recommendation 45**, that competition and consumer functions should continue to be administered by the ACCC. We agree with the reasoning given by the Panel on page 60 of the Draft Report but also add that competition and consumer policy should be considered by the one body because they are so intertwined as to be essentially two elements of the same area of policy.

Governance

We do not believe a strong case has been made that changes are required to the governance of the ACCC, as proposed by **Draft Recommendation 47.** In our view the ACCC is performing to a high standard and significant changes should be avoided. For this reason, we particularly oppose the suggestion of replacing the existing Commission with a Board. This would be a large scale change, undertaken to solve no identified problem.

As regards the recommendation for an Advisory Board to assist the ACCC with more outside viewpoints, we note that the ACCC already has advisory processes such as the Consumer Consultative Committee (CCC) in place. The CCC is a useful and effective process which gives consumer advocates face to face access to ACCC Commissioners and other senior staff. Any new advisory body should aim to build on the success of the CCC rather than attempt to replace it with something new. The ACCC has other consultative mechanisms as well, including with small business representatives.

An option apart from those proposed by draft recommendation 47 may be to provide greater capacity to the advisory processes that are already in place. A possible model is the Financial Services Consumer Panel (FSCP) which is hosted by the UK's Financial Conduct Authority (FCA). The FSCP is an independent statutory body set up to represent the interests of consumers in the development of policy for the regulation of financial services. The FSCP panel members are selected through a competitive recruitment process, paid fees and supported by a small secretariat. The Panel Chair meets regularly with the FCA Chairman and Chief Executive, has a research budget and produces annual reports. The FSCP describes its role as bringing a 'consumer perspective to aid effective regulation', supporting or challenging the FCA where required and acting 'as an independent counter balance' to parallel boards which represent the interests of industry.[19]

Use of the media

We do not agree that there is a need for the ACCC to develop a Code of Conduct for its dealings with the media, as proposed by **Draft Recommendation 48**. Further, we would

[19] See FSCP website at http://www.fs-cp.org.uk and Annual Report, 12/13, available at http://www.fs-cp.org.uk/publications/pdf/FSCPAR%202012-13.pdf;

strongly advise against any proposal which would limit the ability of the ACCC (or any regulator) relaying factual information through the media.

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

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

We have not seen any real case made out that the ACCC's use of the media has been inappropriate. The Draft Report gives no indication of what the ACCC is doing that is causing concern, only that there is a 'perception' that use of media related to enforcement actions is problematic. If the Panel retains this recommendation in its final report, it should be supported with a clearer indication of what the ACCC is currently doing that it should avoid in future.

Recommendation:
There is no need for significant changes to governance of the ACCC.

Access and Pricing Regulator

We do not support the establishment of a new Access and Pricing regulator, as proposed by **Draft Recommendation 46**. This proposal will proliferate regulatory bodies in direct contrast to Federal Government policy to reduce the number of government agencies and bodies.

Moreover, there are significant benefits in maintaining one national regulator responsible for competition, consumer protection and economic regulation. These functions all inter-relate and are based on an economic understanding that fair and effective markets are in the long-term interests of consumers. Keeping the access and pricing functions within the AER and ACCC also ensures awareness of access and pricing issues are retained by these agencies.

It is also not clear to us where the AER's consumer protection responsibilities under the National Energy Retail Law will go if its access and pricing functions are moved to a new body. We assume they would stay with the AER, but in this case the AER will be a very small office.

However, if such a new body is created:

- it should work closely with the ACCC, and perhaps even be co-located as with the AER and ACCC. Competition and economic regulation are closely inter-related and should be coordinated;
- it will need to be given specific consumer expertise at board level to ensure that the consumer perspective is understood; and

- the operations of the body will need to be designed to allow and encourage consumer input. Access and pricing are technical issues and most consumers and consumer advocates will have trouble contributing to the discussion, leading to an overrepresentation of industry views.

Recommendation:
There is no need to establish a new Access and Pricing regulator.

If such a regulator is introduced, it should work closely with the ACCC, be given consumer experience at board level and should have operations designed to allow and encourage consumer input.

Australian Competition Tribunal

Finally, we wish to reiterate concerns expressed in our earlier submission about lack of effective access for consumers to the Australian Competition Tribunal.

In our submission to the Issues Paper, we included a case study outlining our attempts to contribute to the Tribunal's consideration of appeals by Victorian energy distributors to 2011-2015 Victorian Energy Network Prices. In that submission, we said that a number of barriers existed which prevented the Tribunal from having access to a consumer perspective while it was making decisions affecting the cost of living of all Victorian consumers.

More recently, we were involved in the Tribunal's consideration of the merger between AGL and Macquarie Generation. Our experience in this matter was, again, that the Tribunal is not open to consumer perspectives for two reasons:

- the tribunal received several submissions from consumer advocacy organisations, but none appeared to attract any real attention from the Tribunal; and
- despite not being bound by the rules of evidence, the Tribunal's processes are very formal and court-like, which makes it difficult for individuals or even consumer organisations to participate.

We reiterate the recommendation in our last submission that the Tribunal needs to become more accessible to consumers if it is to be in a position to make fully informed decisions on matters coming before it. This could be done through more informal consultation procedures, to reduce cost risks to consumer organisations.

The 2012 review of the limited merits review regime for the energy market found similar problems with the Tribunal, particularly given its co-location with the Federal Court which mires it with court-like, quasi-jurisdictional processes. It recommended a more 'investigatory' or 'inquisitorial' administrative body be established to replace the Tribunal. It also suggested such a body could be speedy, informal and low-cost.[20] We recommend that the Panel look closely at whether an appeal body could be constituted that remains accessible to consumers.

[20] Professor George Yarrow, Hon Dr Michael Egan & John Tamblyn, 'Review of Limited Merits Review', September 2012, available at: https://scer.govspace.gov.au/files/2012/10/Review-of-the-Limited-Merits-Review-Stage-Two-Report.pdf.

Recommendation:
The Panel should consider whether an appeal body for competition matters could be constituted that is accessible to consumers.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
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