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Competition Policy Review Secretariat

The Treasury

Langton Crescent

PARKES ACT 2600

(Uploaded submission on Competition Policy Review website)

Dear Secretariat,

Re: Competition Policy Review Draft Report (September 2014)

The Consumers' Federation of Australia (CFA) appreciates the opportunity to comment on the Competition Policy Review Draft Report (September 2014). We would also like to acknowledge the access provided by the Panel to the CFA and its member organisations in its consultation process. This has allowed our organisations to develop an understanding of the approach and considerations of the Panel in its deliberations to date and has provided an opportunity for our organisations to articulate their considerable knowledge and experience of the interests of consumers in competition policy.

As articulated in our previous submission to the Competition Policy Review's Issues Paper, CFA is the national peak body for consumer organisations in Australia. We represent a diverse range of consumer organisations, including most national consumer organisations. Our organisation members and their members represent or provide services to thousands of Australian consumers. CFA advocates in the interests of Australian consumers, supporting members' campaigns, consumer representation to industry and government processes, develops policy on important consumer issues, and facilitates consumer representation in the development of Australian and international standards of goods and

services. CFA is a full member of Consumers International, the international peak body for the world's consumer organisations.

The CFA's website provides information regarding its membership, functions and objects.
<http://consumersfederation.org.au/about/>

About this submission

A number of our members have made submissions to the Draft Report. These organisations have considerable expertise to address specific aspects of the Review and we urge you to fully consider their submissions.

The CFA submission provides comment on those policy recommendations in the draft report that will, in our view, impact on the consumer welfare outcomes of competition reform.

Overview

The Draft Report seeks to provide a competition policy reform framework to underpin the significant changes and developments in markets and emerging trends, and technological innovation. While CFA supports competitive markets and choice as providing the benefits of innovation, lower prices and improvements in the quality of products and services, there are some circumstances in which the operation of competitive markets alone, do not necessarily advance consumer welfare outcomes.

The CFA supports the Panel's recognition of the importance of the welfare of Australians in the design of competition policy, particularly that the market economy should support the long-term interests of consumers.

"Competition policy, like other arms of government policy, is aimed at securing the welfare of Australians. Broadly speaking, it covers government policies, laws and regulatory institutions whose purpose is to make the market economy serve the

long-term interests of Australian consumers. Competition policy is about making markets work properly.”¹

We also support the inclusion in the Panel’s key conclusions and recommendations of the recognition of the importance of access and choice to vulnerable Australians and those on low incomes. However we note that the Panel concludes that those Australians should *“also enjoy the benefits from choice where this can reasonably be exercised, and service providers that respond to their needs and preferences.”²*

The CFA notes that in many circumstances market outcomes alone do not ensure that low income and vulnerable consumers benefit from competition. Government, rule makers and regulators therefore have a responsibility to ensure that competition reform and market design provides a competition and regulatory framework that supports access to and the delivery of benefits to all Australians, particularly in the provision of essential services human services, health and education.

Competition principles

The CFA supports the Panel’s draft recommendation 1 to develop an agreed set of principles to guide all levels of government in the implementation of competition policy. This should lead to a more consistent reform process across industries and jurisdictions. We also support the Panel’s recommendation that these principles should be subject to a public interest test, to ensure that the principles apply unless there is evidence that the costs outweigh the benefits.

As outlined in our previous submission there are many circumstances where demand side engagement is difficult and where the “lived experiences of consumers” or consumer outcomes have been given insufficient consideration. This is evident in the provision of the essential services of electricity and gas and we note its particular importance in the provision of human services. We recommend that the competition

¹ Competition Policy Review Draft Report (2014), p15, available at <http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf>

² *ibid.*

principles make clear that competition is a means to improving consumer welfare, rather than an objective in and of itself.

We recommend that the Panel take greater account of the principles identified by the CFA that support effective consumer outcomes.

Consumers in Australia are entitled to:

- affordable and equitable access to essential services
- protection from unsafe or unfit products and services
- products and services that are sustainable in terms of their environmental effects
- fairness
- information and education to assist them in making choices in an increasingly complex marketplace
- accessible and effective remedies for failures and breaches of the law
- active monitoring and enforcement of consumer protection laws
- input through representative bodies to policy-making that affects their interests
- low-income and disadvantaged consumers deserve special protection

Importance of demand side and the monitoring of market failure

The CFA is concerned that the Panel has given insufficient consideration to the importance of the demand side throughout the Draft Report and recommendations, with the possible exception of its discussion of human services in part 10. We reiterate comments made in our previous submission that it cannot be assumed that competition of itself, delivers benefits to consumers.

We again note the problems of relying on information disclosure alone to provide consumers with effective choice mechanisms. The complexity of market offers and materials in many industries, such as credit, financial services, telecommunications and energy can lead to consumer confusion, making it very difficult for consumers to benefit from choice. In addition, regulatory compliance information is in many cases detailed, technical and dense and obfuscates rather focusing the minds of consumers on important protection or contract provisions that should be taken into account.

We note, however, that information provision can be very effective for some products, for example groceries, but only if the information is easy to notice, read and use and there is also effective compliance enforcement and consumer education.

We provide more detailed comment on the impacts of this in relation to the energy market later in this submission.

However, information disclosure can be very effective for some products and services, for example petrol and groceries, but only if the information is easy to notice, read and use and there is effective compliance enforcement and consumer education.

Regarding grocery products, CFA considers that the Panel should recognise: the potential for further significant increases in competition in the grocery sector by improving the provisions and operation of the mandatory Grocery Industry (Unit Pricing) Code of Conduct administered by the ACCC; and the potential to enhance competition in other sectors by requiring the provision of unit pricing by other types of retailers

We also note that the harm to consumers in some competitive markets that result from rogue traders, particularly where there are low barriers to entry/exit.

This raises the important issue of the role of regulators, in particular, in monitoring the behaviour of markets and in understanding the lived experiences of consumers in those markets in order to respond appropriately to market failure. We recommend to this end, that the Panel consider the importance of behavioural economics in this analysis. To date we believe that insufficient consideration of behavioural economics has been given by regulators in understanding the effectiveness of Australian markets and consumers effective participation in them, compared with international regulatory frameworks.

Facilitating consumer engagement in review processes

The CFA supports consumer engagement in the review process and in the market place because this leads to better policy development and market outcomes. CFA believes that the Panel has given insufficient consideration to consumer engagement and note that the recommendations of the Productivity Commission on the role of consumer advocacy in consumer policy (Vol 2, page 278 and Vol 1, p49) have not been addressed within the Draft Report. The CFA maintains its concern that consumer engagement processes are integral to effective competition and point to recent developments within the energy regulatory sector which recognise the importance of placing consumers at the centre of market design and reform, including:

- the Standing Council on Energy and Resources (SCER) energy market reform package 'Putting Consumers First;'
- the Australian Energy Market Commission (AEMC) review of their strategic priorities for the energy sector and the release of their 'Consumer Engagement Blueprint;'
- the Australian Energy Regulator (AER) initiation of the Better Regulation Program and the development of seven new AER guidelines;
- the SCER's establishment of a national energy consumer advocacy body, nominally called the Energy Consumers Australia (ECA)

Data access

Consumer access to consumption and billing data should provide the opportunity for comparison and informed choice. The reality, however, is that competition itself gives rise to the development of multiple data platforms to serve the interests and economies of providers. The consumer can, for example, find that when they try to access their own consumption data this is not available in an easily accessible format.

The energy industry provides a case in point, where access to consumption data in a simple and comparable form could empower consumers to make fuel efficient and market efficient choices, driving down the cost and consumption of energy services. In Victoria, government has intervened to introduce an independent site hereby consumers can be empowered to make choices between the complex

array of market offers (120 relevant to a consumer at any one time in their distribution network area). The My Power Planner website provides an estimated consumption profile based on a set of questions the consumer responds to about their energy use. According to the government's research this provides a reliable indicator for the consumer's market choice. However, the most accurate profile would be based on the consumer's individual consumption history being available for input. A mandatory rollout of smart meters in Victoria should enable this data capability. However, access to this data in a usable form through energy retailers or distribution businesses provides a significant barrier to the realisation of this process of accessing this data in a usable form is a barrier to the realisation of these benefits.

CFA recommends to the Panel that the federal government should develop a data access scheme in conjunction with industry, regulators and consumers that provides specifications that facilitate timely consumer access, comparability, and consumer protections.

Human Services

The Draft recommendation contemplates an intergovernmental agreement establishing choice and competition in the field of human services and guiding principles that support this introduction. The principles include that user choice be included at the centre of service delivery and that a diversity of providers should be encouraged (while not crowding out community and voluntary services).

The majority of human services are those that are provided when consumers, or a large percentage of consumers are at their most vulnerable: 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. For this reason alone, the CFA has argued that any change to further competition should proceed slowly and with caution.

This is an area that was specifically addressed by the CFA's Parliamentary Panel event on 22 October 2014 and attended by Panel member Ms Su McClusky. Dr Paul Smyth, Professor of Social Policy at the University of Melbourne, and consumer representatives raised a number of concerns about further competitive forces being introduced without first understanding the contributions, constraints and benefits of the current provision of human services by non-government agencies. Dr Smyth suggested that the full implications of reform needs to be properly and thoroughly understood, including the risks and disadvantages to consumers. These could include the potential loss of knowledge and skills built over a considerable period of time, by the non-government sector in the specialist delivery of human services especially to low income and vulnerable Australians. While not wanting to limit user choice in the delivery of services the CFA believes that there could be considerable consumer detriment in moving to impose further commercial pressures on the sector without first understanding any unintended consequences.

CFA recommends that the panel should give further consideration to their recommendation, in particular:

- the exceptional nature of the services provided
- evidence supporting the benefits of such a reform
- substantial consultation with each of the service delivery sectors including current non-government service providers
- consideration of any unintended impacts that may result

Electricity, gas and water reform

The Draft Report proposes that the state and territory governments finalise National Energy Market reforms through the universal application of the National Energy Retail Law, deregulation of electricity and gas retail prices, and the establishment of a national framework for reliability standards.

The CFA agrees with the Panel that competition policy, laws and institutions serve the national interest best when focused on the long-term interests of consumers. The reform process to date, however, has produced mixed outcomes for consumers. In Victoria, where the reform process has preceded other jurisdictions and included the introduction

of choice of retailer and retail price deregulation, retail prices have not fallen as expected given high levels of churn. Instead, evidence suggests that Victoria has the highest retail prices in the country. In addition, despite the high churn rate, a quarter of consumers have not entered the market and remain on high standing offer prices.

As stated earlier in this submission, complexity in energy market offers makes it extremely hard for consumers to choose an offer that is in their interests and this is harder again for low income and vulnerable consumers who lack the tools and resources to engage effectively with the market, such as independent comparator sites. Further examination is needed into whether confusopoly is a key cause of higher prices, with consumers making ineffective choices and subsequently not sending the right market signals.

The Victorian Government has recognised that the reform outcomes need to be examined. In its recently released *Energy Statement* it committed to undertake a public review of Victoria's retail electricity market, with a focus on:

- Investigating possible steps to improve competition and address the possible existence and extent of retail electricity margins
- Regulatory and market barriers
- Identifying possible responses to address informational, economic, behavioural and demographic factors that inhibit how consumers engage with the retail energy market and their ability to effectively switch

CFA recommends that the Standing Committee on Energy and Resources review the outcomes of the energy reform process, particularly taking into account the consumer outcomes in Victoria. The review should inform the regulatory settings needed to ensure that the current and future regulatory settings provide energy reform is in the long term interests of consumers.

Water

The Review Panel recommends that all governments re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover urban and rural water including economic regulation of the

sector and harmonisation of state and territory regulations where appropriate. This should be overseen by a national body.

CFA notes that there has been substantial technical innovation and reform by industry and state governments in meeting urban water needs across Australia in recent years, in large part driven by the challenges of changing climate conditions and drought. These initiatives were assisted the establishment of the National Water Commission (NWC) in 2004, and the development of the National Water Initiative (NWI) which marks its 20th anniversary this year.

However reform of water services has been inconsistent in the various jurisdictions across the country, particularly as it relates to water regulation frameworks, the inclusion of consumers in determining the planning and price considerations of the services they pay for and government assistance. Therefore consumers in different parts of Australia experience considerable service and price differences. We note that the Federal Government recently introduced the National Water Commission (Abolition) Bill 2014 which proposes the disbanding of the NWC and distribution of some of the NWC's functions to the Productivity Commission and Bureau of Meteorology. Rather than disband the NWC, the CFA suggests that greater national leadership, including a national reform body would be in the long term interests of consumers.

CFA recommends that a COAG focus on urban water be reintroduced and that national urban water reform in the long term interests of consumers. We are not convinced that the suggested disbursement to the PC and BOM are the appropriate bodies to support further reform and support the Panel's recommendation for a national body.

We recommend that the functions of an independent NWC or "like body" should include:

- Research, reporting (monitoring, comparison and analysis)
- Advice to government (COAG and jurisdictions)
- Leadership in encouraging reform (NWI subject to ongoing and timely review)
- Forum for stakeholder engagement and participation (including industry and consumers)
- Promotion of excellence in innovation
- Source of information/education (all stakeholders, consumers)

ACCC and proposed ACCP

We support the Panel's draft recommendation that the ACCC retains responsibility for both competition and consumer protection laws. As we noted in our earlier submission, there are considerable synergies that arise from co-locating the two policy areas, and these would be at risk if the functions were separated across two agencies.

We do not consider the case has been made for changes to the ACCC's governance arrangements, and do not support the recommendation for the ACCC Commission to be replaced by a Board, or for the ACCC to be supported by an Advisory Board. CFA does not believe there is any evidence of a compelling problem with the Commission's focus or approach that these measures are designed to fix. In the absence of such evidence, we recommend that the ACCC's current consultative arrangements, particularly those with consumer representatives, remain open, effective and well-resourced.

However, if a Board or Advisory Board is recommended in the Panel's final report, we strongly support a composition that includes at least one member who has consumer expertise, including through past work with consumers and/or consumer organisations. This is critical for ensuring that the consumer voice is able to have an input into the governance of the ACCC.

In our earlier submission, we argued that the ACCC should be given a market studies power. We acknowledge the Panel's recognition of the need for such a power in the regulatory structure, and believe it is important that this power be located within the ACCC, rather than any new body. There is extensive international experience to support providing the national consumer and competition regulator with the market studies power. This experience also suggests that any issues arising from the co-location of market studies within enforcement agencies can be effectively managed. We also recommend that the Panel make it clear that, as well as businesses, consumer organisations should also have the capacity to request market studies be undertaken by the ACCC.

We also reiterate our earlier recommendation that a super-complaints procedure be introduced. A super-complaints procedure has been established in the UK for some years

as a means of, among other things, strengthening the voice of consumers. As explained in a guidance document when it was introduced:

The super-complaint process is intended to be a fast-track system for designated consumer bodies to bring to the attention of the OFT and the Regulators, market features that appear to be significantly harming the interests of consumers.³

Where a supercomplaint is made, the regulator is then required to respond, advising of the action it proposes to take in respect of the complaint, within 90 days. Supercomplaints have been described as have been an “invaluable source of preliminary information”,⁴ and in a number of cases, the complaints have been referred to the UK’s Competition Commission for market investigation. Some examples of the results of a supercomplaint are available at <https://www.gov.uk/government/news/financial-services-super-complainants-confirmed-by-government>.

Yours sincerely,



Jo Benvenuti
Chair
Consumers’ Federation of Australia

³ Office of Fair Trading (2003) Super-complaints: Guidance for designated consumer bodies, p 4, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284441/oft514.pdf.

⁴ Barry Rodger and Angus MacCulloch (2009) *Competition Law and Policy in the UK and EU* (Routledge-Cavendish, 4th ed) 156.