

9 July 2004

NCP Inquiry
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Commissioners

Consumer Law Centre Victoria submission to the Review of National Competition Policy Arrangements

The Consumer Law Centre Victoria (CLCV) welcomes the opportunity to make this submission to the Review of National Competition Policy (NCP) Arrangements being undertaken by the Productivity Commission (the **Review**).

The CLCV

The CLCV is one of Australia's leading consumer organisations, undertaking research, policy development, advocacy and education. The CLCV also operates a large consumer legal practice assisting thousands of low-income consumers each year with free legal advice and representation. The CLCV is currently working on a range of issues that affect the consumer interest, including utilities, banking and credit, telecommunications, insurance, competition policy, fair trading and access to justice.

Opportunities created - the benefits of NCP

In our view, fair, effective competitive markets deliver the best price, quality and access to goods and services for the majority of Australian consumers. They also enable Australian companies to compete more successfully on an international scale.¹ The CLCV welcomes the contribution of NCP to Australia's overall productivity and acknowledges its success in major consumer markets. The CLCV agrees with the view set out in the Productivity Commission's *Annual Report 2002* that 'microeconomic policy reforms have played a central role in Australia's recent productivity surge. These reforms, with their focus on openness to foreign trade and investment and enhanced domestic competition have been the drivers and enablers of Australia's recent productivity growth.'²

Challenges ahead – maximising benefits and addressing unequal distribution

In our view, the potential benefits of competition have not, however, been fully realised in Australia. Additionally, the experience of the CLCV is that low-income, vulnerable and rural/regional consumers have not enjoyed the benefits of NCP to the same extent as the remainder of the Australian population. Inequitable distribution of the benefits of competition, between different groups of consumers, has in our view, largely arisen as a result of market

¹ For a discussion of the link between domestic competition and international competitiveness see Michael Porter, *The Competitive Advantage of Nations*, Free Press 1990.

² Productivity Commission, *Annual Report 2002* at 6.

failures, particularly information asymmetries, discrimination and lack of effective demand-side participation.

Information asymmetry

Information asymmetry is, in our view, the principal market failure hampering the effective implementation of NCP. This problem is compounded by bundled and complex contracts, such as those offered in the telecommunications industry and the utilities sector.³ In Victoria, for example, information asymmetry in relation to tariff structures, contract terms and conditions, demand management and energy efficiency has hampered the beneficial outcomes expected to flow from the introduction of FRC in the electricity and gas markets.⁴

Discrimination against "unattractive" consumers

In the deregulated Australian financial services market, for example, discrimination against low-income Australians takes place on the basis of factors such as income level, bank balances and home ownership and has arguably led to the creation of exploitative residual markets for low-income and vulnerable consumers.⁵ In these circumstances policy intervention may be required to provide suitable alternatives for low-income and vulnerable consumers that are not exploitative in nature.

In its May 2004 report on 'Banking Fees in Australia', the Reserve Bank of Australia (**RBA**) noted that: 'individuals that maintain high balances and make few transactions can avoid many of the fees introduced since the mid-1990s. In contrast, customers with low balances who make frequent transactions using non-electronic channels are paying considerably more in fees than was the case in the mid-1990s.'⁶ Low-income and vulnerable consumers, who are forced to deal with banks for basic transaction account services because their salary or social security benefits must be deposited into a bank account, are increasingly excluded from low-fee banking facilities. Such facilities are routinely made available to wealthier consumers who are granted generous fee waivers because, for example, they are members of professional associations or have a mortgage, term deposit or other investment with the bank.⁷

Indeed, the RBA's report concluded that those who have benefited most from the deregulation of the banking industry 'are those with a loan secured by a residential mortgage, who use electronic payment channels and who avoid late payment and other similar charges. In contrast, those customers without a loan, who have low balances and have a high volume of transactions would not have benefited from the fall in interest margins and would be

³ "Bundling" refers to the practice of offering consumers a discount for the provision of multiple services. Bundling offers typically promise additional discounts or other benefits for each service that a customer combines on their bill. The discounts often work in conjunction with existing discount schemes and understanding exactly what is and is not included in the various discount offers can be confusing.

⁴ The view of the CLCV was echoed in the findings of the Essential Services Commission in the *Draft Report on the Review of the Effectiveness of Full Retail Competition and the Consumer Safety Net for Electricity and Gas*, March 2004, which found that 'a key finding of the analysis of conduct and performance in the energy markets is the need to improve the availability of relevant, accessible comparative offer information to customers, and, through education, to improve the capacity and confidence of energy consumers to participate in the market by accepting beneficial contract arrangements' at 9.

⁵ See Wilson, Dean, *Payday Lending in Victoria*, Consumer Law Centre Victoria, 2002. We note that a detailed understanding of this situation is hindered by the fact that the Productivity Commission's analysis of micro-economic reform assesses the outcomes of micro-economic reform in terms of averaged benefits only.

⁶ RBA, 'Banking Fees in Australia' in *Reserve Bank of Australia Bulletin*, May 2004 at 4.

⁷ See, for example, Connolly, C and Hajaj, K, *Financial Services and Social Exclusion*, Report prepared for the Chifley Research Centre, University of NSW, March 2001 at 12-13.

paying higher fees.’⁸ Unfortunately, a typical profile of a low and fixed income consumer is one that maintains low balances, has a high volume of transactions and does not have a loan. Moreover, such a consumer is more likely to incur penalty fees, such as direct debit default fees, as the capacity to avoid these charges is mostly determined by having adequate financial means.

The introduction of alternatives such as a regulated Basic Bank Account would provide a solution to the current situation faced by many low and fixed income consumers. In the credit market, No Interest Loan Schemes,⁹ and other similar micro-credit initiatives, seek to provide alternatives to exploitative credit such as payday lending.

Lack of effective demand-side participation

Consumer sovereignty is essential to an efficient, fair marketplace.¹⁰ As Timothy Muris, Chairman of the US Federal Trade Commission has stated, ‘...well-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare.’¹¹ In an Australian context, Louise Sylvan, Deputy Chair of the Australian Competition and Consumer Commission, recently made a similar point: ‘In the same way that misuse by a company of its market power inhibits appropriate vigorous competition, the failure of consumers to be able to exercise their market power also inhibits competition’.¹² Disclosure, education and literacy programs, appropriate consumer protection regulation and law enforcement are all required to maximise the benefits of NCP and mitigate the unequal distribution of the benefits of NCP.

The recent introduction of unfair contract terms legislation into the *Fair Trading Act 1999* (Vic) is one example of consumer protection regulation supporting a fair and competitive market. One consequence of the lack of effective demand-side participation is the creation of one-sided, “take it or leave it” contracts, regularly in a form that is standard across a market. For instance, the telecommunications mobile phone market, while highly competitive on price with many entrants seeking to obtain market share aggressively and quickly, is notorious for the use of standard form contracts which impose unfair terms on consumers.¹³ For sellers who regularly provide consumers with standard form contracts, the cost of analysing the impact of the terms is spread out over a large number of transactions. For consumers, on the other hand, the cost of acquiring and processing information on contract terms is likely to be far greater than the price of entering into the contract. This leads to market failure, in which consumers are unable to influence the terms of standard form contracts.

In our view, significant investment is required to build demand-side advocacy in the Australian community. Initiatives, such as the CLCV National Electricity Market (NEM) Capacity Building Project, which provides stakeholders, including consumers, with a more

⁸ RBA, above n6, at 6.

⁹ The National Low Interest Loan Scheme (often referred to as NILS) is a national network of community-based no interest loan programs co-ordinated by Good Shepherd Youth & Family Services.

¹⁰ Adam Smith first acknowledged the importance of consumer sovereignty in his seminal book *The Wealth of Nations* (1776).

¹¹ Muris, Timothy, *The Interface of Competition and Consumer Protection*, Fordham Corporate Law Institute’s 29th Annual Conference on International Antitrust Law and Policy, October 2002 at 5.

¹² Sylvan, Louise, *Consumer regulation – How do we know it is effective?*, National Consumer Congress, March 2004 at 5.

¹³ Several examples are included in the *Report on Fair Terms in Telecommunications Consumer Contracts 2003* published by the Communications Law Centre. For instance, terms were found in telecommunications consumer contracts which require customers to pay a reconnection fee where disconnection is caused by the supplier (at 3), loss of bonus due to call charges being listed out of chronological order by the supplier (at 5) and the charging of ‘hidden charges’ not outlined in the standard form contract or the over-the-counter sales brochure (at 3-5). See also Field, Chris, *The Death of Unfair Contracts*, 29 *Alternative Law Journal* 35.

detailed understanding of the electricity industry nationally and builds the capacity of the consumer movement to advocate on behalf of consumers in the NEM, are critical to increase consumer awareness and participation in the market. The creation of the Victorian Consumer Utilities Advocacy Centre, which plays a key role in undertaking research on utilities issues and disseminating information gathered in this research as well as undertaking proactive advocacy on behalf of Victorian consumers, is a prime example of how government can foster robust markets by introducing effective consumer advocacy.

Maximising Benefits - Ensuring competitive markets

In order to maximise the benefits of NCP, it is essential that Australian governments act swiftly to prevent anti-competitive conduct by ensuring that there are no safe harbours from the reach of the provisions of Part IV of the *Trade Practices Act 1974* (Cth) (**TPA**).

The shielding of particular industries, such as pharmacists, from the operation of NCP continues to prevent the realisation of the full benefits of NCP. In addition, the recent High Court decision of *Boral Besser Masonry Limited v The Australian Competition and Consumer Competition*¹⁴ indicates the need to strengthen the legislative prohibitions which constrain anti-competitive conduct, to withstand restrictive judicial interpretation.¹⁵

Similarly, NCP fails to benefit consumers in industries, such as the mortgage broking industry, where commissions and 'soft dollar payments' distort the market so that consumers are not provided with accurate and complete information about the products offered by lenders.¹⁶ Further, competitive markets are threatened by the lack of criminal sanctions for company directors involved in serious or hard-core cartel behaviour. The financial gains realised by Australian corporations that participate in cartels are substantial and the existing financial penalties do little to deter illegal behaviour.¹⁷

If you have any questions about this submission please contact Margery Clark on 03 9629 6300.

Yours sincerely

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¹⁴ [2003] HCA 5 (7 Feb 2003).

¹⁵ In considering whether Boral had breached section 46 of the TPA, the High Court held that Boral did not have a substantial degree of market power at the relevant time. This was despite evidence before the Court that Boral had, at the relevant time, between 25-30 per cent market share in a market characterised by significant barriers to entry for new entrants and financial power/vertical integration.

¹⁶ See Consumer Credit Legal Centre (NSW) Inc, *A report to ASIC on the Finance and Mortgage Broker Industry* (March 2003) at 16ff for a discussion of remuneration within the broker industry and the resulting problems for consumers.

¹⁷ We note recommendation 10.1 of the *Review of the Competition Provisions of the Trade Practices Act*, Jan 2003, at 164 which stated that, subject to development of a satisfactory definition of serious cartel behaviour and a workable leniency policy, 'the Committee recommends the introduction of criminal sanctions for serious, or hard-core, cartel behaviour, with penalties to include fines against any convicted corporation and imprisonment and fines, as appropriate, for implicated individuals.'