

20 December 2004

**By email: [ncp@pc.gov.au](mailto:ncp@pc.gov.au)**

Review of NCP Reforms  
Productivity Commission  
PO Box 80  
BELCONNEN ACT 2616

Dear Commissioners

**Consumer Law Centre Victoria submission to the Review of National Competition Policy Reforms – Discussion Draft**

The Consumer Law Centre Victoria (**CLCV**) welcomes the opportunity to make this submission to the Productivity Commission (the **Commission**) in respect of its Discussion Draft on the Review of National Competition Policy (**NCP**) Reforms (the **Discussion Draft**). This submission does not address all of the issues raised in the Discussion Draft, but focuses primarily on consumer protection policy and the important role of consumer advocates as a voice for reform that is solely directed to the long-term interests of consumers, not the interests of businesses. We note that this submission is largely based on an article written by Chris Field, Executive Director of CLCV, entitled 'Competition, consumer protection and social justice - providing a consumers' voice', which will be published in the February 2005 edition of the *Australian Business Law Review*.

**About the CLCV**

The CLCV is Australia's second largest and fastest growing consumer organisation. The CLCV undertakes research, policy development, advocacy and education. The CLCV also operates a large consumer legal practice assisting over one thousand low-income consumers each year with free legal advice and representation. The CLCV's work is focussed on advancing the interests of low-income and vulnerable consumers. The CLCV is currently working on a range of issues that affect the consumer interest, including utilities, competition and consumer protection policies, financial services, telecommunications, exploitative credit and access to justice.

**The role of consumer protection regulation**

We strongly support the Commission's proposal that 'the Australian Government in consultation with the States and Territories should establish a national review into consumer protection policy and administration in Australia.' (p.218)

At the time the *Trade Practices Act 1974* (Cth) (the **Act**) was introduced, it set an international standard in the regulation of anti-competitive conduct and the protection of consumer rights. However, the consumer protection provisions in Part V of the Act have arguably not kept pace with international developments in

the area of consumer protection regulation. This is particularly concerning given the fundamental changes to the Australian economy and opening up of markets such as the supply of energy, financial services and telecommunications following more than a decade of micro-economic reform.

During this decade there has been no review of Part V of the Act, despite considerable reform to consumer protection laws in Australia as well as overseas. There are many examples, but in particular laws prohibiting unfair contract terms have been enacted in the UK and in Victoria. During this same ten years, we have also seen a comprehensive review of Part IV of the Act (the Dawson review) that will shortly lead to a range of changes to the Act. It is time to consider the effectiveness of our current consumer protection regulations, particularly in markets that have been deregulated over the past decade. This should include moving beyond the simple rhetoric of “heavy-handed” versus “light-handed” regulation. Regulation is needed where markets fail consumers. More precisely, regulation is needed, and justified, where: (1) there is a demonstrable market failure (for example, information asymmetries); (2) the regulation proposed is directed to addressing the market failure; (3) the regulation is the least restrictive way of achieving its remedial purpose; and (4) the regulation does not create more costs than the benefits that it seeks to achieve.

In making an assessment about the costs and benefits of regulation we agree with the Commission that economic efficiency is an important factor. However, of equal importance is the promotion of positive environmental and social outcomes and the broader public interest. It is also important to consider the fact that consumer protection is not necessarily anti-competitive – many consumer protection regulations may in fact facilitate and enhance the operation of competitive markets.

Where consumer protection measures promote confidence in markets, assist consumers to safely exercise choice of suppliers and eliminate industry-wide unfair contract terms that cause consumer detriment, then those measures can make markets work more effectively – they can be pro-competitive. There has been considerable research undertaken overseas into the complementary relationship between well-targeted consumer protection legislation and competition. This includes the dampening effect on competition caused by excessive switching costs<sup>1</sup> and the sub-competitive outcomes which can result in potentially competitive industries when consumers are reluctant to, or unable to, search for or to switch suppliers.<sup>2</sup> As the former Chair of the US Federal Trade Commission, Timothy Muris, has observed, ‘well-conceived competition policy and consumer protection policy take complementary paths to the destination of promoting consumer welfare’.<sup>3</sup>

Accordingly, we strongly agree with the Commission that what is now needed is a national review of the consumer protection provisions of the Act and equivalent State and Territory legislation, to (1) explore the effectiveness of those regulations for consumers in modern markets; (2) to consider whether new regulations are required and whether some existing regulations continue to be warranted; and (3) to examine the costs and benefits of existing and proposed new regulations within a context of the complementarities between consumer protection and competition policy. Obviously such a review will require the full support of the Commonwealth Government and we urge the Commission to encourage the Commonwealth Government to take a leadership role on this issue, rather than abrogate the responsibility to the State and Territory Governments.

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<sup>1</sup> Joseph Farrell and Paul Klemperer, *Coordination and Lock-In: Competition with Switching Costs and Network Effects* (2004) [www.paulklemperer.org](http://www.paulklemperer.org). See also Paul Klemperer, ‘Competition when Consumers have Switching Costs’ (1995) 62 *Review of Economic Studies* 515.

<sup>2</sup> Michael Waterson, ‘The Role of Consumers in Competition and Competition Policy’ (2003) 21 *International Journal of Industrial Organisation* 129.

<sup>3</sup> Timothy Muris, *The Interface of Competition and Consumer Protection*, Fordham Corporate Law Institute’s Twenty-Ninth Annual Conference on International Antitrust Law and Policy, New York City, 31 October 2002 at 2.

## **Social welfare and equity considerations**

We welcome the Commission's recognition of the distributional effects of markets – the so-called “winners and losers” of competition – and strongly believe that this issue requires considered analysis as further reforms are progressed.

Despite more than a decade of sustained growth, poverty is a relentless reality for far too many people in Australia.<sup>4</sup> Economic growth exists within a social and environmental context and it exists to serve not just the majority of Australians, but all of them. Critically, the Commission has recognised that ‘there would be value in embedding the need to consider distributional and adjustment issues and the case for adjustment support in the guiding principles underpinning the reform program.’ (p. 298) However, we consider that in the Commission's final report this point should be articulated more strongly and also with a greater emphasis on the need for consumer protection policy and social policy to be considered as part of the competition framework, as opposed to being a consideration outside of the framework. In this respect, we second the comments made in the submission to the Commission on the Discussion Draft by our colleagues at Care Financial Counselling Service (ACT).

## **The public interest test**

We agree fully with the Commission that ‘an effective public interest test is fundamental to good outcomes.’ (p.123) Yet, whilst we accept that the ‘guiding principle under the NCP is that competition will generally enhance community welfare’ (p. 17), we consider that the welfare of consumers will be better served by also recognising the social and environmental impacts of proposed competition reforms, as certain reforms will produce social and environmental benefits, while other reforms may, for example, increase environmental damage which may not be in the long term interests of consumers. We note that academic commentators are also discussing the relationship between environmental goals and industrial competitiveness and argue that the two objectives are not mutually exclusive and do not necessarily result in a trade-off between environmental benefits and private costs.<sup>5</sup> We invite a thorough examination not only of what factors constitute the public interest, but also whether those factors should be weighted and whether there should be a specific requirement that consumers, on an equitable basis, directly benefit from the reforms in the form of improved quality or service or lower prices.

## **The role of consumer advocacy in advancing reform**

Consumers need a strong voice for economic reform in their interest, to counter-balance the voice of businesses seeking protection from competition, to ensure a just distribution of economic gains and for regulation that not only protects them from market failure but makes markets work for them. Not all businesses are committed to competition. Those businesses will place their own capacity to take profits in the short-term ahead of the interests of consumers. As economist Michael Porter describes it ‘managers [of businesses] are often the first and the loudest voices for easy approval of mergers or alliances, because eliminating domestic rivalry is a tempting way to raise short-term profits.’<sup>6</sup> Consumer organisations have an important role in being a countervailing voice to these business interests. We are pleased that this role has been highlighted by the Productivity Commission in the Discussion Draft:

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<sup>4</sup> See, for example, Senate Community Affairs References Committee, *A hand up not a hand out: Renewing the fight against poverty*, March 2004.

<sup>5</sup> See, for example, M. Porter and C.van der Linde, ‘Toward a New Conception of the Environment-Competitiveness Relationship’, 1995 4(9) *Journal of Economic Perspectives*, 97-118 and M. Porter and C. van der Linde, ‘Green and Competitive: Ending the Stalemate’, 1995 September-October, *Harvard Business Review*, 119-134.

<sup>6</sup> Michael Porter, *The competitive advantage of nations*, Free Press, 1990.

In a reform-specific context, it is the role of consumer advocates in providing a counterbalance to producer groups seeking to maintain anti-competitive arrangements that lead to higher prices, reduced service quality or less market innovation, that is most relevant. (p.298)

In our submission, the Commission needs to go further in its final report and specifically recommend that the Federal and/or State and Territory Governments fund a National Consumer Council, based, for example, on the model of the National Consumer Council in the United Kingdom.<sup>7</sup> We do not agree with the Commission that whether there is a need for public funding for consumer advocacy groups is something that is 'far from clear.' (p.301) A recent report into the need for consumer advocacy in the National Electricity Market (NEM), undertaken by Allens Consulting and commissioned by the Consumers' Federation of Australia,<sup>8</sup> stressed the importance of consumer advocacy in the development of the NEM. As the report noted, 'consumer involvement can improve the quality of decision-making and the operation of the market, resulting in public benefits, as well as benefits to consumers themselves.'<sup>9</sup> The report goes on to say:

The capacity of existing advocacy organisations for small consumers to engage in these issues is limited by resource constraints and sometimes by their charters... Without additional resources from new and existing sources to support advocacy for small consumers, their interests in the national electricity market will not be represented adequately.<sup>10</sup>

Given that the Discussion Draft proposes other key reform areas which will clearly impact on consumers, such as education and training systems, aged care services and health care, we consider that there is indeed a justified need for further funding of consumer advocacy and that issues such as which groups should receive the funding and how much they should receive, should not act as a barrier to the Commission recommending the need for increased public funding of consumer advocacy.

Should you wish to discuss this submission further please contact Anna Stewart on (03) 9629 6934.

Yours sincerely

**CONSUMER LAW CENTRE VICTORIA LTD**



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<sup>7</sup> See [www.ncc.org.au](http://www.ncc.org.au)

<sup>8</sup> Allens Consulting, *National Energy Market Consumer Advocacy: Emerging Needs and Institutional Models*, June 2004, available at <http://www.consumersfederation.com/reports.htm>.

<sup>9</sup> Above at vii.

<sup>10</sup> As above.