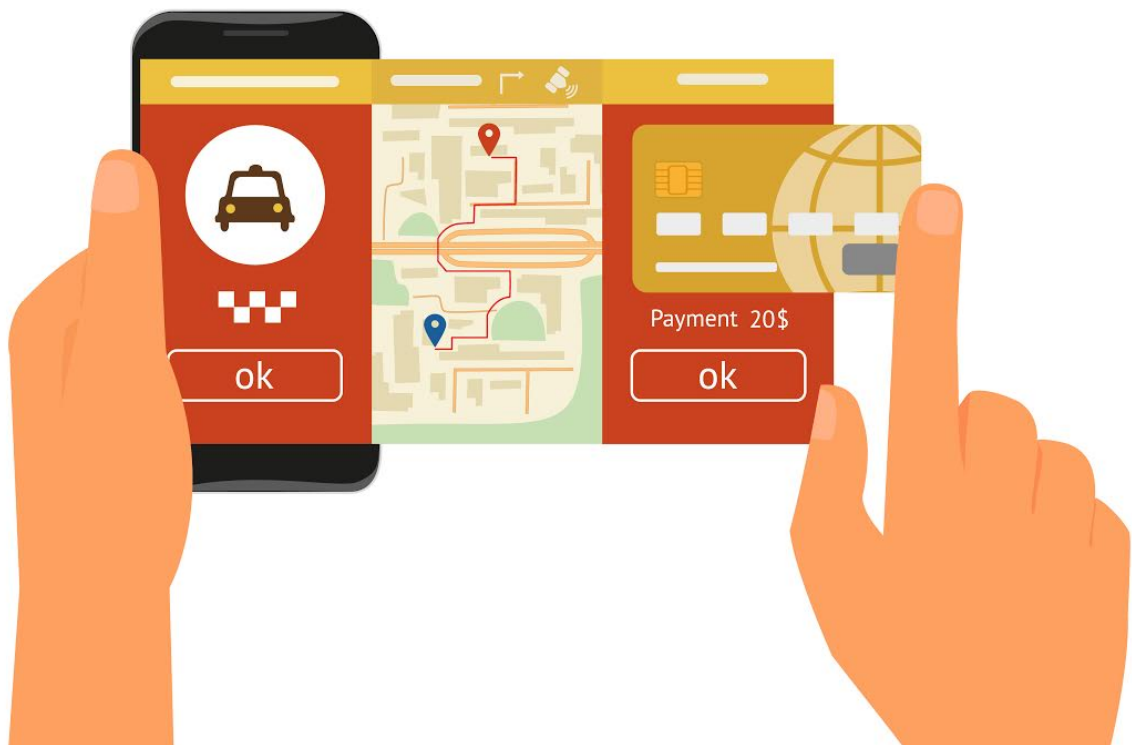


choice

SUBMISSION TO THE TREASURY ON THE COMPETITION POLICY REVIEW FINAL REPORT



26 MAY 2015

WWW.CHOICE.COM.AU E CAMPAIGNS@CHOICE.COM.AU
57 CARRINGTON ROAD MARRICKVILLE NSW 2204 P 02 9577 3333 F 02 9577 3377

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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57 CARRINGTON ROAD MARRICKVILLE NSW 2204
P 02 9577 3333 F 02 9577 3377

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INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Treasury on the Competition Policy Review Final Report (the *Final Report*).

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

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

While the policy recommendations are in many instances welcome, current inquiries and law reform processes operating alongside the Competition Policy Review threaten to undermine some of these objectives. For instance, the proposed *Copyright Amendment (Online Infringement) Bill 2015* may work against the Review Panel's recommendation to ensure that consumers are able to circumvent attempts to prevent their accessing cheaper legitimate goods from overseas, and may in fact punish consumers who attempt to do so.

The Inquiry into the Commonwealth's Treaty-Making Process provides an opportunity to further the Review Panel's recommendation that trade negotiations be informed by an independent and transparent analysis of proposed intellectual property provisions, but could also lead to that recommendation being stalled. The on-going negotiations for the Trans-Pacific Partnership may also undermine the Review Panel's recommendations by locking in current laws that require reform, and by introducing new legal frameworks that increase barriers to competition, rather than reduce them.¹ These various processes must be considered together – the suite of recommendations contained within the *Final Report* will have little impact if directly conflicting legislation designed to protect particular industries from competitive forces continues to be progressed through Parliament.

¹ For instance, an early leaked draft of the Trans-Pacific Partnership's intellectual property chapter indicated that a ban on parallel imports may be included in the final agreement. A more recent leaked draft indicates this particular provision has been deleted, but with no access to official documents it is impossible to confirm that the finalised agreement will not stymie the reform recommendations contained within the Competition Policy Review Final Report.

This submission is structured in response to the *Final Report*, and makes comment on a selection of the Review Panel's recommendations. We have focused our analysis on those recommendations most likely to result in a significant impact on consumer welfare. Additionally, the final section of this submission considers issues that directly relate to Australia's competition policy framework, but were not addressed in the *Final Report*. These include changes to the GST low-value threshold, failures in code frameworks, and the value that could be gained from more open reporting and sharing of data between regulators and the public.

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

CHOICE has prepared in-depth recommendations and commentary in instances where we do not oppose or support a recommendation in its entirety. The recommendations that are relevant to CHOICE that we can accept or reject as a whole, are summarised in the table below.

CHOICE summary view of relevant Competition Review Final Report Recommendations

#	Recommendation	Position
1	Competition principles	Support.
2	Human services	CHOICE continues to urge Australian governments to be extremely cautious about expanding market-based reforms in human services.
3	Cabotage – coastal shipping and aviation	Disagree with the Review Panel’s conclusion that the price monitoring and ‘light-handed’ regulatory approach in aviation appears to be working well overall.
6	Intellectual property review	Support.
7	Intellectual property exception	Support.
8	Regulation review	CHOICE is unconvinced that a full review is required. If a review takes place, consumer organisations must be adequately resourced to participate.
10	Priorities for regulation review	Taxis and ride-sharing: broadly support, but urge action rather than further review.
11	Standards review	Support.
13	Parallel imports	Support.
14	Pharmacy	Support serious consideration of the Review Panel’s recommendations or alternative proposals that would increase price competition while protecting the public interest.
19	Electricity and gas	Urge caution in perusing recommendation until clear benefits to consumers from the reforms can be demonstrated. ACCC should retain its current powers.
20	Water	Broadly support but caution against economic regulation based on return of regulated asset base as stated in the National Water Initiative Pricing Principles.
21	Informed choice	Strongly support.
23	Competition law simplification	Support, in particular the recommendation that the

		process involve public consultation.
29	Price signalling	Support. If implemented, the Review Panel's recommendation will allow case-by-case targeting of price signalling in all markets where the practice substantially lessens competition.
30	Misuse of market power	Broadly support, but consideration should be given to whether or not the conduct benefits the long-term interests of consumers.
31	Price discrimination	Support.
36	Secondary boycotts	Support recommendation for the ACCC to report annually on secondary boycott complaints.
38	Simplification of authorisation and notification	Support.
40	Section 155 notices	Support extending the power to cover the investigation of alleged contraventions of court-enforceable undertakings. Support increasing the fine for non-compliance with section 155 of the <i>Competition and Consumer Act 2010</i> .
41	Private actions	Support.
42	National Access Regime	Support.
43	Australian Council for Competition Policy - establishment	CHOICE recommends that the proposed role of the ACCP could be more efficiently undertaken through providing increased resources to existing institutions.
44	Australian Council for Competition Policy - role	CHOICE recommends that the proposed role of the ACCP could be more efficiently undertaken through providing increased resources to existing institutions.
45	Market studies power	Support, but recommend that this power rest with the ACCC.
46	Market studies requests	Support, but recommend that consumer representative bodies also have the ability to make market studies requests.
49	ACCC functions	Strongly support.
51	ACCC governance	Oppose the recommendation for substantial changes to the ACCC's governance, in particular the proposed

		abolition of the Commissioner position representing consumers' interests.
52	ACCC Media Code of Conduct	Oppose. There is no evidence of a problem that needs fixing and it is likely to be counter-productive
53	Small business access to remedies	Support.

CHOICE recommends:

- The proposed competition principles should be amended to make clearer that improving consumer welfare should be the overriding objective of competition policy, rather than just one of a large set of principles. Competition and consumer choice should be recognised as means of improving consumer welfare, rather than objectives in and of themselves.
- Australian governments should exercise extreme caution when considering the expansion of market-based initiatives in essential human services.
- The major Australian airports should be deemed open to arbitration.
- That the Federal Government should direct the Productivity Commission to undertake a review of Australia's intellectual property rights system.
- Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of the entirety of the agreement. At a minimum any proposed intellectual property provisions should be subject to the described cost/benefit analysis. Such an analysis should be undertaken and published before negotiations are concluded.
- That the Federal Government implement Recommendation 31 immediately, by removing restrictions on parallel imports and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.
- Australian governments should only review regulations that have been subject to widespread criticism by multiple stakeholder groups, have not been reviewed through similar processes and - based on an initial assessment - appear to be restricting competition without delivering commensurate consumer welfare or public interest benefits. Resources should be provided in any review to independently quantify community or public benefit.
- States and Territories should remove regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest.

- Endorsing Recommendation 13, remaining restrictions on parallel imports should be removed unless it can be shown that:
 - the benefits of the restrictions to the community as a whole outweigh the costs; and
 - the objectives of the restrictions can only be achieved by restricting competition.
- Recommendation 21 should be acted on as a matter of priority. Governments should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice. A working group should be established to develop a partnership agreement that both allows people to access and use their own data for their own purposes and enables new markets for personal information services.
- Section 46 of the Competition and Consumer Act 2010 should be amended in order to better achieve its goals and improve its policy effectiveness. This could be achieved by amending Section 46 in the way recommended by the Review Panel, but CHOICE also urges the Federal Government to consider options for reframing the section so that Court is directed to consider the long-term interests of consumers, rather than focus on the extent to which the conduct has the purpose or effect of increasing or lessening competition.
- That the objectives of the Australian Council for Competition Policy be instead pursued through existing organisations.
- That the market studies power should reside with the ACCC, and that the Federal Government should consider a mechanism that would prioritise market studies requests from consumer advocacy organisations for consideration, provided they met clear criteria in terms of identifying systemic consumer detriment.
- The Federal Government should initiate a review of how Air Service Agreements are negotiated. Such a review should investigate opportunities for placing the needs of consumers at the centre of Australia's Agreement negotiation strategy. The review could be conducted by the Productivity Commission.
- The Commonwealth Consumer Advisory Affairs Council should undertake an investigation into the effectiveness of Australia's code framework.
- The Federal Government should not abolish or lower the current GST low-value threshold on imported goods unless there is evidence to demonstrate that the costs of collecting the tax will not outweigh the revenue raised.

Competition law principles: Recommendations 1 and 22

CHOICE welcomes the Review Panel's recommendation to introduce an updated set of national competition principles, while retaining the central concepts, prohibitions and structure enshrined in the current competition law. We believe it is useful to articulate a set of principles that will guide ongoing reform across jurisdictions, unified around an objective of achieving durable consumer benefits. This will help sustain momentum in reform processes that may take several years, such as the opening up of protected industries. Some reforms may be subject to further inquiries and detailed investigations, such as the recommendations relating to intellectual property. In these circumstances, a set of national principles can play an important role in ensuring there is a consistent approach to reform across multiple sectors.

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

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

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

Recommendation:

- The proposed competition principles should be amended to make clearer that improving consumer welfare should be the overriding objective of competition policy, rather than just one of a large set of principles. Competition and consumer choice should be recognised as means of improving consumer welfare, rather than objectives in and of themselves.

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

Human services: Recommendation 2

CHOICE previously urged the Review Panel to scale back their approach to expanding principles of choice and competition in human service sectors. Following the release of the Final Report we maintain our view that Australian governments should exercise extreme caution when considering the expansion of market-based initiatives in essential human services.

Governments need to explore the consumer benefits of market-based reforms in sectors as varied as aged care, childcare, employment services and disability services. It is not satisfactory, for example, to declare that user choice is the ultimate goal of reforms in these services. Governments must be able to articulate how user choice will improve access, quality or service and how consumer outcomes can be assessed over time. To the extent that user choice can improve welfare, it may be an appropriate policy to pursue. In other words, the challenge is not to put user choice at the heart of service delivery but rather to put consumer welfare at the heart of human services and to be transparent and accountable about measuring the impact of policy choices.

When competition is introduced into human services, it is usually on the assumption that competitive forces will deliver better outcomes. But it is not always clear who is the intended beneficiary of reforms. This is an important consideration because if governments want competition to deliver benefits, the system needs to be designed so as to drive competition between services, on the factors that are important to the beneficiary. For example, if the goal is to drive innovation in job services so that providers compete based on who will deliver the very best service to job seekers, then the system needs to be designed with this in mind. Yet since the late 1990s the job services system has not been designed to drive that sort of innovation. The emphasis has been much more on meeting the needs of the government in terms of throughput than the needs of jobseekers as consumers.

Many human service sectors featuring elements of user choice and competition are not achieving the goal of enhanced consumer welfare. For example, aged care is notoriously complex, employment service providers struggle to innovate on service quality, and childcare sites across Australia face pervasive issues with limited access, making a farce of the right to choose a provider. Australian governments have a responsibility to fix human service sectors that are already failing their community of consumers.

The Review Panel's recommendation is also weakened by not giving greater consideration to the role of consumer protection measures in human service sectors. It is through good quality general and industry-specific consumer protection legislation and regulation that imbalances in markets between service providers and consumers can be addressed in the consumer interest. Essential service markets typically adopt additional specific obligations on providers, for example in the form of mandatory dispute resolution schemes, service provider obligations for customers in financial hardship and responsible service provision. Choice and competition reforms in human service reforms should consider how to use consumer protection measures to enhance consumer welfare.

Market forces don't operate on public interest principles and won't naturally concern themselves with important community priorities of equity, access and quality. Yet these principles are central to the provision of all human services. Australians will continue to ask their governments to prioritise these elements of human services alongside people's desire to exercise their own choices, where they are capable of doing so, among a range of service providers.

There are examples of good steps forward to enhance consumer welfare in disability care. The National Disability Insurance Scheme, with its emphasis on individual consumer control, does have the potential to transform the lives of many people with a disability. If it is ultimately successful in improving the lives of people living with disability, a large part of that success will be due to the fact that the user community advocated for the reform and participated in the design of the system. The lesson for Australian governments is that they need to work closely with the communities that are the users of human services and who should be the ultimate beneficiaries of reforms.

The Review Panel is right to recommend Australian governments have a clear picture on how to best approach market-based reforms in human services but it misses the mark on several key aspects of reform. Firstly, it should put the public interest and consumer welfare at the heart of its approach. Secondly, governments should consider how they benchmark consumer welfare in human service sectors. Thirdly, sector-specific consumer protections should be factored into market regulation. And finally, the user communities, who must be the ultimate beneficiaries of reforms, should play a fundamental role in designing market reforms.

Recommendation:

- Australian governments should exercise extreme caution when considering the expansion of market-based initiatives in essential human services.

Aviation: Recommendation 5

While the Final Report argues that the current regulatory approach for airports is largely working well, CHOICE believes there is room for immediate improvement.³

Airports are important to Australia's economy, with the tourism sector worth an estimated \$113 billion over the past year.⁴ There is little to no competition between airports within Australia, partially due to our population density and geography.⁵ With over 146 million passengers transiting through our airports each year, effective and efficient regulation of this monopoly infrastructure is vital.⁶

To ensure that passengers receive a quality service at competitive prices it is important that appropriate access agreements are negotiated between airport users and airports. Currently airports negotiate with airport users under a 'light hand approach'. To the extent that this may weight negotiations in favour of monopoly infrastructure providers, it will be consumers who pay the price through higher fares and lower standards of customer service.

In this process, the ACCC's role is limited to price monitoring.⁷ There are limited dispute resolution processes available if negotiations between an airport and airline or other airport user break down. A party can seek redress under Part IIIA of the *Competition and Consumer Act 2010* (Cth) via the National Competition Regime. However, the ACCC considers "the effectiveness of the threat of declaration under Part IIIA as a constraint on the airports' market power is limited by the considerable costs, time and uncertainty associated with seeking declaration." Consequently there are calls by the ACCC, the major Australian airlines and other airport users for aeronautical services to be deemed open to arbitration by the ACCC if negotiations between airport users and airports fail.⁸

There is limited competition between the four major gateway airports to Australia (Brisbane, Sydney, Melbourne and Perth) and as such airlines have limited negotiating power. Having an

³ Competition Policy Final Report, p206.

⁴ Tourism Research Australia's State of the Industry 2014 report (incorporating the latest data for the year ending September 2014), p 9.

⁵ Forsyth, P., 2006, 'Airport Policy in Australia and New Zealand: Privatisation, Light Handed Regulation and Performance', p13.

⁶ Bureau of Infrastructure, Transport and Regional Economics, 2014, Airport Traffic Data 1985–86 to 2013–14.

⁷ See ACCC role in airports & aviation, <https://www.accc.gov.au/regulated-infrastructure/airports-aviation/accc-role-in-airports-aviation>

⁸ ACCC, QANTAS Group and Virgin Australia, and the Board of Australian Airlines Representatives submissions to the Productivity Commission's 2012 Economic Regulation of Airport Services Inquiry, <http://www.pc.gov.au/inquiries/completed/airport-regulation/submissions/sub019.pdf>

independent third party arbitrator could ensure that disputes are resolved in a timely and cost effective manner, compared to the previous cases that have been referred to the National Competition Council. Short of deeming all of the major gateway airports open to arbitration, consideration could be given to the proposition for the airport causing the most present concern being deemed declared under Part IIIA.⁹

Recommendation:

- The major Australian airports should be deemed open to arbitration.

Intellectual property and international price discrimination

Intellectual property review: Recommendation 6

CHOICE strongly agrees with the Review Panel's conclusion in the *Final Report* that our intellectual property (IP) rights system should be a priority area for review, and that the Productivity Commission is the most suitable body for conducting an overarching review. In our submissions to the *Issues Paper* and *Draft Report*, CHOICE presented the view that Australia has not got the balance right between protecting IP rights and promoting competitive outcomes. The current system substantially favours rights holders over consumers, and this can lead to anti-competitive outcomes.

This review should specifically consider the recommendations of the Australian Law Reform Commission's Copyright and the Digital Economy report and explore further opportunities to introduce a flexible, fair use copyright regime.

Recommendation:

- That the Federal Government direct the Productivity Commission to undertake a review of Australia's intellectual property rights system.

⁹ Littlechild, S., 2011, 'Economic Regulation of Airport Services: Some comments on the Productivity Commission Draft Report of August 2011'.

Trade negotiations and intellectual property: Recommendation 6

CHOICE strongly supports the recommendation to establish an independent review to assess Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements and to build a transparent process that would assess the costs and benefits of relevant treaty provisions.

Free trade agreements traditionally focused on the removal of barriers to trade between signatories, but modern agreements increasingly include provisions that relate to intellectual property and domestic copyright law. As trade agreements grow more complex and deal with broader issues, the potential for impact on domestic laws and policies increases. In situations where free trade agreements include sections that directly impact on our domestic regulatory framework, there is enormous value in frank and open public debate.

The Trans-Pacific Partnership (TPP) Agreement, for example, is currently being negotiated between Australia and 11 other countries.¹⁰ It appears to deal with traditional trade issues including tariffs and imports/exports, but leaked negotiating texts suggest that the TPP also includes chapters on issues that directly impact on domestic law, like intellectual property.

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

To help avoid these kinds of unintended consequences, it would be useful to conduct and publish an independent, transparent cost/benefit analysis of all proposed provisions prior to the conclusion of negotiations. At a minimum, an analysis of provisions relating to IP should be

¹⁰ DFAT, undated, 'Trans-Pacific Partnership Agreement Overview', <http://www.dfat.gov.au/fta/tpa/tpa-overview.pdf>

¹¹ Wikileaks, 16 October 2014, 'Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (second publication)', <https://wikileaks.org/tpa-ip2/>

made publicly available well in advance of the agreement being finalised. This would promote effective and valuable public consultation, reducing risks and imbuing trade agreements with increased legitimacy in the eyes of the public. CHOICE strongly supports this element of Recommendation 6. In light of the Foreign Affairs, Defence and Trade References Committee's inquiry into the Commonwealth's treaty-making process, this is a timely recommendation to pursue.¹²

Recommendation:

- Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of the entirety of the agreement. At a minimum any proposed intellectual property provisions should be subject to the described cost/benefit analysis. Such an analysis should be undertaken and published before negotiations are concluded.

Price discrimination: Recommendation 31

CHOICE strongly supports the recommendation to address international price discrimination through removing restrictions on parallel imports and ensuring consumers are able to take lawful steps to circumvent attempts to prevent their access to legitimate cheaper goods.

As the Review Panel recognised, consumers are paying significantly more for identical digital products than consumers in comparable markets, such as the United States and the United Kingdom.¹³ These high prices are linked to the lack of competitive pressure faced by content delivery businesses in Australia, rather than higher costs such as rent, wages or transport.¹⁴

To support Treasury's consideration of the Competition Policy Review's Final Report, CHOICE has repeated a 2012 investigation into the price and accessibility of online goods. This report found that price differences for various product categories remain significant. For example, in 2012, the average price difference for a selection of top 10 rip-offs purchased from Steam in

¹² Due for report 18 June 2015,

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Treaty-making_process

¹³ CHOICE, 10 June 2014, 'Submission to Competition Policy Review Issues Paper',

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

¹⁴ House of Representatives Standing Committee on Infrastructure and Communications, July 2013, 'At what Cost? IT pricing and the Australia Tax',

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

Australia in comparison with the US was 232%.¹⁵ Unbelievably, even in the face of the weakening dollar, that price difference for online games has increased to a staggering 258% today.

On the other hand, Australians searching for the best price deals on iTunes or Google Play for television shows do not to scale the geoblocking wall – prices on offer in the Australian store are slightly better than the prices recorded in both the US and UK stores. Australians shopping for television programs on Google Play are paying approximately 17% less than consumers in the US, and 21% less than UK consumers. CHOICE attributes this change to increased competitive pressure from international sources as well as a change in the value of the Australian dollar.

However, even in relation to television shows, lack of availability may still encourage Australian consumers to circumvent geoblocks. The most recent season of popular TV show House of Cards was subject to a 25 day delay before being released in Australia. This delay is comparatively better than the 95 day delay in releasing the first season in Australia, but remains a problem.

Technological measures that allow suppliers to discriminate against Australian consumers (such as through the identification of IP addresses) are anti-competitive where they support significant price differences for Australian consumers.¹⁶

Australia's competition policy framework should not support commercial strategies that sustain artificially higher prices. However, we agree with the Review Panel's view that this does not constitute a case for government regulation of prices. Rather, we support the Review Panel's call for the removal of those barriers put in place by businesses that restrict Australians' access to competitively priced goods and services from overseas, thereby sustaining higher prices locally.

Giving consumers more confidence to circumvent online geoblocks by clarifying their legal right to do so would provide immediate benefits. Recent CHOICE research found that approximately 340,000 Australian households were accessing overseas-based subscription service Netflix in the period before the company launched in Australia, despite the presence of

¹⁵ Top 10 rip-offs as identified on steamprices.com. Top 10 at the time of the 2012 report compared with Top 10 at the time of this report.

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

geoblocks and the fact that the company was not advertising in Australia.¹⁷ Much recent activity in this market has been attributed to Netflix's growth and recent entry – ranging from Foxtel's pricing changes¹⁸ to the launch of new streaming services seeking to tie up exclusive rights¹⁹ – underlining the benefits that competition from an international market can provide.

Current policies aimed at reducing rates of piracy fail to address the underlying causes of piracy, including pricing and availability issues.²⁰ Recommendation 31 of the Competition Policy Review *Final Report* is a welcome alternative reform option that takes direct aim at one of the driving causes behind piracy, by enabling consumers to confidently access more competitive markets.

Recommendation:

- That the Federal Government implement Recommendation 31 immediately, by removing restrictions on parallel imports and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.

Regulation review: Recommendation 8

CHOICE remains unconvinced that a national review of all regulation is needed. There are already numerous processes to review regulations for their effectiveness and impact on competition. For example, the Federal Government has recently:

- Committed to reducing red tape by at least \$1 billion per year;
- Implemented Department and Regulator level task-forces to review regulation and legislation to meet this goal;²¹
- Implemented a mandatory Regulator Performance Framework to assess the way regulators administer regulation and its impact on productivity;²² and
- Announced a review to encourage greater acceptance of international standards and risk assessments.²³

¹⁷ CHOICE, November 2014, 'Digital consumers – attitudes and trends'. Please note that we have assumed each respondent represents one household only, and together our sample represents all Australian households. We have surveyed those aged 18-65yrs only (however household figures are based on 'total' households in Australia: <https://aifs.gov.au/institute/info/charts/households/index.html>).

¹⁸ For example, see <http://mumbrella.com.au/foxtel-boss-flags-major-changes-tackle-threat-streaming-rivals-249430>

¹⁹ For example, see <http://www.businessspectator.com.au/article/2014/8/28/technology/can-streamco-turn-tide-netflix>

²⁰ The *Copyright Amendment (Online Infringement) Bill 2015*, currently under inquiry, and the Copyright Notice Scheme Industry Code, currently awaiting registration by the Australian Communications and Media Authority.

²¹ See <https://www.cuttingredtape.gov.au/>

²² See <https://www.cuttingredtape.gov.au/parl-sec/media/new-regulator-performance-framework>

Similar processes exist at state and local levels. It is unclear why an additional review of regulation is required. A more effective approach would be to review regulations that have not been reviewed previously or that multiple stakeholders have concerns with.

CHOICE agrees with the Review Panel's assessment that better regulation rather than deregulation should be the focus of any assessment.²⁴ However, there is significant risk that important consumer and public protections will be wound back if any review works from the assumption that restrictions on competition should be removed unless evidence demonstrates the need to do otherwise.

Recommendation eight requires that:

“Legislation (including Acts, ordinances and regulations) should be subject to a public interest test and should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.”

Quantifying community benefit is often a complex task that requires resources to independently assess the benefits in cost terms. If a national program of regulation reviews is progressed, sufficient funds should be made available for community concerns to be adequately represented either through external research or through funding for community organisations. Without providing adequate resources for consumer and community participation in regulation reviews, the process risks becoming a forum for sectoral interests to distort policy outcomes away from consumer welfare.

Recommendation:

- Australian governments should only review regulations that have been subject to widespread criticism by multiple stakeholder groups, have not been reviewed through similar processes and - based on an initial assessment - appear to be restricting competition without delivering commensurate consumer welfare or public interest benefits. Resources should be provided in any review to independently quantify community or public benefit.

²³ See <https://www.cuttingredtape.gov.au/form/international-standards>

²⁴ Competition Policy Review Final Report, p 116.

Taxis: Recommendation 10

CHOICE agrees that the regulation of taxi services should be focused on ensuring minimum standards for the benefit of consumers, rather than restricting competition. We welcome the Review Panel's recognition that the taxi and ride-sharing industries should be priority areas for review, but are disappointed that the Panel has not retained its recommendation in the Draft Report, that "States and Territories should remove regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest".²⁵ CHOICE strongly supports the Draft Recommendation, on the basis that further review is not necessary at this point, but action to remove regulations that restrict competition will deliver concrete benefits to consumers and to innovative passenger transport services.

Australia's competition policy framework should aim to increase consumer welfare by promoting genuine competition; it should not favour or protect a particular business model at the expense of consumers. The current taxi system raises costs for consumers, primarily to benefit incumbents. Restrictions on the number of licences issued should be eased, and barriers preventing emerging services from competing with taxis and hire cars should be removed.

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

Recommendation:

- That States and Territories should remove regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest.

²⁵ Competition Policy Review Draft Report, Draft Recommendation 6.

Parallel imports: Recommendation 13

CHOICE strongly supports Recommendation 13, to remove remaining restrictions on parallel imports. Parallel imports provide benefits to Australian consumers and are one means of reducing the impacts of international price discrimination. They create situations where Australian consumers are able to exercise the choice to purchase legitimate products at more competitive prices.

Just as a company may import their inputs from markets where they are cheapest, consumers should also be able to access products from markets where they are cheapest. CHOICE supports the Review Panel's recommendation to remove remaining restrictions on parallel imports.

Some submissions to the Competition Policy Review Draft Report raised concerns in relation to health and safety standards being placed at risk through increased parallel imports.²⁶ In response to these concerns, we refer to the statements made in CHOICE's recent submission to the 2014 Review of the Motor Vehicle Standards Act 1989.²⁷ It is vital that consumers have confidence in the goods they purchase, particularly in relation to their safety. Removing barriers to importation, including restrictions on parallel imports, must be accompanied by stringent safety requirements. CHOICE agrees with the Australian Automobile Association's view that regulatory reforms to improve the affordability of vehicles for Australian consumers must be predicated on ensuring the level of vehicle safety is not compromised.²⁸ This is achievable and does not constitute a reason to keep in place barriers that impede the development of a more competitive market.

Recommendation:

- Endorsing Recommendation 13, remaining restrictions on parallel imports should be removed unless it can be shown that:
 - the benefits of the restrictions to the community as a whole outweigh the costs; and
 - the objectives of the restrictions can only be achieved by restricting competition.

²⁶ For example, see the Australian Motor Industry Federation submission, available at <http://competitionpolicyreview.gov.au/draft-report/non-confidential-submissions/>.

²⁷ Available at https://www.infrastructure.gov.au/vehicles/mv_standards_act/2014_submissions.aspx.

²⁸ Australian Automobile Association submission to the Competition Policy Review Draft Report, available at <http://competitionpolicyreview.gov.au/draft-report/non-confidential-submissions/>.

Electricity and gas: Recommendation 19

CHOICE recommends caution in perusing recommendation 19 until clear benefits to consumers from the reforms can be demonstrated. CHOICE also maintains that ACCC should retain its current powers rather than having the powers transferred to the proposed Access and Pricing Regulator and the Australian Energy Market Commission.

In our submissions to the Issues Paper and Draft Report CHOICE highlighted that while competition in the energy market is important, more still needs to be done, particularly on the demand side. Churn rates are currently cited as evidence that the market is working as customers are switching. But this is not a true indication of a competitive market, and moreover can be an indicator of customer dissatisfaction with their energy retailer. A CHOICE survey found that:²⁹

- One third of respondents who recently joined their electricity retailer said they had tried to compare providers but had found it was too hard to work out the best choice;
- Only about half of those who recently joined their electricity retailer were confident they had made the best choice; and
- 29 per cent said they didn't bother comparing providers as they are all about the same in terms of what they offer.
- Our national survey found that only 9 per cent of people trust their energy retailer.

CHOICE asked the Review Panel to recognise and respond to the less successful aspects of the national energy market reforms. Specifically we presented the case that while the deregulation of retail electricity markets has increased contestability on the supply side, it has produced mixed results for consumers.

The Australian Energy Market Commission notes the energy market reforms should result in competitive pressures that see:

- Prices that trend to the efficient cost of supplying a service;
- A quality of service that matches customers' expectations; and
- A choice of products and services that match customers' preferences.³⁰

²⁹ CHOICE survey of electricity consumers in June 2012 and CHOICE Consumer Pulse June 2014.

³⁰ AEMC, 2014 Retail Competition Review, [Final Report](#), p18.

In the Victorian energy market, very much the forerunner for retail deregulation in Australia, there is little evidence of these positive competitive outcomes. Further, a number of energy retailers have engaged in practices that undermine consumer confidence and trust in the energy market in recent times. One of the major issues for consumers is the luring of customers to a fixed term contract with a subsequent price increase during the fixed term. CHOICE continues to support reforms that would ensure consumers are not misled by fixed-term contracts – fixed should mean fixed.

Water: Recommendation 20

CHOICE supports moves to national consistency in the water market, and broadly supports the Review Panel's recommendations on this topic, but cautions against economic regulation based on return of regulated asset base as stated in the National Water Initiative Pricing Principles.

Urban water services provide an essential service to the community and the regulatory environment must provide reliable and efficient services to the end user. CHOICE supports the National Water Initiative and sees benefits in a national coordinated approach to water regulation.

Reform is required, but should aim to avoid the mistakes made in electricity regulation. The network's revenue and profit should not be purely based on increasing the regulated asset base. While the COAG Water Resource Pricing Principles have merit, further safeguards are required. These include the need to ensure that there is adequate and properly funded consumer representation during price setting periods.³¹ This will ensure the representation of a diverse range of voices in consultations.

Consideration should be given to providing flexibility for the economic regulator to decide which economic modelling suits the local market. In addition there could be provisions to include negotiated settlements between consumer groups, the regulator and the water service provider as has been recommended by the Productivity Commission for the monopolised energy sector.³² These safeguards should be considered when developing the new best-practice pricing guidelines.

³¹ See [National Water Initiative Pricing Principles](#)

³² See page 321 and 322 of the Productivity Commission's [Electricity Network Regulatory Frameworks Report Volume 1](#) and [A summary of evidence and thinking on negotiated settlements in the regulation of energy network service providers](#) by CME, 2013 for a in depth discussion of negotiated settlements.

Since the energy market has come into being there has been a proliferation of bodies to govern, regulate and facilitate the energy market's functions. We have seen the establishment of the Australian Energy Regulator, Australian Energy Market Commission and the Australian Energy Market Operator, with governance costs of \$131 million in the 2013-14 financial year.³³ These costs do not include the compliance costs of businesses that engage lawyers, engineers and various other professionals to engage in the regulatory processes. Flawed energy market rules have also resulted in the regulated network businesses overbuilding their networks, while benefiting from generous rulings on the cost of capital. Examining the dysfunctional energy market rules and its associated costs, it is difficult to see the benefits of duplicating the same regulatory environment in the urban water market.

CHOICE urges caution in reproducing the regulatory path of the national energy market and notes the need for a consumer voice to be heard during price setting processes.

Moving towards horizontal separation

In its report on Australia's Urban Water Sector, the Productivity Commission outlines a number of options ranging from complete vertical integration to horizontal separation of retail-distribution models.³⁴ Vertical integration is prevalent across Australia's water sector. Considering how water is collected, stored and delivered to the public, it is difficult to identify the benefits of removing vertical integration. CHOICE would support reforms in the water market, including moves towards horizontal separation, if there was a clear case that such changes will be in the long-term interests of end users.

Informed choice: Recommendation 21

Recommendation 21 should be acted on as a matter of priority as it will lead to tangible and significant benefits for consumers through increased access to information and competitive pressure on hard-to-navigate industries.

³³ Australian Energy Market Operator \$78.8 million in fees levied against the energy industry (see page 76 of the AEMO annual [report](#), Australian Energy Regulator "The AER's total expenditure for 2013-14 was just over \$34 million", Australian Energy Market Commission "Net cost of providing services (18,896)"

³⁴ Productivity Commission 2011, Australia's Urban Water Sector, Report No. 55, Final Inquiry [Report](#), Canberra.

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

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

While the four markets being addressed by the Midata programme provide a guideline for potential launch-points in Australia, the automotive industry could be another sector to consider, given the increasing amount and depth of proprietary information held by consumers' cars, via on-board computers. CHOICE agrees with the comments made by the Australian Automobile Association in its submission to the Draft Report, that "there is a concern that vehicle manufacturers are looking to restrict access to data produced by vehicles to advance their own commercial interests". We note that in a recent United States copyright hearing, General Motors argued that consumers are licensees rather than owners of software systems that are integral to running their vehicles.³⁵ Given the increasingly sophisticated operation of motor vehicle software, this issue will have significant impacts on consumers' rights and also the subsequent costs of vehicle repair and maintenance. Providing consumers, and independent repairers of their choice, with access to car service and repair data will empower consumers to engage more effectively with the market and will encourage a more competitive marketplace.

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

- a) Supporting robust demand-side competition by enabling consumers to make better informed decisions based on their personal preferences, consumption habits and needs; and

³⁵ See 'General Motors says it owns your car's software', autoblog, 20 May 2015, accessed at www.autoblog.com/2015/05/20/general-motors-says-owns-your-car-software/

- b) Encouraging innovation and the development of a broader range of more useful products for consumers, as third parties analyse available open data and identify possibilities for new products and services.

Simply making data available will not result in better-informed consumers and more competitive markets – it is necessary that the data also be accessible and useable. The United States’ “smart disclosure” policy memorandum provides some guidelines to ensure that data is not merely released, but is provided to consumers in a format that will aid their ability to make informed decisions. CHOICE agrees that the characteristics of smart disclosure include accessibility, machine readability, standardisation, timeliness, interoperability and privacy protection. The importance of the end user experience cannot be understated – ‘one click’ processes for downloading/uploading data would aid in increasing usability for consumers.

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

CHOICE notes that, in addition to increasing access to data currently held by businesses, there are also opportunities for government to release data to consumers in order to assist them in making more informed choices. The NSW Minister for Innovation and Better Regulation recently outlined plans to establish a consumer complaints register using complaints data currently held by NSW Fair Trading.³⁶ Developing a register that provides consumers with information on which traders have had high levels of complaints made against them will address existing inequalities of information and empower consumers to make more informed purchasing decisions. Making this information public will incentivise businesses to improve their complaints handling and other practices, to the benefit of consumers. CHOICE strongly supports this initiative by the NSW Government, and encourages other States and Territories, and the Federal regulators such as the ACCC and ASIC, to follow suit.

Recommendation:

- Recommendation 21 should be acted on as a matter of priority. Governments should work with industry, consumer groups and privacy experts to allow consumers to

³⁶ Victor Dominello MP, Minister for Innovation and Better Regulation, 7 May 2015, ‘NSW to Release Consumer Complaints Data’, media release.

access information in an efficient format to improve informed consumer choice. A working group should be established to develop a partnership agreement that both allows people to access and use their own data for their own purposes and enables new markets for personal information services.

Misuse of market power: Recommendation 30

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

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

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

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

- a) the "purpose" element of the test is directed at the impact of the conduct on individual competitors, rather than the impact of the conduct on the competitive process in the market; and
- b) the words "take advantage" are given significant weight and are considered separately to the overall operation of the section and from analysis of the competitive impact of the actual conduct.³⁷

These two problems result in it being very difficult for a regulator to successfully bring an action for breach of section 46. Even where a dominant company engages in conduct for a clearly anti-competitive purpose resulting in a significant anticompetitive effect, the technical

³⁷ Australian Competition and Consumer Commission, 25 June 2014, 'Submission to the Competition Policy Review - Reinvigorating Australia's competition policy', pp76-81 and Supplementary Submission dated 22 August 2014.

requirements of section 46 make it difficult to establish that a firm has “misused” its market power.

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

The Review Panel has recommended amending section 46 to apply where conduct has the “purpose, effect or likely effect” of substantially lessening competition in “that or any other market”. The Review Panel also recommends directing the court to have regard to the extent to which the conduct has the purpose, effect or likely effect of increasing or lessening competition in the market. This element of the recommendation is intended to mitigate concerns raised by critics of the effects test proposal regarding the potential for such a test to act as a disincentive to pro-competitive conduct by large businesses. For example, it is argued that a large business that conducts research on its products, leading to better products but harming less innovative competitors, will be in breach of a provision that includes an effects test. A small business (i.e. one without substantial market power) doing the exact same thing would not contravene the same provision, according to critics.

However, supporters of the effects test have argued that conduct that enhances competition, like research and development or innovation, by definition cannot substantially lessen competition and will not breach the law.³⁸ In order to be found to have substantially lessened competition, a business must have first acted in an anti-competitive manner. The courts have long recognised that competition is deliberate and ruthless, and consideration of whether conduct lessens competition will be considered through this lens. CHOICE agrees with this proposition, and consequently considers the Review Panel’s recommendation that the legislation direct the court to consider the extent to which the conduct increases or lessens competition in the market is unnecessary. However, CHOICE does not oppose the recommendation.

The current section 46 is inconsistent with accepted competition law jurisprudence. It focuses on conduct that has the purpose of harming a competitor, rather than conduct that harms the competitive process. CHOICE believes that Australia’s competition law policy should not seek to protect particular industries or businesses, but should focus on improving the competitive process as a whole. CHOICE broadly supports the Review Panel’s proposal for amending

³⁸ J Walker and R Featherstone, 14 August 2014, ‘ACCC suggestion is far from novel and not anti-competitive’, The Australian Financial Review

section 46, but suggests reframing the provision to focus on whether conduct harms or benefits the long-term interests of consumers.

Recommendation:

- Section 46 of the Competition and Consumer Act 2010 should be amended in order to better achieve its goals and improve its policy effectiveness. This could be achieved by amending section 46 in the way recommended by the Review Panel, but the recommendation should be reframed so that Court is directed to consider the long-term interests of consumers, rather than focus on the extent to which the conduct has the purpose or effect of increasing or lessening competition.

Australian Council for Competition Policy: Recommendations 43 and 44

CHOICE maintains our view that the proposed functions and mandate of the Australian Council for Competition Policy (ACCP) could be achieved by providing additional resources to existing organisations.

In our submission to the Review Panel's Draft Report, we observed that in the current budgetary environment, it would be more prudent to pursue the objectives of the proposed ACCP through existing organisations. We also queried whether the package of reforms resulting from the Competition Policy Review would carry the same administrative and leadership challenges of the Hilmer Review. The agenda is less extensive, and the difficult challenge of expanding competition in human services may not carry the same commitments to timeframes and contingent competition payments from the Australian Government to the States and Territories. In respect of Recommendation 44 on the ACCP's proposed role, these functions could be undertaken by the Commonwealth Treasury, the Productivity Commission or the treasury department of the relevant state government (for proposed privatisations).

If the Federal Government is minded to pursue the establishment of the ACCP, CHOICE believes far greater attention should be dedicated to the demand side of the marketplace. We would recommend additional roles to:

- Evaluate net consumer impacts of competition policy reforms;
- Make recommendations on ways to design markets to maximise consumer participation; and

- Advise on the application of behavioural economics to competition policy.

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

Recommendation:

- That the objectives of the Australian Council for Competition Policy be instead pursued through existing organisations.

Market studies powers and requests: Recommendations 45 and 46

CHOICE strongly supports the establishment of a market studies power, but believes this should reside with the ACCC. In its overview of the 2008 Market Studies Roundtable, the Organisation for Economic Cooperation and Development (OECD) observed that market studies were a good way to develop the link between consumer policy and competition policy, and noted that market studies are “a natural vehicle to highlight the synergies from combined jurisdiction over both policy areas”.³⁹

In the same way that consumer organisations who engage in case work and direct consumer assistance are well placed to undertake policy development and research and identify systemic consumer issues, we believe the ACCC would benefit greatly from the capacity to undertake market studies, a power that would be complementary to (rather than conflict with) its role as a regulator.

As we observed in our submission to the Review Panel’s Draft Report, the international experience overwhelmingly supports aligning market studies with the ACCC and a convincing case for its location elsewhere has not been made. The international experience further suggests that concerns about co-location of market studies within enforcement agencies can be suitably managed. We urge the Federal Government to amend Recommendation 45 and grant the ACCC powers to conduct market studies.

³⁹ Organisation for Economic Co-operation and Development (OECD), 2008, ‘Policy Roundtables – Market Studies 2008’, p7, <http://www.oecd.org/regreform/sectors/41721965.pdf>

We note that while Recommendation 46 does not specifically name consumers or their representatives as being able to make market studies requests, it does not exclude them. We would urge the Federal Government to consider a mechanism that would prioritise requests from consumer advocacy organisations for consideration, provided they met clear criteria in terms of identifying systemic consumer detriment. This could be achieved through a process similar to the super-complaints trial that CHOICE has recently undertaken with the NSW Department of Fair Trading, which puts in place a transparent and time-limited process through which we are able to refer systemic consumer issues to the regulator, who then agrees to publicly report on the outcomes. CHOICE would be happy to provide further details of this approach as we believe it establishes an important avenue to ensure the consumer voice is heard.

Recommendation:

- That the market studies power should reside with the ACCC, and that the Federal Government should consider a mechanism that would prioritise market studies requests from consumer advocacy organisations for consideration, provided they met clear criteria in terms of identifying systemic consumer detriment.

ACCC governance and media code of conduct: Recommendations 51 and 52

CHOICE rejects proposals for significant changes to the governance structure of the ACCC and to develop a code of conduct regarding its media activities. In respect of governance, the Review Panel concludes that the ACCC is a “well regarded and effective body”, yet cites no evidence for why governance changes are required. We are not opposed to the appointment of part-time commissioners and we recognise the benefits of increased diversity and experience at a Commission level. However, we note that the current requirements for sectoral commissioner positions reflects the fact that consumers and small business are less resourced to influence policy processes compared to large businesses. The appointment of sectoral commissioners is one means to redress this imbalance.

In respect of Recommendation 52 for the ACCC to develop a code of conduct regarding its media activities, there is no compelling evidence for a problem that needs to be fixed. In fact, CHOICE would note the ACCC has been particularly effective in recent times in using the media to inform public debates, provide guidance to market participants about what types of

conduct will and will not be tolerated, and raise awareness of consumers' rights. Seeking to constrain the Commission's activities in this regard is likely to be counter-productive.

Other issues

Air service restrictions

CHOICE agrees with the panel that air service agreements should not be used to protect Australian carriers, but rather should focus on the best interests of the travelling public.⁴⁰ Restrictions on the number of travellers or frequency of travel between countries act as a brake on competition. These restrictions result in higher airfares, reduced services and less choice for consumers. In some instances they prevent consumers flying directly to their desired destination, resulting in increased costs and inconvenience for travellers.

The Federal Government can take immediate action to implement the Competition Policy Review's recommendation. Currently bilateral air service agreements are negotiated on a range of criteria. The Department for Infrastructure and Regional Development notes that the Minister considers the broader national interest on a case-by-case basis when determining Australia's negotiating position at air services talks.⁴¹ A key aspect of this assessment (and indeed of the negotiations themselves) is to ensure Australian airlines have a comparable opportunity to compete in foreign markets and to allow them greater flexibility in operating services and building strategic alliances. As a result, the Department pursues a holistic approach to market deregulation that does not focus exclusively on short-term tourism priorities, such as securing a new air service on a specific route.

Assessing whether policy options that seek to achieve more open aviation markets are in the national interest involves weighing up a range of potentially competing costs and benefits. If the overriding objective is to ensure reciprocal access for Australian airlines then the Australian tourism industry and the Australian travelling public are likely to be disadvantaged. CHOICE believes that international air-service agreements should focus on consumer outcomes over protection of Australian airlines. Bilateral open skies arrangements for air routes should be the ultimate goal to increase competition on international routes, resulting in increased choice, better service and lower fares for the Australian travelling public.

⁴⁰ Competition Policy Review Final Report, p156.

⁴¹ The Minister for Infrastructure and Regional Development.

Recommendation:

- That the Federal Government initiate a review of how Air Service Agreements are negotiated. Such a review should investigate opportunities for placing the needs of consumers at the centre of Australia's Agreement negotiation strategy. The review could be conducted by the Productivity Commission.

Code framework failures

The Competition Policy Review has given little consideration to the voluntary codes that can operate to constrain competition and may deliver important consumer outcomes, although in many cases not in the most efficient way.⁴²

The code framework overlaps with competition policy rather than forming a part of it. Put another way, competition policy needs to play a part in supporting an effective code framework, and conversely the code framework needs to ensure that it does not conflict with competition policy aims, while doing more than merely promoting competition. Every time a code is established it imposes costs on industry and thus, normally, on consumers. If the code is not effective in promoting consumer welfare for example by lifting standards generally, avoiding anti-competitive or other detrimental conduct or providing a remedy to harmed consumers, then those costs are a net public detriment.

The biggest problem for consumers with voluntary codes is that they can be proposed or developed in lieu of a mandatory response to a problem where such a response would provide a more effective and efficient result. This risk can be overcome only if we can develop ways to ensure that voluntary codes of practice are developed in accordance with best practice, including the requirement that they are fit for purpose. This will require the articulation of that best practice (which needs to be flexible to be relevant to diverse circumstances) and the creation of adequate incentives for adoption of that best practice.

There is also potential risk that some stakeholders, in particular some classes of consumers or consumers on the whole, will not have their interests adequately represented in a code development process. This risk exists equally in relation to both the operation of market forces and the development of legislation, and is thus not an argument against voluntary (or

⁴² See CHOICE 2014, Submission to Competition Policy Review Issues Paper, pp36–38.

mandatory) codes per se. Nevertheless, a new focus on best practice would require that code development processes obviate or reduce this risk.

Options for reform include enhancing the ACCC authorisation process and the creation of guides and incentives to encourage best practice code development.⁴³ CHOICE believes these issues are worth consideration and should be explored by a body equipped to consider consumer and competition issues.

Recommendation:

- That that Commonwealth Consumer Advisory Affairs Council undertakes an investigation into the effectiveness of Australia's code framework.

GST low-value threshold

There has recently been a renewed push from parts of Australia's retail sector to reassess the GST low-value threshold (LVT).⁴⁴ Currently, goods that cost less than \$1000 that are purchased online from overseas businesses do not attract GST. CHOICE supports the principal of tax-neutrality however we caution against moves to lower or abolish the LVT in the absence of a business case establishing that it would raise net revenue. This issue is relevant to reforming Australia's competition policy framework for the digital era, but would likely serve to reduce competition by restricting Australian consumers' access to cheaper online markets as the cost savings consumers can currently enjoy are very likely to be dramatically outweighed by the costs of collecting the GST.

We support the approach of successive Federal Governments, which has been to investigate options for reducing the GST LVT provided the benefits outweigh the costs, including the costs to consumers.

Without reforms to Australia's parcel processing system, there is currently no evidence that a reduced LVT would raise more revenue than it would cost to administer.⁴⁵ The Productivity Commission examined LVT in 2011, considering the costs that would be borne by Australian Customers, couriers and Australia Post, and consumers and businesses if the threshold was lowered to \$100 and compared these with the revenue that would be raised. It found that the

⁴³ See CHOICE 2014, Submission to Competition Policy Review Issues Paper, pp 36 – 43.

⁴⁴ See <http://www.joshfrydenberg.com.au/quest/opinionDetails.aspx?id=162>

⁴⁵ See <https://ipa.org.au/publications/2322/no-to-the-gst-attack>

costs in 2010-11 would total \$1.2 billion while the amount raised would be just \$495 million (in both GST and duty), resulting in a net loss of over \$700 million. ⁴⁶

One strategy put forward by Australian retailers to allow a lower GST threshold to raise money is to outsource the collection costs to consumers. For example, it has been suggested that Australia could adopt a similar approach to the UK, where the Royal Mail charges an £8 (A\$15.68) collection fee for parcels that are liable for tax or customs. ⁴⁷ If Australia's GST threshold was lowered to, for example, \$20, this approach would turn a \$20 parcel into a \$36 parcel before even applying GST. It would mean charging consumers \$16 to collect \$2 in tax. CHOICE strongly opposes any move to push collection costs to consumers when there is no overall benefit to the community.

Recommendation:

- That the Federal Government not eliminate or lower the GST LVT unless there is evidence to demonstrate that the costs of collecting the tax will not outweigh the revenue raised.

⁴⁶ Productivity Commission, 2011, 'Economic Structure and Performance of the Australian Retail Industry'.

⁴⁷ See [http://www.royalmail.com/help-and-support/i-need-advice-about-customs-requirements#Receiving mail from abroad](http://www.royalmail.com/help-and-support/i-need-advice-about-customs-requirements#Receiving%20mail%20from%20abroad), currency conversion as at 18 May 2015 (1 British Pound = \$1.96 Australian Dollar).