

## Statement

The Australian Labor Party welcomes the opportunity to make a submission to the Productivity Commission inquiry into the enforcement and administration of the *Australian Consumer Law*.

The Labor Party is the party of the Trade Practices Act 1974, the National Competition Policy, the Australian Consumer Law (ACL) and the criminalisation of cartels.

The ACL is a vital piece of legislation that protects consumers from things like unconscionable conduct, unfair contracts, unsafe products, misleading conduct and scams. The ACL has brought together State, Territory and Federal governments, and was implemented by the previous Labor Government.

Ensuring the ACL operates as intended, and to address opportunities for improvements in administration and enforcement, is considerably important.

In the 2016 federal election, the Australian Labor party announced a suite of policy measures regarding the ACL. That policy suite is designed to deter and punish anti-competitive and anti-consumer conduct by increasing penalties, using some of the increased revenue from these penalties to increase the Australian Competition and Consumer Commission's (ACCC) litigation budget, and give the ACCC formal powers to conduct market studies in the public interest.

This submission details the implications of that policy suite for enhancing the enforcement and administration of the *Australian Consumer Law* as per the Productivity Commission's terms of reference.

## The Case for Action

There is a broad public concern about the lack of competition and anti-consumer conduct in Australian markets. This concern is not limited to banks, supermarkets and petrol retailers. Many people are worried that Australia's markets are not sufficiently competitive or consumer friendly in a range of areas.

At the same time, **penalties for engaging in anti-competitive and anti-consumer conduct and for breaching the rights of consumers are inadequate**. Penalties are too small to act as a deterrent, are low by international standards and are seen by transgressors as a mere "cost of doing business" according to the Federal Court<sup>i,ii</sup>, the Australian Competition and Consumer Commission<sup>iii</sup>, and consumer advocates<sup>iv</sup>. This clearly has implications for the efficacy of administration and enforcement of the *Australian Consumer Law*.

For example, the ACCC has appealed the \$1.7 million penalty imposed on Reckitt Benckiser for misleading or deceptive conduct regarding Nurofen products. The penalty was small relative to company turnover and the profits made on the products, and is unlikely to have a deterrence effect<sup>v</sup>.

Over the last 5 years we have seen a range of appalling contraventions of consumer rights, often targeting the most vulnerable members of our community. These include predatory consumer leasing agreements, breaches of product safety standards, scams and misleading advertising<sup>vi</sup>.

The maximum penalty a corporation faces for breaching the Australian Consumer Law ('the ACL') is \$1.1 million. This is very small relative to the annual revenue of large companies. It is approximately one-tenth the size of the maximum penalty under the *Competition and Consumer Act 2010* competition provisions.

Resourcing is a serious consideration for agencies. The ACCC is the leading agency of taking action for conduct that breaches the *Australian Consumer Law*. An increase in the litigation budget signals

the ACCC will have the capacity to pursue the most egregious breaches. These breaches warrant the highest penalties but also involve complex litigation.

According to the Australian National Audit Office review *Managing Compliance with Fair Trading Obligations - Australian Competition and Consumer Commission*<sup>vii</sup>:

The ACCC's focus on specific complaints is also of concern given that only a very small proportion of fair trading complaints (approximately one per cent) are ultimately escalated to the round table meeting and/or the under assessment meeting, raising the possibility that some matters may be 'missed'. Figure 5.4 shows that about 60 matters are considered at the under assessment meeting each quarter, compared to the approximately 10 000 complaints that the ACCC receives in relation to fair trading related matters each quarter and that most matters considered at the meeting are escalated. The high level of escalations suggests that if more matters were considered, a similar trend would prevail with many of these likely to be considered appropriate for escalation (and by extension, there are a number of matters that may be being 'missed').

Labor notes the ANAO recommendations regarding case selection, their relevance for the administration and enforcement, and the Australian Competition and Consumer Commission's agreement to implement them.

Nonetheless, a case can be made for additional measures to strengthen deterrence and enforcement effects, and lighten administrative effects, of the Australian Consumer Law. Aside from the aforementioned inadequacy of current penalty settings, **an increased litigation budget would assist in chasing large and complex cases without decreasing the number of escalated cases.**

Finally, The Australian Consumer Law is underpinned by six important principles<sup>viii</sup>:

1. to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
2. to ensure that goods and services are safe and fit for the purposes for which they were sold;
3. to prevent practices that are unfair;
4. to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
5. to provide accessible and timely redress where consumer detriment has occurred; and
6. to promote proportionate, risk-based enforcement

One potential avenue to support these principles is **ensuring the peak ACL body – the Australian Competition and Consumer Commission – has an independent market studies function.** This function would be of significant practicality in addressing markets with ongoing concerns, including safety, that require a market-wide review before instigating legal action (under the ACL for example).

The recommendations in this submission address the terms of reference guiding the Productivity Commission:

- the complementary roles played by ACL regulators and the effectiveness of existing mechanisms in improving the coordination, consistency of approach and collaboration between ACL regulators
- the roles of specialist safety regulatory regimes in protecting consumers, their interaction with ACL regulators and the extent to which the responsibilities of different regulators are clear

- the implications of changes in the level of resourcing and regulator involvement in the administration of the ACL, including the national product safety law
- other regulatory models, including models or approaches to consumer protection overseas, that may inform improvements to the current model to ensure it remains flexible and responsive in addressing new and emerging issues.

In particular, the reforms the Australian Labor Party has proposed address the following specific information requests:

*The Commission is seeking participants' comments on the progress in implementing the ACL and the general success of the multiple regulator model.*

*To what extent have issues noted in the Commission's 2008 report — such as inconsistency, gaps and overlaps in enforcement and unclear delineation of responsibilities among regulators — been addressed by the current arrangements? To what extent have the 'high level' reforms documented in the implementation progress reports been reflected in improvements in 'on the ground' administration, compliance and enforcement of the ACL?*

*What evidence or metrics are available that can be used to assess or substantiate these claims?*

*What have been consumers' and businesses' experiences under the ACL regime? Does the multiple regulator model cause any confusion or other problems for consumers seeking redress or for business operations? How, in broad terms, could any such problems be addressed?*

*What, if any, alternatives to the multiple regulator model should be considered? What benefits and costs would the alternatives have?*

and

*Are the levels of resources for enforcing the ACL adequate? What are the effects of differences in resources available to state and territory ACL regulators? To what extent, if any, does the potential for the ACCC or ASIC to undertake enforcement actions affect the resources the states and territories devote to ACL enforcement?*

#### **Australian Labor Party Policy proposals – summary**

1. Increase civil penalties under the Australian Consumer Law from a maximum of \$1.1 million to \$10 million, bringing penalties in-line with the competition provisions of the Competition and Consumer Act 2010.
2. Adopt the EU's penalty system for anti-competitive conduct, which is based on 30 per cent of the annual sales of the relevant product or service, multiplied by the number of years the infringement took place, limited to the greater of 10 per cent of annual turnover or \$10 million (as per existing threshold). \*\*
3. Use some of the revenues from increased penalties to increase the ACCC's litigation budget from its current level of \$24.5 million to a maximum of twice that level (\$49 million).
4. Amend the *Competition and Consumer Act 2010* to give a market studies function to the ACCC to explore public interest issues such as pricing discrepancies and increased market

concentration.

*\*\* Note: Since recommendation 2 does not apply to the ACL, it will not be discussed in detail here.*

The policy package deters and punishes unscrupulous conduct by businesses that hurt consumers.

The policy package fosters competitive markets as per the original intention of the CCA and ACL. Competitive markets improve consumer welfare, drive innovation, increase production and job creation and reduce the cost of living.

#### Increased penalties

Labor proposes an increase the maximum penalty for contravening the Australian Consumer Law from \$1.1 million to \$10 million, in-line with those under the CCA.

This current \$1.1 million maximum is very small relative to the annual revenue of large companies. It is approximately one-tenth the size of the maximum penalty under the *Competition and Consumer Act 2010* competition provisions.

Support for an increase in the maximum penalty is shared by legal experts, consumer advocacy organisations such as Choice and the Consumer Action Law Centre, and by the ACCC and its chairman Rod Sims<sup>ix x</sup>.

The ACCC is very active in ensuring its legal action and consumer advice are disseminated in the media. Increasing the maximum penalty under the ACL would allow to ACCC to warn of – and deliver – higher penalties than those they currently note are inadequate.

The ACCC has a comparative advantage over state-based agencies in size, profile, and resourcing. When the ACCC warns of / delivers upon a large case, the result is known nationally.

#### Double ACCC litigation budget

Currently the ACCC escalates about 60 consumer and fair trading cases per quarter from approximately 10,000 complaints<sup>xi</sup>. An increased litigation budget will assist in prosecuting large and complex cases without decreasing the number of escalated cases.

An increase in the litigation budget signals the ACCC will have the capacity to pursue the most egregious breaches. These breaches warrant the highest penalties but also involve complex litigation.

Over the last 5 years, the ACCC has received \$1.50 in penalties for every \$1 it spent on litigation. According to the PBO costing for Labor, the increase in ACL penalties would yield more than enough revenue to fund a doubling of the ACCC litigation budget.

An increased litigation budget would also allow the ACCC to run cases with less incentive for settlement, and more incentive for precedent. This would have a natural flow-on effect in informing state agencies when enforcing the ACL.

An increased litigation budget signals to all players that the community are not content for the ACCC to be out-resourced by entities that can afford to breach and litigate, knowing that budgetary considerations will inhibit proper punitive response.

#### Market studies function

A market studies function was recommended by the Harper Review. Market studies explore competition issues of public interest such as increased market concentration,<sup>xii</sup> the impacts on

inequality in certain markets, and to ensure markets are functioning in the best interests of consumers. Australia is an outlier internationally, having no body with a fully independent market studies function<sup>xiii</sup>.

Formal market studies can guide policy makers, instigate legal action, and inform consumer information campaigns. We believe the ACCC is a natural fit for market studies, our proposal formalises and significantly expands some of the market study functions available to the ACCC.

Having the ‘peak’ ACL body with such a power serves the comparative advantage – and thus complementary functioning – of the ACL regulators. The market studies function would allow the ACCC to further deliver on the guiding six principles of the ACL.

Labor recommended the ACCC be given a market studies function to explore public interest issues such as increased market concentration<sup>xiv</sup>, the impacts on inequality in certain markets and to ensure markets are functioning in the best interests of consumers.

This function would be of significant practicality in addressing markets with ongoing concerns, including safety, that require a market-wide review before instigating legal action (under the ACL for example).

As recommended by the Harper Review, a new organisation to be kept separate from the enforcement function of the ACCC was recommended. However this creates bureaucratic overlap, imposes a cost to the Federal Budget and fails to exploit synergies with the ACCC’s existing functions, expertise and experience.

Additionally, keeping such a function in the ACCC is in keeping with the comparative advantage of the federal regulator compared to state-based regulators. State-based regulators would, however, be able to request the ACCC conduct market studies in areas of particular concern to them.

The proposed market studies reforms bring Australia in line with international best practice (including the EU and UK).

### Financial Implications (PBO)

2015-16	2016-17	2017-18	2018-19	Total <sup>xv</sup>
-	-	31.2	31.2	62.4

The costed components are expected to increase the underlying cash and fiscal balances by \$62.4 million over the 2015-16 Budget forward estimates period.

This represents an increase in revenue of \$111.4 million from the increased ACL civil penalties component which is partially offset by the increased departmental expenditure of \$49.0 million associated with the increased ACCC litigation budget.

## Summary of proposed changes to penalties

	Existing penalties	Proposed penalties
Australian Consumer Law:	<p><b>Corporations:</b></p> <ul style="list-style-type: none"> <li>• \$1,100,000</li> </ul> <p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• \$220,000</li> </ul>	<p><b>Corporations:</b></p> <ul style="list-style-type: none"> <li>• \$10,000,000</li> </ul> <p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• Unchanged</li> </ul>
General provisions under Part IV of the CCA	<p><b>Corporations:</b> the greatest of:</p> <ul style="list-style-type: none"> <li>• \$10,000,000</li> <li>• If Court can determine "reasonably attributable" benefit obtained, 3 times that value; or</li> <li>• If Court cannot determine benefit, 10 per cent of annual turnover in preceding 12 months.</li> </ul> <p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• \$500,000</li> </ul>	<p><b>Corporations:</b></p> <ul style="list-style-type: none"> <li>• Up to 30% of the sales of the relevant product, multiplied by the number of years the infringement lasted.</li> <li>• The maximum penalty is limited to 10% of annual turnover.</li> </ul> <p>Or</p> <ul style="list-style-type: none"> <li>• \$10,000,000 if greater than the above-base fine calculation.</li> </ul> <p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• Unchanged</li> </ul>
Secondary boycotts (Section 45D) under the CCA	<p><b>Corporations:</b></p> <ul style="list-style-type: none"> <li>• \$750,000</li> </ul> <p><b>Individuals</b></p> <ul style="list-style-type: none"> <li>• \$500,000</li> </ul>	Unchanged
Cartels under the CCA	<p><b>Corporations</b> (the greatest of):</p> <ul style="list-style-type: none"> <li>• \$10,000,000</li> <li>• Three times the total value of the benefits obtained by one or more persons and that are reasonably attributable to the offence</li> <li>• If benefits cannot be fully determined, 10 per cent of the annual turnover of the company (including related corporate bodies) in the preceding 12 months.</li> </ul> <p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• Up to 10 years in jail and/or fines of up to \$360,000 per criminal cartel offence</li> <li>• A pecuniary penalty of up to \$500,000 per civil contravention.</li> </ul> <p>Other penalties for cartel civil contraventions or criminal offences include injunctions, disqualification orders and community service orders.</p>	<p><b>Corporations:</b></p> <ul style="list-style-type: none"> <li>• Up to 30% of the sales of the relevant product, multiplied by the number of years the infringement lasted.</li> <li>• The maximum penalty is limited to 10% of annual turnover.</li> </ul> <p>Or</p> <ul style="list-style-type: none"> <li>• \$10,000,000 if greater than the above-base fine calculation.</li> </ul> <p><b>Individuals:</b></p> <ul style="list-style-type: none"> <li>• Unchanged</li> </ul>

## Harper Review recommendation regarding market studies power

### **Recommendation 45 — Market studies power<sup>xvi</sup>**

The Australian Council for Competition Policy (ACCP) should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation, or to the ACCC for investigation of potential breaches of the CCA.

The ACCP should have mandatory information-gathering powers to assist in its market studies function; however, these powers should be used sparingly.

The NCP recognised that different circumstances across the jurisdictions could lead to different approaches to either the scope or timing of reform. In agreeing with this approach, the Panel considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

This would ensure that each jurisdiction has the freedom to identify its own concerns, while allowing the ACCP the flexibility to consider whether those concerns have broader or cross-jurisdictional impacts.

In addition, the Panel considers that all market participants, including small business and regulators, should have the opportunity to raise issues they would like to see become the subject of market studies. Funding could be set aside in the ACCP budget to undertake studies in addition to those referred by governments. The decision would rest with the ACCP as to which of these outside requests it might take up, and it would not be obliged to agree to all requests.

To give the ACCP the capacity to focus on the priorities of governments and market participants, the Ministerial Council on Federal Financial Relations would need to oversee priorities and resourcing.

### **ACCC submission regarding market studies (Harper Review Final Report)<sup>xvii</sup>:**

Reflecting overseas experience, the ACCC notes that it would like the ability to initiate market studies for various reasons:

- as a lead-in to competition or consumer protection enforcement action when anti-competitive behaviour is suspected in a sector but the exact nature and source of the problem is unknown;
- to identify a systemic market failure (instead of ad hoc compliance action against individual firms) and to better target a response (whether, for example, [through] enforcement action or compliance education);
- to identify market problems where affected parties are disadvantaged and either have difficulty making a complaint to the ACCC or accessing the legal system to take private action;
- to address public interest or concern about markets not functioning in a competitive way; the market study could either confirm such concerns, and propose some solutions, or reveal them to be unfounded; or
- to fact-find to enhance the ACCC's knowledge of a specific market or sector, particularly where a market is rapidly changing, and raises issues across the ACCC's functions.

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- <sup>i</sup> Smart Company, 1 February 2015, *Too big to care: Will Coles and Woolies lift their game in 2015?*, <http://www.smartcompany.com.au/business-advice/strategy/45489-too-big-to-care-will-coles-and-woolies-lift-their-game-in-2015/>
- <sup>ii</sup> Federal Court of Australia, 22 December 2014, *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (22 December 2014), <http://www.austlii.edu.au/au/cases/cth/FCA/2014/1405.html>
- <sup>iii</sup> ACCC, 23 May 2016, *ACCC appeals \$1.7m penalty against Reckitt Benckiser for misleading Nurofen representations*: <https://www.accc.gov.au/media-release/accc-appeals-17m-penalty-against-reckitt-benckiser-for-misleading-nurofen-representations>
- <sup>iv</sup> E.g. CHOICE, Consumer Action Law Centre, Legal Aid NSW, Australian Communications Consumer Action Network.
- <sup>v</sup> ACCC (2016)
- <sup>vi</sup> Some ACCC cases with media coverage: “[Woolworths misled consumers over product safety hazards](#)”, “[ACCC takes action against SoleNet, Sure Telecom and James Harrison](#)”, “[Free Range Egg Farms ordered to pay \\$300,000 penalty for false or misleading “free range egg” claims](#)”.
- <sup>vii</sup> Australian National Audit Office (2016) *Managing Compliance with Fair Trading Obligations - Australian Competition and Consumer Commission*
- <sup>viii</sup> Australian Consumer Law Review (2016) *Fact Sheet 1 – Australian Consumer Law Review*, [http://consumerlaw.gov.au/files/2016/03/ACL\\_Review\\_FS1-04-2016.pdf](http://consumerlaw.gov.au/files/2016/03/ACL_Review_FS1-04-2016.pdf)
- <sup>ix</sup> ABC PM (2016) *ACCC calls for increase to maximum penalties for breaches of consumer laws*, <http://www.abc.net.au/pm/content/2016/s4452894.htm>
- <sup>x</sup> Australian Consumer Action Law Centre (2016) *Andrew Leigh and Labor announce beefed up ACCC*, <http://consumeraction.org.au/andrew-leigh-labor-announce-beefed-accc/>
- <sup>xi</sup> Auditor General (2016), *ANAO Report No.23 2015–16 Performance Audit Managing Compliance with Fair Trading Obligations Australian Competition and Consumer Commission*: [https://www.anao.gov.au/sites/g/files/net616/f/ANAO\\_Report\\_2015-2016\\_23.pdf](https://www.anao.gov.au/sites/g/files/net616/f/ANAO_Report_2015-2016_23.pdf)
- <sup>xii</sup> See Andrew Leigh’s ‘Markets, Monopolies & Moguls’ speech, 19 May 2016, [http://www.andrewleigh.com/markets\\_monopolies\\_moguls\\_speech](http://www.andrewleigh.com/markets_monopolies_moguls_speech)
- <sup>xiii</sup> Prof. Ian Harper *et al* (2015), *Competition Policy Review*, pp.447-459: [http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf)
- <sup>xiv</sup> See Andrew Leigh’s ‘Markets, Monopolies & Moguls’ speech, 19 May 2016, [http://www.andrewleigh.com/markets\\_monopolies\\_moguls\\_speech](http://www.andrewleigh.com/markets_monopolies_moguls_speech)
- <sup>xv</sup> Totals may not sum due to rounding
- <sup>xvi</sup> Harper *et al* (2015) *Competition Policy Review – Final Report, March 2015*, pp. 77-78, [http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report\\_online.pdf](http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf)
- <sup>xvii</sup> *Ibid* p.448