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By email: policy@finance.nsw.gov.au

Easy and Transparent Trading Consultation Paper
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
Sydney NSW 2000

Dear Sir/Madam

Easy and Transparent Trading Consultation Paper – Increasing transparency and consumer choice

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Easy and Transparent Trading Consultation Paper (**the Consultation Paper**). We have limited our comments to Section 2 relating to increasing transparency and consumer choice.

We welcome efforts to improve consumer outcomes. However, we caution against over-reliance on increased disclosure and consumer choice to fix the problems Australians face in consumer markets. These kinds of regulatory interventions often do little to improve, and can actually worsen, consumer outcomes. Public education campaigns are also rarely effective, as they are generally unable to 'cut through' marketing by for-profit firms.

Instead, we support reform that removes harmful conflicts of interest, improves conduct and product design standards and encourages the fair treatment of consumers. We prefer that these reforms apply consistently across all Australian jurisdictions to ensure consumers around the country are afforded the same protections.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just market place for all Australians.



Notice of key terms in a consumer contract

The majority of the options for reform outlined in the Consultation Paper are focused on disclosure. However, as recently noted by the Productivity Commission:

Australia's regulatory framework relies heavily on disclosure to protect and empower consumers, however the traditional notion that more information (versus, say, better information) leads to improved consumer outcomes is not always the case.¹

The Australian Securities and Investments Commission (**ASIC**) also recently stated that:

...disclosure alone is not working to drive fair consumer outcomes. For example, the Financial System Inquiry noted that disclosure alone is unlikely to correct the effect of broader market structures and conflicts that drive product development or distribution practices that result in poor consumer outcomes.²

As such, we consider disclosure-based reform generally less effective at improving consumer outcomes than reform that requires firms to improve standards of behaviour and treat consumers fairly. In relation to section 2.1 of the Consultation Paper, our preferred policy response would be to introduce a general unfair trading provision in Australia, which would draw on similar international approaches. An unfair trading provision would have some parallels with option two for reform set out in section 2.1, being a duty on traders not to take advantage of consumer ignorance arising from consumers not understanding terms and conditions.

The Consultation Paper criticises this option as likely 'hard to enforce'. We consider such concern to be misplaced. There is no reason why the existing enforcement powers of Australian Consumer Law regulators could not be brought to bear to encourage compliance.

Further, this sort of provision would enable regulators to prosecute traders based on their business models, and the outcomes they deliver for consumers, rather than whether or not the business conducted 'tick a box' compliance by disclosing particular terms. By linking the standard for unfair trading with the distortion of economic behaviour (i.e. consumers making decisions that are not in their welfare), the provision would work to incentivise businesses to develop trading practices that promote openness, thereby enabling consumers to make choices that benefit themselves, the economy and society.

For more information about our recommendation for an unfair trading provision, please see our submission to the Australian Consumer Law Review.³

¹ Productivity Commission, *Inquiry into Competition in the Australian Financial System – Final Report*, August 2018, p. 87, available at: <https://www.pc.gov.au/inquiries/completed/financial-system#report>.

² Australian Securities and Investments Commission, *Submission: Design and distribution obligations and product intervention power*, August 2018, pp. 34-40, available at: <https://download.asic.gov.au/media/4849144/design-and-distribution-obligations-and-product-intervention-power-revised-exposure-draft-legislation-submission-by-asic.pdf>.

³ Consumer Action Law Centre, *Submission: Australian Consumer Law Review*, 30 May 2016, p. 34, available at: <http://consumeraction.org.au/wp-content/uploads/2016/05/Consumer-Action-ACL-Review-Submission-FINAL.pdf>. See also Brody & Temple, 'Unfair but not illegal: Are Australia's consumer protection laws allowing predatory business to flourish', *Alternative Law Journal*, Vol 41:3 2016.



Disclosure of broker commissions and referral fees

Finance broking

While increased transparency is welcome, structural change is needed to remove conflicts of interest and professionalise the standards of advice being provided by brokers. Additional information alone will not achieve this. Disclosure does not necessarily alert a customer that they need to proactively assess the advice they receive. For example, US research has shown that requirements to disclose mortgage broker commissions actually increased trust in brokers, when it should have led customers to be more critical about the advice they received.⁴ We note that brokers already have disclosure obligations under the *National Consumer Credit Protection Act 2009* (Cth), which we consider have been largely ineffective in addressing conflicts of interest.⁵

ASIC's report into mortgage broker remuneration,⁶ and the Productivity Commission's recent report into competition in the Australian financial system, both pointed to serious issues with the current conflicted remuneration structure of the mortgage broking sector. The Productivity Commission stated that 'at its simplest, brokers have a strong incentive—regardless of what may be in their customer's best interest—to give preference in their loan recommendations to lenders that pay higher commissions.'⁷

Rather than disclosing commissions, we recommend removing the structural conflicts of interests created by commissions. The prohibition on conflicted remuneration, which applies to most financial products, should be extended to all consumer credit products. We also recommend imposing a best interest obligation on all licensees that provide credit or credit services. For further information about our recommendations relating to mortgage broking, please see our submission to the Productivity Commission inquiry into competition in the financial system.⁸

Debt management firms

High and hidden broker commissions and referrals fees are also a problem in the unregulated 'debt management' industry. These firms provide unregulated debt advice and debt 'solutions' people in a situation of high financial stress, and who highly reliant on advice from the firm.

The UK Financial Conduct Authority found that consumers are very unlikely to shop around for help with debt and, once engaged with a company, are 'susceptible to influence or may make choices that are not in their best interests.'⁹ These findings are particularly concerning in the Australian context of unqualified, unregulated companies using heavy, emotional and targeted advertising to promise a 'life free from debt' without any obligations to disclose fees, meet basic professional standards or act in their client's

⁴ Lacko and Pappalardo, The effect of mortgage broker compensation disclosures on consumers and competition: A controlled experiment, Federal Trade Commission Bureau of Economics Staff Report, February 2004, <https://www.ftc.gov/reports/effectmortgage-broker-compensation-disclosures-consumers-competition-controlled-experiment> (also cited in Financial Services Authority, Consumer Research 69: Financial Capability: A Behavioural Economics Perspective, July 2008).

⁵ Productivity Commission, *Inquiry into Competition in the Australian Financial System – Final Report*, August 2018, see Box 11.8, available at: <https://www.pc.gov.au/inquiries/completed/financial-system#report>.

⁶ Australian Securities and Investments Commission, *Report 516: Review of mortgage broker remuneration*, March 2017, available at: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-516-review-of-mortgage-broker-remuneration/>.

⁷ Productivity Commission, *Inquiry into Competition in the Australian Financial System – Final Report*, August 2018, p. 21, available at: <https://www.pc.gov.au/inquiries/completed/financial-system#report>.

⁸ Consumer Action Law Centre et. al., *Submission: Inquiry into Competition in the Australian Financial System – Draft Report*, 10 April 2018, pp. 5-8, available at: https://www.pc.gov.au/__data/assets/pdf_file/0016/227131/subdr130-financial-system.pdf.

⁹ Financial Conduct Authority, *Thematic Review TR15/8: Quality of Debt Management Advice*, June 2015, available at: <https://www.fca.org.uk/publication/thematic-reviews/tr15-08.pdf>.



interests.¹⁰ It is easy and commonplace for firm to recommend the debt option from which the firm makes the most fees, rather than the option that is in the best interest of the debtor. Creditors, too, are left worse off when a debt management firm charges high and hidden fees – money that could have otherwise gone to repaying debts.

While disclosing commissions for debt management services might assist, the better and necessary reform is to introduce a robust regulatory framework for all debt management firms. For further information, please a joint communique from consumer and industry groups, regulators, academics and industry groups on the need for urgent reform.¹¹

Comparison services

The Consultation Paper includes a case study relating to commissions in comparison websites. We consider that the provisions in the Australian Consumer Law relating to false or misleading representations are insufficient to adequately facilitate transparency and fair outcomes on comparator websites as well as online review platforms.

While these services can be extremely helpful to consumers, where they are mired by conflicted remuneration, they can make outcomes worse for consumers. For example, commissions received by comparison websites per sale can vary between suppliers, encouraging the website to promote those that provide higher amounts. Similarly, where there is common ownership between comparator websites and businesses listed on them, the conflict of interest is obvious.¹²

We note that industry self-regulation has not improved practices in this area, and we do not consider that disclosure of commissions will be effective to ameliorate consumer detriment. At the very least, substantial consumer testing should occur to inform standards of information disclosure.

Trailing commissions

Our concerns relating to trailing commissions to date have focussed largely on the mortgage broking and insurance sectors. In relation to mortgage brokers, the Productivity Commission recently found that:

*There is little if any evidence to substantiate the claim that trail commissions are a payment for the ongoing provision of services to borrowers. In practice, trail commissions have the effect of aligning the broker's interests with those of the lender, rather than those of the borrower.*¹³

¹⁰ For example, see Debt Rescue, *What debt free people look like*, accessed 15 September 2017, available at: <http://debtrescue.com.au/what-debt-free-people-look-like/> and Debt Negotiators, *Bad Credit and Financial Hardship Solutions and Advisors*, accessed 15 September 2017, available at: <http://www.debtnegotiators.com.au/finance-solutions/>.

¹¹ Consumer Action Law Centre, *Communique on Debt Management Firms*, 2016, available at: <http://consumeraction.org.au/debt-management-firms-comm/>.

¹² For further information about the limitations of comparison websites, see Productivity Commission, *Inquiry into Competition in the Australian Financial System – Final Report*, August 2018, pp. 354-355, available at: <https://www.pc.gov.au/inquiries/completed/financial-system#report>; Australian Securities and Investments Commission, *Submission: Inquiry into Competition in the Australian Financial System*, September 2017, pp. 52-53, available at: https://www.pc.gov.au/__data/assets/pdf_file/0014/222170/sub040-financial-system.pdf.

¹³ Productivity Commission, *Inquiry into Competition in the Australian Financial System – Final Report*, August 2018, p. 329, available at: <https://www.pc.gov.au/inquiries/completed/financial-system#report>.



As a result, the Productivity Commission recommended banning trailing commissions for home loans. We strongly agree with the Productivity Commissions' recommendation. We have also recommended banning up-front and trailing commissions to all life insurance policies, whether within or outside superannuation.¹⁴ We do not consider disclosure alone is able to address the inherent conflicts of interest created by trailing commissions, and support consideration of banning trailing commissions in other markets where there is evidence of consumer harm.

Consumer information standards

As noted above, disclosure alone is not working to drive fair consumer outcomes. In fact, additional disclosure can contribute to what behavioural economists refer to as 'information overload'. As noted by ASIC, when faced with complex decisions or lots of information 'consumers often experience information overload—that is, the amount of information consumers have to process can affect how they process that information and weaken the use of their critical decision faculties.'¹⁵

Further, research has found that a firm subjected to a disclosure mandate may deliberately induct information overload to obfuscate relevant information or make their products too complex to understand.¹⁶ As such, mandatory disclosure rules can prove ineffective for consumers, most of whom are being bombarded with information competing for their attention every day. In our experience, providing more information rarely improves consumer outcomes in any meaningful way.

We recommend that any mandated disclosure be thoroughly consumer tested for effectiveness. Mandated disclosure or comparison sites should not be relied upon in isolation and should be implemented in tandem with reform targeted at firm behaviour, such as improved conduct or product design requirements, stronger protections against unfair sales practices and removal of conflicts of interest. For example, we recommend an 'opt in' regime for sales of add on insurance and extended warranties, rather than additional disclosure.¹⁷

That said, we are generally supportive of Fair Trading having a general power to prescribe information standards. We agree that this would allow for the creation of information standards quickly, in response to emerging issues. We consider, however, that standards should also cover other market practices beyond information disclosure to address conflict of interest or other concerns that harm consumer outcomes.

Publish data on traders and licensees

We support the establishment of an online portal for centralised access to information and ensuring consistency of information across all licensing regimes. We also support publishing regulator complaints data.

¹⁴ Consumer Action Law Centre, *Submission: Future of Financial Advice – Post Implementation Review*, 8 June 2017, available at: <https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2017/06/CALC-submission-170608.pdf>.

¹⁵ Australian Securities and Investments Commission, *Report 470: Buying add-on insurance in car yards – why it can be hard to say no*, February 2016, available at: <http://download.asic.gov.au/media/3549387/rep470-published-29-february-2016.pdf>.

¹⁶ Petra Persson, Stanford University, *Attention manipulation and information overload*, September 2017, available at: https://web.stanford.edu/~perssonp/Attention_Manipulation_Aug2017.pdf.

¹⁷ For further information on our recommendations relating to extended warranties, see Consumer Action Law Centre et. al., *Submission: Australian Consumer Law Consultation RIS*, 23 April 2018, pp. 17-24, available at: https://policy.consumeraction.org.au/wp-content/uploads/sites/13/2018/04/180423-ACL_Super-RIS-submission-FINAL-.pdf.



For further information about our recommendations relating to publishing complaints data, see our submission on the Consumer Complaints Register.¹⁸

Please contact
any questions about this submission.

if you have

Yours Sincerely,
CONSUMER ACTION LAW CENTRE

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¹⁸ Consumer Action Law Centre and Financial Rights Legal Centre, *Submission: Consumer Complaints Register*, 4 November 2015, available at: <https://consumeraction.org.au/wp-content/uploads/2015/11/151104-joint-submission-to-NSW-FT-Complaints-Register.pdf>; CHOICE and Consumer Action Law Centre, *Submission: Review of the Complaints Register Guidelines*, May 2018, available at: <https://www.choice.com.au/-/media/3ebf9461b5964eb7b9a75deb721a8ea5.ashx?la=en>.

