Organisation for Economic Co-operation and Development

DAF/COMP/WD(2022)46

Unclassified

English - Or. English

2 June 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Integrating Consumer Behaviour Insights in Competition Enforcement – Note by Australia

24 June 2022

This document reproduces a written contribution from Australia submitted for Item 9 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/behavioural-insights-in-competition-enforcement.htm

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1. Overview

1. The Australian Competition and Consumer Commission (ACCC) is Australia's national consumer protection and competition regulator. Most of the ACCC's work is conducted under the provisions of the Competition and Consumer Act 2010 (CCA).

2. The ACCC's competition and consumer roles are complementary, and competition enforcement can be assisted by an understanding of consumer behaviour. As the (former) OFT notes in its 2010 paper *What does Behavioural Economics mean for competition policy*, competitive markets rely on confident, rational and effective consumers to activate vigorous competition between firms.

3. Yet sometimes consumers do not meet these expectations, including due to deliberate firm behaviour. In the academic literature, Gabaix and Laibson's (2006) seminal paper *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets* models the way consumer behavioural biases can lead to market inefficiencies – even in otherwise competitive markets. The paper concludes that in markets with some myopic (or unaware) consumers, informational shrouding flourishes even when the shrouding generates allocational inefficiencies.

4. These theoretical findings can be observed empirically in markets. For example, as the OECD's ongoing work on dark patterns demonstrates, in the face of consumer behavioural biases, market forces are unlikely to eliminate misleading and manipulative practices, and competition may instead exacerbate these practices.

5. Therefore, understanding consumer behavioural insights can play a significant role in competition enforcement – it is a key aspect of analysing and understanding market dynamics, understanding incentives and firms' response to those incentives, and in addressing consumer harm.

6. The ACCC draws on consumer behavioural insights in both its competition and consumer roles. This paper discusses the ways in which consumer behavioural insights have informed the ACCC's work in:

- Market studies, including the Digital Platform Inquiry, Home Loan Price Inquiry, Funeral Services Sector report and Consumer Loyalty Schemes report;
- Presenting expert witness testimony in litigation;
- Consumer redress, particularly where consumers must take action to claim a refund they may be entitled to; and
- Evidence gathering, including incorporating consumer behavioural insights into the ACCC's requests for information from complainants.

2. Market studies and inquiries

7. In addition to enforcing the existing provisions of the CCA, the ACCC undertakes market studies and inquiries.[1]

8. The ACCC has integrated consumer behavioural insights in a number of market studies and inquiries. Most often, the ACCC draws on consumer behavioural insights to better understand market dynamics – particularly the demand side of the market – with a view to determining whether there is effective competition within a specific market, and whether competition or consumer enforcement action is needed.

9. In this submission, we discuss four reports which drew on consumer behavioural insights: the Digital Platforms Inquiry, the Home Loan Price Inquiry, the Funeral Services Sector report, and the Consumer Loyalty Schemes report.

2.1. Digital Platforms Inquiry

10. In June 2019, the ACCC released the Digital Platforms Inquiry Final Report. Through the Terms of Reference (TORs) of the Digital Platforms Inquiry, the Treasurer directed the ACCC to consider the impact of online search engines, social media, and digital content aggregators (collectively defined as 'digital platforms') on competition in media and advertising markets, in particular in relation to the supply of news and journalism and the implications for media content creators, advertisers and consumers in Australia.

11. In this Inquiry, the ACCC identified a wide range of competition and consumer harms associated with the rise of digital platforms in Australia. These include:

- Google and Facebook have created risks for the efficient and effective operations of media and advertising markets due to:
  - their position as gatekeepers between Australian businesses and consumers
  - their substantial market power in their core markets
  - their activities in related markets
  - the opacity of many of the services they provide.
- Digital advertising markets and, in particular the ad tech supply chain (which serves publishers and advertisers using display advertising) are opaque. This harms advertisers and increases the risk of anti-competitive self-preferencing
- Consumers are not adequately informed about how their data is collected and used and have little control over the huge range of data collected by digital platforms.

[1] Market studies are generally self-initiated by the ACCC and aim to improve the ACCC's understanding of industry practices and dynamics in those sectors. An inquiry is initiated via a formal direction from the Treasurer under the CCA. Inquiries involve extensive investigation and analysis, including public consultation and often involve the compulsory production of documents and information by parties which supply goods or services covered by the direction. We publish our findings in a formal report to help inform consumers, other stakeholders, encourage public debate and inform policy consideration.

Both market studies and inquiries can result in the ACCC making policy recommendations, including recommendations to amend the competition provisions of the CCA or other pieces of legislation. Market studies and inquiries may also uncover alleged anti-competitive conduct which may lead to a competition enforcement investigation.

- News content creators rely on dominant digital platforms for a significant proportion of referral traffic (and therefore advertising and subscription revenue), but face difficulties in monetising their content.
- Australian consumers accessing news through digital platforms potentially risk exposure to unreliable news through 'filter bubbles' and the spread of disinformation, (or 'fake news') online.

12. The ACCC was informed by behavioural insights in making many of these findings.

13. The ACCC found that self-preferential default settings can leverage consumers' default bias to entrench the market power of incumbents and increase barriers to entry for rivals. For example, Google Search benefits from being pre-installed on nearly all Android devices and being set as the default search engine on both the Chrome browser and the Safari browser, which means Google Search is effectively the default search engine on over 95 per cent of Australian mobile devices in 2019. These default settings entrench Google's dominance in the general search services market and raises barriers to entry for rival search services providers.

14. The ACCC also found that consumers' relationships with digital platforms are impacted by behavioural biases that impede their ability to make informed choices in their use of digital platform services. For example:

- Consumers are unlikely to be able to accurately assess the risks of unilateral variation clauses commonly found in digital platforms' terms and policies, because they tend to discount the likelihood of adverse changes due to present bias. This can make it very difficult for consumers to accurately factor in the long-term costs of data collection into their decision on whether to use a digital platform or to change their privacy settings. These biases may also cause consumers to accept longer-term detriments from intrusive data practices in exchange for the shorter-term benefit of accessing a digital platform.
- Framing digital platform services to consumers as 'free' is likely to exploit behavioural biases due to the emotional appeal of free offers. Further, consumers do ultimately pay for these services with their data. Marketing a service as 'free' means consumers are likely to focus more on the zero monetary cost and less on the non-monetary or future costs of providing digital platforms with their user data. The ACCC's view is that few consumers are fully informed of, fully understand, or effectively control, the scope of data collected and the bargain they are entering into with digital platforms when they sign up for, or use, their services.
- Framing can also mean consumers tend to only read text towards the top of long text disclosures, and digital platforms could take advantage of this by putting problematic terms further down.
- Information overload can hinder consumers' ability to engage with privacy policies, which can result in consumers using products with intrusive data practices while being unaware that these data practices are taking place.

15. Further, the ACCC was concerned that some digital platforms may leverage behavioural biases in their user interfaces designs by using 'dark patterns' to nudge consumers to make choices that are not aligned with their own interests or preferences. These dark patterns include:

- Use of defaults and pre-selections to nudge consumers towards more privacy-intrusive settings, especially where consumers would have selected a less privacy-intrusive option if the options were presented differently.
- Designing interfaces that make it unnecessarily difficult for consumers to change their defaults or to actively opt out of certain data practices. The ACCC found that there are several user interface design features in Google Account settings that introduce confusion and are likely to discourage users from opting out of Google's collection of their location data. This is discussed in greater detail in the Expert Witness Testimony section below.

16. To address the competition and consumer issues identified in this Inquiry, the ACCC made 23 wide-ranging recommendations in areas including competition, consumer protection, media regulation, and data protection law.

17. The following recommendations leverage behavioural insights to improve competition and consumer outcomes:

- *Recommendation 3*: Google should provide Australian users of Android devices with the ability to choose their default search engine and default internet browser from a number of options. This recommendation has the potential to overcome default bias in consumers' choice of general search engines and have the effect of improving competition in the search services market.
- *Recommendation 16(b)*: Notification requirements under Australian privacy law should be strengthened to require clearer disclosures that minimise the risk of information overload for consumers. This may involve notices being given in a multi-layered format or the use of standardised wording or icons to denote certain types of data practices. The ACCC noted that comprehensive consumer testing would be required to design effective notices that limit the impact of information overload on consumers' decision-making.
- *Recommendation 16(c)*: Consent requirements under Australian privacy law should be strengthened to require a clear, affirmative, unbundled consent to mitigate the effect of pre-selection or default bias. The ACCC also recommended that all settings enabling non-essential data collection (such as for targeted advertising) should be pre-selected to 'off' so that default settings are better aligned with majority of consumers' privacy preferences, while still giving consumers who prefer to enable more data collection the ability to make an informed choice to opt in.
- *Recommendation 18*: A mandatory code of practice should be developed to regulate digital platforms' data practices that includes requirements to establish a limited retention period for personal information obtained that is not required for providing the digital platforms' core consumer-facing service(s). This would mitigate the impact of status quo bias preventing consumers from actively requesting the deletion of their user data, even when they might prefer that their data is deleted after a certain period.

18. Incorporating behavioural insights into the ACCC's recommendations in the Digital Platforms Inquiry helped ensure that its recommendations can most effectively achieve the desired effect of improving consumers' awareness of digital platforms' data practices and enhance their ability to make informed choices about the digital platform services they use and the settings they select.

2.2. Home Loan Price Inquiry

19. In December 2019 the ACCC released the Home Loan Price Inquiry Final Report. The Home Loan Price Inquiry Final Report focussed on the demand side of the market and, in particular, impediments to borrowers switching to alternative lenders. The Final Report drew on consumer behavioural insights to understand the challenges or frictions borrowers face over the process of switching to a new lender.

20. The consumer experience in searching for the best loan, and switching where there is a better loan available, is critical to drive competition. In addition to savings for individual borrowers, increased switching in the home loan market can generate demand-side pressure on lenders, which encourages lenders to innovate and offer better products and lower prices to attract and retain borrowers. Increased switching can also benefit borrowers who do not switch, as a credible threat of switching can be enough for lenders to improve their product offerings.

21. As a starting point, the ACCC drew on market data to understand the difficulties borrowers face in the home loan market. The ACCC found that as borrowers' loans get older, the gap between what they pay and what borrowers with new loans pay widens. For example, at September 2020 borrowers with home loans between three and five years old were, on average, paying around 58 basis points above the average interest rate for new loans, and borrowers with home loans between five and 10 years old were, on average, paying around 71 basis points above the average interest rate for new loans.

22. Drawing on behavioural insights, the ACCC found an 'intention-action gap' in the market for home loans – that is, the proportion of borrowers who stand to benefit from switching significantly exceeds the proportion of borrowers who say they intend to switch.

23. To address these issues and encourage borrowers with older home loans to engage in the home loan market, the ACCC made several recommendations:

- All lenders should be required to provide borrowers with variable rate loans originated three or more years ago with an annual prompt to encourage borrowers to engage in the home loan market to see if they could benefit from switching lenders or home loan products. The prompt should:
    - be provided directly to borrowers;
    - communicate the potential benefits of switching in a compelling and personalised way, including a comparison between the borrower's current interest rate and the average interest rate paid for new loans similar to the borrower's loan; and
    - set out the next steps for borrowers to look for a better home loan offer
- All lenders should be required to provide a standardised Discharge Authority form to borrowers to complete. The form should be easy to access, fill out and submit.
- All lenders should be subject to a maximum time limit of 10 business days to complete the discharge process.

24. The recommendations as a package recognise the behavioural and structural barriers consumers face in the home loan market including: high search costs as a result of opaque discounts; and frictions in the switching process, including unclear and/or complicated steps for borrowers, uncertainty about how long the discharge process will take, and unnecessary delays in the process.

25. By integrating consumer behavioural insights and focussing on demand-side pressures, the ACCC's recommendations have the potential to drive competition and enhance consumer welfare in the Australian home loan market.

2.3. Funeral Services Sector report

26. In December 2021 the ACCC released a report on competition and consumer issues in the funeral services sector. The ACCC deemed the funeral sector a 2021 compliance and enforcement priority in response to long standing criticisms that some funeral businesses were using their significant market power to bundle services and block new entrants to the market, or to engage in unconscionable conduct.

27. The ACCC's Funeral Services Sector report identified six key areas of concern:

- Pricing often lacks transparency and clarity and may mislead consumers, for example where providers do not advise consumers of all the costs associated with their services
- Some standard form consumer contracts contain potentially unfair contract terms, including excessive interest rates or late fees for overdue accounts
- Claims about being 'local' funeral businesses may mislead consumers
- Failing to fulfil prior commitments regarding prepaid funeral products and services harms consumers, who may struggle to enforce their contractual rights
- Non-disclosure of payments in return for third-party endorsements from comparison websites or health service providers can mislead consumers and may have a detrimental impact on the broader competitive process
- Bundling or tying that limits consumers' access to funeral products or services and may restrict competing businesses' access to customers.

28. While much of the ACCC's enforcement action has been directed at breaches of the consumer law, these issues can also have an impact on competition in the funeral services sector. For example, a lack of transparency in pricing from funeral services companies can make it difficult for consumers to understand and compare prices and inclusions for products and services – and even harder to compare different providers. As another example, misleading ownership claims may distort the competitive process for those consumers who would prefer to use an independent or family-owned business, rather than a subsidiary of a larger corporate entity.

29. Many of relevant consumer behavioural insights stem from understanding the nature of the market. The death of a friend of family member can be a very distressing time for consumers, and many consumers organising a funeral are unfamiliar with the process and under significant time pressure which may heighten existing behavioural biases.

30. The ACCC integrated an understanding of consumer behavioural insights into its analysis of issues in the funeral services sector, its enforcement action, and its recommendations for industry. This work drew on the behavioural insights literature, in addition to an online survey which sought information about the experiences of consumers in the funeral services sector.

31. The survey allowed the ACCC to better understand how consumer search and decision-making works in the funeral services sector. For example, while theoretical economic models may assume consumers shop around and compare options for most purchases, the survey results showed that approximately 25% of consumer respondents

nominated prior usage as the biggest reason for choosing a particular funeral home, with around 22% of consumer respondents identifying a ‘referral from someone I know’ and only 13% indicating that their selection was mostly because they had ‘shopped around for options’.

32. The survey was supplemented by drawing on the behavioural insights literature applied to the context of consumers seeking to acquire funeral services. Some consumer behavioural insights which helped shape the ACCC’s analysis include:

- Heuristics and bounded rational consumers: To reduce costly time and effort in decision making, bounded rational consumers use limited amounts of the available information and use simplified rules.
- Sunk cost fallacy and endowment effect: Sunk costs and the endowment effect are relevant to the extent that consumers invest time and effort working towards choosing a service. The sunk costs (time and effort) and feeling of ownership from progressing towards a decision mean that information presented late in the process – such as unavoidable costs – can lead to harm as consumers are reluctant to start their search anew.
- Scarcity heuristic and affect heuristic: Organising a funeral often occurs under significant time pressure and during periods of intense grief. When time is scarce, and consumers are unfamiliar with the market and feeling vulnerable, funeral services providers can exploit this by engaging in misleading, deceptive, or unconscionable sales practices.

33. Drawing on these insights, the ACCC was better able to understand the potential harm of firm conduct and take enforcement action where there was evidence of a breach of the competition or consumer law.

34. The ACCC’s priority work in the funeral services sector resulted in a number of enforcement outcomes including:

- In March 2021, WT Howard Funeral Services and Coventry Funeral Homes each paid a penalty of $12,600 after the ACCC issued both businesses with infringement notices for allegedly making a false or misleading representation about their ownership.
- In September 2021, Alex Gow Funerals paid a penalty of $13,320 after the ACCC issued an infringement notice for an alleged false or misleading representation about the price of its funeral services and the fees that consumers are required to pay. Alex Gow Funerals has also amended its invoices to ensure they accurately describe relevant fees.
- In November 2021, Bare Funeral Group paid a penalty of $13,320 after the ACCC issued an infringement notice for allegedly making a false or misleading representation on its website about the ‘minimum price’ for cremation only and memorial services.
- In January 2022 Bowra & O’Dea paid a penalty of $26,640 after the ACCC issued it with two infringement notices for allegedly advertising prices for two of its funeral and cremation services that did not include unavoidable costs. Bowra & O’Dea also entered an undertaking to remove certain terms from its contracts with consumers and establish and maintain a consumer law compliance program.

2.4. Consumer Loyalty Schemes Final Report

35. In December 2019, the ACCC released the Consumer Loyalty Schemes Final Report. The ACCC's review of loyalty schemes in Australia focussed on consumer issues including whether consumers are properly informed and receive the benefits advertised by loyalty schemes; and competition issues including the potential impact of loyalty schemes on competing firms, in particular on new entrants.

36. The ACCC found a key feature of loyalty schemes is the use of psychology in their design, and the way in which they are designed to appeal to behavioural biases. The final report discussed several consumer behavioural insights and their relevance to loyalty schemes including:

- Social identity: a loyalty scheme which serves to make the member feel a sense of exclusivity and belonging can play a central role in the member adopting the brand (sub-consciously or otherwise) as an element of their own self-definition.
- Endowed progress: when consumers feel as if they have started on the journey towards a reward, they feel compelled to complete the journey to claim the reward. Loyalty schemes can induce this by providing an artificial advancement towards a goal, such as through sign-on bonuses.
- Goal gradient effect: the tendency to put in extra effort to achieve a goal increases with proximity to the goal. This phenomenon can be observed in loyalty scheme status credits earning, where members have been seen to increase their consumption (more flights, more stays, more rentals) as they approach the next status tier to achieve it sooner.
- Size heuristics: consumers do not have the capacity, time or motivation to evaluate all available information. In the context of loyalty schemes, consumers may not be able to judge the value of a point, and firms can take advantage of this, for example by offering points with high numeric values but low, opaque actual dollar values.

37. While the report had a strong focus on consumer complaints about loyalty schemes, it also recognised loyalty schemes have the potential to raise competition concerns. This can occur depending on the extent to which loyalty schemes 'lock up' customers and introduce switching costs that increase barriers to entry and expansion for rival firms. If barriers are enduring and induce exit or deter entry, consumers are likely to be worse off.

38. The report also recognised that competition issues may arise not only in the primary market in which the loyalty scheme predominantly operates, but also in related markets through exclusive partnerships with firms supplying complementary products.

39. Although there has not been specific competition enforcement action following the release of the report, the ACCC's advocacy work has resulted in some loyalty scheme operators making changes to benefit consumers, in line with the ACCC's findings and recommendations.

3. Expert witness testimony – behavioural insights in consumer litigation

40. In recent years the ACCC has introduced expert witness testimony incorporating consumer behavioural insights in litigation to assist in articulating the harm arising from particular conduct. This has been particularly relevant in consumer enforcement matters involving online transactions.

41. While the ACCC has not yet deployed behavioural insights in a competition litigation setting, the examples in which we have done so in consumer litigation have been instructive as to how the principles could apply in competition litigation settings. These insights can play an important role in understanding market dynamics, understanding incentives and firms' response to those incentives, and in addressing consumer harm.

42. Moreover, pursuing consumer cases helps promote competition in these markets including through:

- promoting fair competition by removing any unfair advantage gained by market participants through misleading or deceptive conduct; and
- better informed consumers making decisions more in line with their own underlying preferences.

43. In this submission, we discuss three consumer enforcement matters which drew on consumer behavioural insights: Trivago, Google Location and Google DoubleClick.

3.1. Trivago

44. In 2018 the ACCC brought proceedings against hotel comparison site Trivago, alleging Trivago misled consumers by representing its website would quickly and easily help users identify the cheapest rates available for a given hotel. In fact, Trivago used an algorithm which placed significant weight on which online hotel booking site paid Trivago the highest cost-per-click fee in determining its website rankings and often did not highlight the cheapest rates for consumers.

45. Trivago's conduct was potentially damaging to consumers, to hotel owners and to the competitive process between hotel websites and hotel comparison websites – the conduct meant consumers may have paid more for a room at a hotel than they should have, and hotels lost business from direct bookings despite offering a cheaper price.

46. In litigation the ACCC presented evidence from an expert behavioural economist addressing questions about consumer behaviour online. The ACCC's witness was asked to comment on:

- How (if at all) would the way Trivago displays the Top Position Offer on the Trivago website be likely to affect the purchasing decisions of consumers?
- How (if at all) would the display of the red Strike-Through Price juxtaposed next to the green Top Position Offer be likely to affect consumer behaviour?
- How (if at all) would the display of the "top deal" icon and "percentage savings box" next to the Top Position Offer be likely to affect consumer behaviour?

47. Much of this evidence on consumer behavioural insights was accepted by the court and informed the first-instance judgment. Specifically, evidence was accepted on bounded rationality and 'satisficing', colour psychology, and decoy pricing.

48. The court found "Evidence of this nature is potentially of assistance in a case such as this in determining whether or not the alleged representations were conveyed by the website and whether or not consumers were likely to be misled. It cannot be assumed that, even if the Judge has used such websites on occasion, he or she is necessarily familiar with the way in which consumers generally, or a substantial portion of consumers, interact with such a website."

49. The ACCC's case against Trivago was successful at first instance, with Trivago's request for appeal dismissed in November 2020. In April 2022, the Federal Court ordered Trivago to pay penalties of $44.7 million for breaching the Australian Consumer Law.

3.2. Google Location

50. As discussed in the Market Studies and Inquiries section above, the ACCC's Digital Platforms Inquiry found there were several user interface design features in Google Account settings which introduced confusion and were likely to discourage users from opting-out of Google's collection of their location data.

51. In 2019 the ACCC brought proceedings against Google alleging that its location tracking disclosures were misleading. For consumers using Android mobile devices, the ACCC found that even if a consumer managed to navigate to the relevant setting to 'pause' Google's collection of Location History, Google may still be collecting location data through other settings including 'Web & App Activity'.

52. The conduct was potentially damaging to consumers who were deprived of the opportunity to make an informed choice about whether to share their personal location data with Google; and potentially damaging to competition as the extra location data Google collected may create or raise barriers to competition.

53. In litigation, the ACCC presented evidence from an expert behavioural economist and Google presented evidence from its own expert behavioural economist. The expert witnesses provided evidence on the consumer decision making process, and how the choice environment can affect judgement and decision making.

54. The expert witnesses submitted separate reports, as well as a joint report which provided some guidance for the court including in relation to:

- Present bias: preferences described in behavioural economics implies that users will invest less effort in navigating through screens online;
- Ambiguity aversion: preferences as described in behavioural economics implies users will invest more effort in navigating through screens online; and
- Choice architecture: can affect whether, how much, and how carefully users will invest effort to read and understand content as well as affect the paths they will use to navigate through the screens.

55. The court accepted expert witness evidence on consumer behaviour insights including on ambiguity aversion, present bias, status quo bias, loss aversion, cognitive cost, and choice architecture.

56. The Court noted in its judgment "The expert evidence [provided] the appropriate framework for understanding how users approached the process"

57. The ACCC's case against Google was partially successful. The court found that Google had contravened the Australian Consumer Law in respect of its historical conduct and dismissed the ACCC's allegations with respect to Google's later conduct. A hearing on relief is due to take place from 15 to 17 June 2022.

3.3. Google DoubleClick

58. In 2020 the ACCC brought proceedings against Google alleging that in 2016 Google misled consumers to obtain their consent to expand the scope of personal

information that Google could collect and combine about consumers' internet activity, including for targeted advertising.

59. Eight years after acquiring DoubleClick in 2008, Google significantly increased the scope of information it collected about consumers on a personally identifiable basis. It then used this information to serve highly targeted advertisements.

60. The ACCC alleged that Google's consent notification – asking consumers to agree to allow Google to combine their data – was misleading, because consumers could not have properly understood the changes that Google was making nor how their data would be used. The ACCC also alleged that parts of Google's privacy policy was misleading because it represented to consumers that Google would not reduce consumers' rights under the policy without obtaining their prior explicit consent.

61. The conduct was potentially damaging to consumers who were deprived of the opportunity to make an informed choice about Google combining their data; and potentially damaging to competition as the data combination may further entrench Google's dominance in ad tech.

62. In this case, the ACCC considered the court would be assisted by expert evidence on consumer information processing from the field of neuroeconomics. An expert neuroeconomist can provide an opinion on the nature of the cognitive processes engaged in acquiring and processing information, how people select action plans based on the acquired representations, what kind of information the human brain can process efficiently (and what kind it cannot), as well as the environmental conditions facilitating or hampering this information processing. Google presented evidence from an expert behavioural economist.

63. The expert witnesses submitted separate expert witness reports, as well as a joint report which provided guidance for the court including in relation to:

- the analysis of behavioural biases needs to start with theory, rather than with empirical observations and then identify supporting theory;
- context dependence is an important consideration for any behavioural insights concept. Behavioural economic concepts and individual decisions in one setting are not generalisable to all people and situations;
- the meaning of 'nudge' and the ability of the choice architect to nudge users; and
- the impact of default options on decision making, and that exploiting the default option bias to shape behaviour is a type of nudge.

64. The ACCC is awaiting judgment in this case.

4. Consumer redress

65. Consumer redress is an important aspect of the ACCC's consumer enforcement role. In Australia, non-party redress may be ordered by the court as part of litigation[2] or may be offered by a firm to settle a matter as part of a court-enforceable undertaking.[3]

[2] See Competition and Consumer Act 2010 (Cth), s.239.

[3] Ibid, s.87B

66. Redress may also have broader competition implications. For example, misleading or deceptive conduct may put a firm in a stronger competitive position compared with firms who accurately represent their goods or services. Ordering firms who breach the consumer law to compensate affected consumers – in addition to any pecuniary penalties – can have an impact on general deterrence and can re-level the playing field. Therefore, the ACCC considers redress in consumer law cases to be an important complement to competition enforcement.

67. A redress scheme will typically aim to compensate a consumer for loss or harm caused by a breach of the law. In many cases, consumers must take active steps to access redress, such as filling out a form or confirming their payment details. Where possible, the ACCC incorporates consumer behavioural insights directly into consumer redress schemes to maximise take-up by eligible consumers.

68. Consumer redress schemes are generally open for a finite time and, where relevant, overseen by the court. These parameters generally do not provide scope for testing different behavioural insights design elements via a randomised controlled trial. However the ACCC did have the opportunity to test two different schemes via a modified pre-post analysis in a case against Equifax.

4.1. Equifax consumer redress

69. In 2018 the ACCC brought proceedings against Equifax regarding false or misleading representations to consumers, including that its paid credit reports were more comprehensive than the free reports (when they were not), and that consumers had to buy credit reporting packages for it to correct information held about them (when Equifax was required by law to correct this information for free).

70. The Federal Court ordered Equifax, by consent, to pay penalties of $3.5 million. The court also ordered that Equifax establish a consumer redress scheme which would allow affected consumers to seek refunds for a 180 day period.

71. In his judgment, Justice Lee expressed some concern about the effectiveness of consumer redress schemes in compensating affected consumers and accordingly ordered that an independent reviewer be appointed to report on the Scheme.

72. The initial redress scheme was largely designed by the relevant legal teams. The information inviting consumers to make a claim was dense, and the process for making a claim contained a number of frictions. The first redress scheme closed in May 2019 and after contacting around 37,000 consumers, Equifax provided compensation to around 2,600 individuals totalling around $360,000.

73. Following the close of the initial scheme, Equifax agreed to offer a second redress scheme with a view to improving take-up rates. The second scheme incorporated consumer behavioural insights including:

- Plain language email correspondence with clear steps to action;
- Use of an online application process through an embedded link to a pre-populated form which required little further input prior to being submitted; and
- A reminder text sent one week prior to the close of the scheme.

74. The second scheme targeted only those consumers who had not already received compensation under the initial redress scheme and was open for a 6-week period. The scheme closed in October 2019 and after contacting around 34,000 consumers, Equifax provided compensation to around 7,000 individuals totalling around $1,250,000. While not

all consumers submitted a claim, the design incorporating behavioural insights had a substantially higher take-up rate and within a much shorter time frame.

75. The ACCC has adopted behavioural insights lessons from the Equifax scheme and incorporated them into our broader consumer redress work with significant success.

5. Evidence gathering

76. The ACCC, like all competition enforcement agencies, cannot actively monitor all markets for potential anti-competitive conduct. Contacts and complaints from consumers, small businesses, competitors, and other market participants can alert the ACCC to conduct which may breach the CCA.

77. While some competition complaints arise from large businesses who are accustomed to dealing with regulators, many others arise from smaller market participants and can be incomplete or missing information needed to inform the ACCC's investigation.

78. Where the ACCC receives a complaint, we sometimes ask for further detail from the complainant to determine whether to progress the investigation. The response rate to these requests for information has historically been around 25%, meaning the ACCC misses further important information from around 75% of complainants.

79. The ACCC internally reviewed the standard request for information, and incorporated behavioural insights in an attempt to increase the response rate and the incidence of complainants answering certain questions (where insufficient information has been provided) or providing certain documents (such as evidence to support allegations).

80. The ACCC's amended communication incorporated evidence-based techniques, drawing on the behavioural insights literature to encourage response and information completion.

81. Immediately following the release of the redesigned information request, the response rate increased to around 60% – more than double the previous rate. The impact of this has enhanced the ACCC's data collection and improved the probability that we can investigate real competition concerns.

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