

27 September 2024

Director, National Competition Policy Unit
Competition Taskforce Division
Treasury
Langton Cres
Parkes ACT 2600

Via email: nationalcompetitionpolicy@treasury.gov.au

Dear Treasury,

Submission on Treasury's Revitalising National Competition Policy Consultation Paper

Thank you for the opportunity to provide a submission in response to the consultation paper on Revitalising National Competition Policy (**Consultation Paper**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 53,000 reflects the diversity of Australia's director community, comprised of directors and leaders of not-for-profits (**NFPs**), large and small and medium enterprises (**SMEs**) and the government sector.

In our role as host of the [Climate Governance Initiative Australia](#), we are committed to lifting directors' climate capability through educational resources, webinars and events. To date, we have issued practice guides and reports on topics such as [sustainability governance structures](#) and preparing for [mandatory climate reporting](#), which have had cumulative unique downloads of around 26,000; hosted webinars attended by around 6,000 attendees; issued monthly climate newsletters sent to around 20,000 recipients; and organised three major climate governance conferences with over 4000 attendees in total.

Our submission focuses on the intersection of competition policy and the net zero transformation for organisations and their boards. While competition is crucial for the net zero transformation, it will require concerted action and cooperation between governments, as well as between businesses to decarbonise whole sectors at a more rapid pace, particularly in the highest-emitting sectors.

This submission largely reflects points we made in our previous [submission](#) (**AICD Submission**) on draft guidance for business on sustainability collaborations and Australian competition law (**Draft Guidance**) released by the Australian Consumer and Competition Commission (**ACCC**) in July this year.

More broadly, we note that a review of competition policy settings is timely given sluggish productivity growth in the Australian economy and the significant lag since the last comprehensive review. While we do not have significant competition law expertise, and hence have limited our comments to sustainability related aspects, we encourage Treasury to continue to engage closely with business and key advisers to ensure regulatory settings support innovation, economic efficiency, and drive down costs. The AICD would be pleased to facilitate discussions with directors across various sectors, should this be of assistance to Treasury.

Executive Summary

In respect of the specific questions on the Consultation Paper, we offer the following key points for consideration:

- That the 'public interest test' be amended to align with the competition reform themes, particularly the need to harness competition for the net zero transformation (Question 13).
- That Treasury consider a data sharing principle:
 - that establishes a presumption in favour of providing access to data in an appropriate way; and
 - that ensures competition law restrictions do not prohibit data sharing across sectors to reach net zero and achieve sustainability goals more rapidly (Questions 29-31).
- That *Reform Theme 2* be expanded to encompass not only the benefits of the net zero transformation but also broader sustainability goals, for example nature positivity (Question 32).
- That the National Competition Reform Agenda assess the opportunities for the net zero transformation and sustainability goals by addressing the rigidity in Australia's competition laws. Legislative reform may be needed to accelerate progress towards national sustainability goals (Question 33).
- That the ACCC should be adequately resourced to respond to and facilitate an increased number of sustainability collaborations (Question 34).

Consultation Questions

Questions about the public interest test

13. Are changes required to the 'public interest test' in the Principles to make it more effective? If so, what changes could be made and why?

The AICD recommends amending the 'public interest test' in sub-clause 1 (3) of the National Competition Principles Agreement (**CPA**) to align with new reform themes, particularly the need to harness competition for the net zero transformation. Specifically, we suggest expanding the test to encompass the impacts of climate change beyond the limited scope of 'ecologically sustainable development'.

We encourage Treasury to incorporate language that reflects the objective of the *Climate Change Act 2022 (Cth)*, which aims 'to advance an effective and progressive response to the urgent threat of climate change drawing on the best available scientific knowledge.' This would ensure that climate considerations are adequately integrated into the 'public interest test'.

National Competition Reform Program: Questions about data sharing principles

30. In your experience, are there any issues related to data sharing that have not been identified and should be considered?

31. What considerations should be taken into account in drafting and implementing a data sharing principles?

One critical avenue for accelerating the net zero transformation is the enhancement of data availability and transparency. By making relevant data publicly accessible, governments can foster collaboration among businesses, drive innovation, and facilitate the strategic actions necessary for achieving net zero targets. We acknowledge there are challenges with sharing data, particularly data that is privately owned or subject to privacy concerns.

The AICD encourages Treasury to consider a principle that provides a presumption in favour of Governments providing access to data in an appropriate way.

Data sharing is also an area where existing competition law is inhibiting beneficial collaboration between competitors. For example, it is widely accepted that mandatory climate-related financial reporting requirements (introduced by the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024*) will require data and systems that do not currently exist to measure and reduce emissions. Directors have repeatedly highlighted the challenges associated with obtaining accurate and reliable data on climate-related factors, particularly data relating to risks that occur outside the scope of a company's direct control (such as Scope 3 emissions data). The same problem will be presented for broader potential sustainability reporting over time (e.g. nature and biodiversity).

To ensure data availability and certainty, industry collaboration will be critical. Given interdependencies across sectors for Scope 3 reporting, we understand that sectors and industry bodies are currently considering options (such as industry databases and tools) to uplift data capability and ensure availability and certainty for Scope 3 reporting. At present, however, there are competition law constraints restraining such collaborations.

The AICD also encourages Treasury to consider a principle that ensures competition law restrictions do not prohibit data sharing across sectors to reach net zero and achieve sustainability goals more rapidly. See discussion on sustainability collaborations below for further details.

National Competition Reform Program

32. Do the reform themes adequately capture existing and emerging competition issues? Are there any additional objectives under each theme that you consider are important to improve community outcomes? What would you change?

The net zero transformation and reducing greenhouse gas emissions is just one aspect of a broader range of sustainability challenges facing the economy, businesses, and directors. These challenges encompass building resilience to climate change impacts, restoring and regenerating nature and biodiversity, and promoting human rights and social well-being, including those that relate to First Nations peoples.

In Australia, organisations are increasingly having to address sustainability as a consequence of regulatory reform (e.g. in the context of human rights and modern slavery) and for their long-term competitiveness and resilience (e.g. in areas such as climate mitigation, adaptation and nature).

The need to integrate sustainability considerations into modern competition policy is more important than ever, as many businesses are looking to work together to address a broad range of sustainability issues

beyond climate. As highlighted in the AICD Submission and above in relation to data sharing, we are concerned that existing competition law may prohibit sustainability-related collaboration in a range of areas. For example, it is unclear whether industry-wide reporting frameworks for reporting climate-related information or to address modern slavery in supply chains, which could require industry participants to come together to share information about their approaches to reporting and data availability, would breach competition laws.

To address this concern, the AICD recommends reform theme 2 be expanded to encompass not only the benefits of the net zero transformation but also broader sustainability goals.

National Competition Reform Program

33. What specific reform actions could governments pursue in the National Competition Reform Agenda? What are the potential benefits and costs?

There are instances where sustainability benefits cannot be achieved without further policy intervention. The ACCC's Draft Guidance recognises the urgent need for action on environmental sustainability:

"... the clear need for urgent action on environmental sustainability. Environmental harm, including climate change and biodiversity loss, represents a special category of threat to the environment and economy which requires action by all stakeholders, including the business community."

The AICD Submission focuses on the need to ensure that sustainability collaborations with a public interest to decarbonise whole sectors at a more rapid pace are not discouraged by undue competition law constraints. This is particularly important for arrangements that may not be in a business' short term financial interest, but nonetheless have broader benefits.

We have significant concerns that the Draft Guidance may create undue concern and have a chilling effect on lawful sustainability collaborations. The authorisation process can take time, is public, can be costly and there is limited scope for flexibility or adjustments.

If genuine sustainability collaborations between business are not proceeding, it means that private sector resources—typically a significant source of capital and expertise—are being held back from helping to decarbonise the economy at a more rapid pace or address broader cross-border challenges (like modern slavery).

Regulators in other jurisdictions (e.g. the [UK's Competition and Markets Authority](#), [New Zealand's Commerce Commission](#) and the [European Commission](#)) have provided guidance to business about how they will apply their enforcement powers to sustainability collaborations and the recommendations in the AICD's Submission align with approaches adopted in these jurisdictions. For example, we recommended that the ACCC's 'class exemption' power be used to authorise sustainability collaborations between competitors that pursue a genuine sustainability objective without requiring an authorisation. The exemption should provide clear guidance and case studies to support businesses to self-assess and avoid the need for individual authorisations.

We understand that the above recommendation (as well as others included in the AICD Submission) fall within the ACCC's current mandate and would encourage Treasury to convey its support for legitimate sustainability collaborations that achieve sustainability goals.

As part of our consultation, it was identified that legislative reform may be needed to address rigidity in Australia's competition laws and accelerate progress towards national sustainability goals. To that end, we recommend Treasury consider the following reforms:

- The European Union's 'safe harbour' arrangements for certain sustainability-agreements exempted from competition rules;¹
- The UK's exemption for certain environmental sustainability agreements contained in the Green Agreements Guidance;²
- The use of comfort letters for competitors who approach the ACCC confidentially to discuss sustainability collaborations that are considered very low risk; or
- Immunity from prosecution for all sustainability agreements where parties have discussed their agreement with the ACCC, and it did not raise competition concerns, or those concerns were addressed. This approach has been adopted in the UK.³

Implementation arrangements

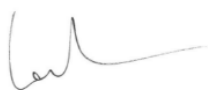
34. What institutional, governance and other arrangements, including mechanisms to share the economic growth and revenue benefits of reforms, would best support the implementation phase of a revitalised NCP?

We anticipate an increased workload for the ACCC given the urgent need to decarbonise the economy. We recommend that the ACCC be adequately resourced to respond to, and facilitate, growing demand for sustainability collaborations and guidance.

Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au, or Christie Rourke, Senior Policy Adviser at crourke@aicd.com.au.

Yours sincerely,



Louise Petschler GAICD

General Manager, Education & Policy Leadership

¹ EU Antitrust: Horizontal Block Exemption Regulations and Horizontal Guidelines

² Green agreements guidance (publishing.service.gov.uk)

³ Ibid.