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Director,
National Competition Policy Unit
Competition Taskforce Division
The Treasury Langton Crescent
PARKES ACT 2600

By email: nationalcompetitionpolicy@treasury.gov.au

Dear Sir,

RE: Revitalising National Competition Policy: consultation paper

Who we are

Governance Institute of Australia (Governance Institute) is a national membership association that advocates for a community of governance and risk management professionals, equipping over 8,000 members with the tools to drive better governance within their organisation. Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted, and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors.

We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO. We are a founding member of the ASX Corporate Governance Council. We are also a member of the ASIC Business Advisory Committee, the ASX Business Committee and the ACNC Sector Users Group.

Executive summary

Our members consider that national competition policy plays an important role in reducing business and transaction costs across the economy. Inefficient, time-consuming, and costly business transactions and dealings, including rigid regulations not fit for a modern 21st century digital economy contribute to increased costs of doing business that is subsequently passed through to consumers. Government can play a key role in reducing business and transaction costs, barriers to market entry and associated inflationary pressures via structural reforms to national competition policy. Our members also consider National Competition Policy (NCP) cannot be separated from the comprehensive corporate law reform that is required to initiate the entire economy productivity reform process. For instance, the latest review of Australia's corporations and financial services legislation by the ALRC, shows that the *Corporations Act 2001* is no longer fit-for-purpose.¹ This has a flow on effect that impacts all Australians and entities of all sizes that interact with corporations and financial services.

¹ See [Confronting Complexity; Reforming Corporations and Financial Services Legislation](#), Australian Law Reform Commission, 18 January 2024.

This Submission is in three parts. The first provides comment on the National Competition Principles and Reform Program. Part two includes comments on the institutional and implementation arrangements. Part three addresses the need for complementary reforms, including a root and branch review of the Corporations Act alongside competition reforms to enable a more productive and innovative economy.

Our members consider the recommendations outlined in this Submission are critical to foster a more dynamic and resilient economy that will drive higher living standards for all Australians.

Recommendations

PART 1

A review of the National Competition Principles and Reform Program

Refine the Legislative Review principle to improve the assessment of current and proposed government policies and processes through consistent guidelines and added transparency about how competition analysis is performed.

'Government's' first priority in implementing the Hilmer Report was to facilitate greater competition in markets, including by making sure their own activities did not interfere with potential competitors. The Competition Principles Agreement 1995 (CPA) sets out, among other things, agreed reforms and guidance for ongoing action that facilitated governments unlocking the benefits of competition.' – Consultation Paper page 15.

Clause 5 of the CPA requires governments to consider potential impacts on competition from their legislation (including subordinate legislation) known as the 'Legislation Review' Principle, for example regulation that unnecessarily restricts new businesses entering a market. However, the effectiveness of the legislative review principle has faced difficulties in practice. Jurisdictions establishing a regulation impact assessment process to identify and measure the impacts (i.e. costs and benefits) of potential new regulations, including any competition impacts have been subject to criticism. ***There is a general lack of guidance and transparency of detail about how competition analysis is performed in connection with legislative reform and there is no requirement to promote competition where it is in the public interest.***

Recommendation 1 – *Initiate targeted reviews under the Legislative Review Principle to assess legislation, including government policies and processes, that might impact competition in a particular market, particularly where this creates barriers to entry for new technologies.*

Recommendation 2 – *Consider consistent guidelines on competition analysis and embed a requirement for all jurisdictions to promote competition where reasonably possible and where it is in the public interest.*

Expand the scope of the 'Access principle' to non-physical infrastructure to lower barriers of accessing and sharing data across the digital economy

'Clause 6 of the CPA, known as the 'Access Principle', seeks to promote competition in upstream and downstream markets through economically efficient access to services provided by significant monopoly infrastructure. The Principle provides for the owner and operator of the infrastructure to provide access on reasonable terms, for instance, they can charge fees for providing access. The

Access Principle requires the Commonwealth to legislate for an access regime to enable third party access to services provided by significant infrastructure facilities in the circumstances set out in the Principle. The National Access Regime (NAR) was created under what is now Part IIIA of the Competition and Consumer Act 2010 (Cth) (CCA).’ – Consultation Paper p. 16.

The NAR is limited to services provided by nationally significant infrastructure facilities, such as electricity, telecommunications and water however, as the Consultation Paper acknowledges, new forms of intangible infrastructure have emerged that are not economically feasible to duplicate that require a degree of interoperability to facilitate meaningful competition. This has been observed by data accumulation and the sophistication of multi-national digital platforms and large data holdings. Owners of this infrastructure and data assets have enjoyed large competitive advantages that have acted to prevent competitors in upstream and downstream markets from competing effectively. **As data has become the ‘new oil’ in the economy, there needs to be further consideration of how baseline data can be reasonably accessed and shared across industry lines which may generate further competition and lower prices for services.** The Access Principle could be reformed to address the modern infrastructure access barriers created by large data holders. Governments could foster more competitive outcomes by safely sharing their data. A new principle could establish a presumption in favour of governments providing access to data in appropriate ways and competition could also be enhanced by private entities sharing their data

However, there may need to be further investigation to determine whether these competition problems can be addressed by broadening the scope of the Access Principle, particularly as it relates to third party user-consent and privacy provisions or whether a new standalone principle should be considered.

Recommendation 3 – *Initiate a feasibility study on baseline data access and sharing of critical data infrastructure so that all industries can reasonably access user data across the economy.*

Refine the Public Interest Test, particularly by placing greater primacy on ecological sustainable development to shift business activities into more environmentally conscious and sustainable practices.

The public interest test is not exhaustive but requires a list of factors to be considered when making policy decisions that may include in no particular order, ecologically sustainable development, economic and regional development, employment-related policies (for example, occupational health and safety), social welfare and equity considerations, consumer interests, the competitiveness of Australian businesses, and the efficient allocation of resources.

Currently there is no specific guidance on how to apply the public interest test to inform decision making, and it is not clear to which principles it should apply. This has resulted in different interpretations of how to apply the test leading to varying results in the assessment of similar situations. A lack of transparency in decision making and the absence of appeal mechanisms against decisions made under the test has the benefit of flexibility but is significantly outweighed by a lack of certainty in the outcomes reached by decision makers.

In line with international policy development towards the transition to net zero and environmentally sustainable communities, greater primacy of ecologically sustainable development in the weighting of the public interest test may be required to ensure that environments are well-protected, and appropriately restored as to prevent further environmental decline.

Reforming the public interest test by making the public interest test simpler and clearer, improving the guidance for its application and adding further transparency, including the reasons for decisions reached and how competition objectives were managed should be prioritised.

Recommendation 4: *Reevaluate the Public Interest Test, by making the test simpler and clearer. Consider specific guidance on how to apply the public interest test and set transparency requirements to better inform stakeholders on how competition objectives were managed and prioritised by decision makers.*

Five provisional reform themes

The five provisional reform themes identified in the Consultation Paper are an important starting point but require more greater vision to shift the economy into gear for a more environmentally sustainable, net-zero, digitally engaged and inclusive economy.

Promoting a more dynamic business environment

Governance Institute's members support the reduction of barriers to business entry, expansion and exit, ensuring that businesses do not face excessive or unnecessary compliance costs to participate in markets. They also support the promotion of national coherence of regulatory frameworks and where reasonable the mutual recognition of regulatory approval and accreditation processes across jurisdictions where the benefits outweigh the costs.

Recommendation 5: *Reduce barriers to business entry, expansion and exit, remove unnecessary compliance costs and promote national coherence and interoperability of regulatory frameworks including mutual recognition of regulatory approvals and accreditation processes across jurisdictions.*

Harnessing the benefits of competition in the net zero transformation

The net zero transformation requires concerted action and cooperation by businesses within and across industry lines. Collaborations to tackle the net zero transformation will become increasingly important for a successful transition to a low-emissions economy. This will require the sharing of knowledge, information, concepts and practices not ordinarily featured in market practices of established industries. Exemptions to sustainability collaborations will require government to allow significant bandwidth for sustainability partners to tackle the significant challenges that the net zero transformation will bring. Lowering barriers that hinder the diffusion of low and zero-emissions technology, whilst ensuring businesses do not face excessive compliance costs to participate in the low carbon economy should be prioritised with the aim of ensuring long-term competitiveness in markets when delivering net-zero initiatives. The reform theme should be expanded as to incorporate the shift towards a nature positive, environmentally sustainable economy that drives businesses towards ecologically sustainable development practices and nature repair and restoration.

Recommendation 6: *Expand the reform measure on harnessing the benefits of competition in the net zero transformation to incorporate market activities associated with a nature positive, environmentally sustainable economy that drives businesses and government decision makers towards ecologically sustainable development practices and nature repair and restoration.*

Leveraging the economic opportunities of data and digital technology.

'Australia is trailing behind in adopting data-driven technology, ranking 26th in the world for business use of using analytics, and 23rd for business use of AI.' – Consultation Paper p.40 Barriers to public access to data, particularly large volumes of data held by incumbent firms, can create information

asymmetries that disempower consumer choice and restrict efficient matching of service providers and users. The tension that exists between data collection, use, security and personal privacy requires urgent attention. The Government's response to the *Privacy Act* review and the pipeline of recommendations associated with its findings requires prioritisation to enable the policy settings proportionate to risk, allowing Australians to more likely realise the large economic benefits and competition enhancing impacts of data while managing the risk of harm

Recommendation 7: Prioritise a dynamic and inclusive digital economy that encourages businesses to innovate and use technology and data to improve efficiency, quality and utility of their goods and services, help consumers make better informed choices by empowering consumers to make productive use of their data, and promote flexible and responsive regulatory models that ease the adoption of new technology to enhance efficiency and consumer outcomes.

PART 2

An institutional and implementation framework to deliver on the National Competition Policy Reform Agenda

The successful implementation of a substantial reform agenda will require effective institutional frameworks and implementation frameworks that deliver on stated objectives and outcomes. As the NSW Government has observed, '[the] strength of the NCP agreements [since its inception in 1995] has been the establishment of a framework in which governments are made accountable for implementing reforms and an external body is made responsible for monitoring governments' compliance'. – Consultation Paper p.43

The assessment and monitoring framework promotes learning by doing, recognising the need to fine-tune the implementation of policies and finding systemic ways to identify and resolve problems to progress reform satisfactorily. The National Competition Commission (NCC) was established in 1995 under Commonwealth legislation (now known as the *Competition and Consumer Act 2010* (Cth)) and had the dual role of assessor and advisor creating a conflict of interest in terms of playing an active participant in the reform development process and assessing the progress of such reforms.

A reoccurring theme of Australian policy reform is that it has tended to be driven by one-off reviews, for example the Hilmer and Harper Review, rather than by a stand-alone institution with competition policy as its business-as-usual function. A potential solution is an *institution that plays a leadership role in advocating for competition policy, driving implementation of decisions made, and conducting independent, transparent reviews of progress made in an increasingly dynamic and globalised economy.*

There are significant benefits in the creation of institutions with a clear objective of reforming and reviewing competition policy settings in Australia. By proactively recommending policy changes where there is a net economic benefit, the reporting body could investigate and advice governments on proactively removing barriers to trade between states and territories.

The benefit of providing advice to governments on potential competition issues extends further along the policy making cycle. Early policy development could be 'washed' through a supplementary impact assessment process to identify possible competition issues associated with proposed policies. Thirdly, the body could act in an educative and awareness raising capacity to drive potential areas for national competition policy reform by undertaking studies of specific markets. A permanent, independent expert body which advises government and legislature in the areas of competition policy making, competition law and regulation with its reports published would deliver significant benefits to competition policy reform in Australia.

Recommendation 8: Establish a permanent, independent expert advisory body which advises government and legislature in the areas of competition policy making, competition law and regulation more generally in line with established National Competition Policy objectives.

PART 3

Consider complementary reforms by initiating a process for modernising the Corporations Act 2001 to reduce the regulatory incidence on Australian corporations and to enable innovation

Cost of living pressures are impacting all Australians yet most importantly, the cost of doing business which impacts the purchase of all goods and services across the economy continues to rise. There is a need to **address the drivers of business costs** including complex and obfuscated corporations' laws and regulations that are no longer fit for purpose.

Australia has not undertaken large scale structural corporate law reform since the *Corporations Act 2001*. Now over 20 years old, the *Corporations Act* was designed and structured relying on concepts that go back much further. **A series of ad hoc reforms with no systemic review or reform of corporate law has resulted in the ballooning of the size and scope of the Corporations Act.** It has become increasingly complex and expensive to engage with the Act which no longer serves the needs of a modern digital economy, and it is proving particularly challenging for many small and medium-sized organisations to engage with it.

Corporate law reform should be institutionalised via a dedicated independent corporate law reform body with the skills and expertise to make recommendations to the government for implementation. Without a comprehensive program of structural reform, the economy will continue to be hindered by high regulatory incidence and costs that impact consumers and their living standards. The Australian Law Reform Commission's latest assessment of Australia's corporations law describes the Corporations Act 'as unnecessarily complex, shrouded in obfuscation and obscurity and a legislative maze'.

Our members commend the Government's initiative to revitalise national competition policy, however, without a simultaneous measure to review corporations' law, competition frameworks will deliver limited results on the outcomes it sets to achieve.

Corporate law reform and competition reform should not be a point in time, one-off, or once in a generation review. In an increasingly dynamic economy, with increasing geopolitical risks and tensions competition policy requires government, the business community and civil society to be more purposeful through a dedicated competition reform body comprised of leading experts and government officials to take stock of what is working well and what could be improved.

The establishment of a specialist corporate law reform body will deliver to government holistic structural reform proposals that are capable of driving productivity reforms to support economic growth, job creation and living standards. This is necessary at a time when dynamic industry forces are shaping the future of the economy and productivity growth continues to lag historical averages.

Recommendation 9: Establish a designated Corporations Law Reform Body to develop industry, academic and government-led advice improvements to the Corporations Act 2001 to move Australia towards a world leading competitive economy.

For further information regarding this submission, you may contact me or Senior Advisor, Policy and Advocacy, Daniel.popovski@governanceinstitute.com.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'C Maxwell', enclosed in a light blue rectangular box.

Catherine Maxwell
General Manager, Advocacy and Policy