



Live in the Now – Restoring the Relevance of the National Competition Principles

Australian Council of Trade Unions response to the
Revitalising National Competition Policy discussion paper

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Introduction

The Australian Council of Trade Unions (ACTU) is the peak trade union body in Australia representing, through our affiliated unions and states and regional trades and labour councils, more than 1.6 million workers across the country who are engaged across a broad spectrum of industries and occupations in the public and private sectors. As the *Price Gouging Inquiry (PGI)* commissioned by the ACTU has shown, competition policy, and its failures, can have significant impacts on the lives of working people. We welcome the opportunity to provide a response to the Revitalising National Competition Policy Discussion Paper and the Government's interest in competition reform. It is our view, informed by the outcomes of the PGI, that there is much work to be done in this space.

Competition can be an important and valuable tool in some markets to ensure that consumers have access to the best products at the best prices. The last few decades have also shown that it is not a silver bullet – that the pursuit of competition for its own sake can, in some cases, be detrimental, impacting negatively on both workers and consumers or failing to ensure the greatest benefit to the wider economy. This is particularly the case where a competition model is a poor framework for the delivery of a public good, or where poorly regulated competition undermines the quality of good and services, and the pay and working conditions of the employees that delivering it. Both problems have plagued the marketisation of a range of sectors from aged care, through to vocational education and training. We must be cautious then, as part of this Review, to ensure that competition is consistently viewed as a tool to achieve positive outcomes and not an end in and of itself.

The National Competition Principles (NCPs) are ripe for review, presenting clearly as a product of a different time. As we will discuss later in this submission, it may be that the need for review is deeper than is currently envisaged by the Discussion paper to ensure that an updated set of NCPs are dealing with the problems we face today.

The Competition Reform Themes (CRTs) raised in the discussion paper also raise a number of significant issues, both in the sense that they have correctly identified competitive issues that need to be directly addressed through legislative or regulatory change but also raise the spectre of an orthodoxy that says competition can solve every problem and that prioritising competition is always the right decision.

Response to the discussion paper – National Competition

Principles

The aim and focus of the NCPs

As the Discussion Paper notes, the NCPs were developed as a response to a particular period in Australia's history and their concerns and priorities are reflective of the concerns and priorities of that time. The NCPs are heavily focussed on the impact on competition created by government-owned businesses and the ability of government-controlled regulators or monopolies to preference their own interests over that of their competition. This is clear on even a cursory examination of the principles themselves and is clearly acknowledged by the discussion paper, which lists the main actions arising from the principles as Government's deciding to:

1. Ensure that legislation does not restrict competition
2. Put government businesses on a level footing with private businesses
3. Separate 'contestable' parts of government businesses from monopoly and regulatory functions
4. Monitor prices of government business enterprises to reduce the incentive to exercise monopoly power.

Leaving aside the validity or merit of these concerns at the time, the obsession with Government businesses and their impact on competition that is exhibited by the NCPs clearly demonstrates their desperate need for review. The economy that the NCPs sets itself against, one replete with multiple sectors dominated by government-owned monopolies, a significant number of large government owned businesses and stifling regulation preventing competition is not merely different from the economy we have today – it is virtually unrecognisable to anyone born in Australia since the early 1990s.

Anti-competitive behaviour today stems not from the dominance of markets by large government-owned companies but from market leaders – large multinationals who have come to dominate their markets and who utilise their vast market power to stifle competition and extract profit from consumers who lack viable alternatives to their services. Those few government-owned enterprises left are less monopolies than they are either cultural institutions like the ABC, providers of essential, loss-making, services such as letter delivery like Australia Post.

A key issue today is the increasing corporate concentration in nearly all sectors of the Australian economy and the negative consequences that causes. In all but one industry in the Australian

economy the top four firms have between 60 to 80% of market share.¹ This can stifle new entrants, productivity growth and fair and ethical pricing behaviour.

Corporate anti-competitive behaviour is now the key force holding back competition in Australia today and this has resulted in significant impacts on consumers as well as workers and businesses within those supply chains. As the PGI found, corporate consolidation was a significant cause of the recent inflationary period, with "profit push" or "sellers' inflation" phenomenon occurring within a context of high corporate concentration, as evidenced by the surge in corporate profits and the increased profit share of Gross Domestic Product. The inquiry found that this seller's inflation was aided by consolidation, a finding corroborated by research from OECD, IMF, BIS, European Commission, European Central Bank, US Federal Reserve Bank, Bank of England, and numerous global and local think tanks and detailed research studies, and that the impact of that inflation on Australian workers has been profound. A distinctive aspect of the inquiry was the submissions and representations from ordinary Australians, who shared stories of real hardship and sacrifices made to make ends meet.

The PGI also found a selection of exploitative business pricing practices enabled by concentration and corporate anti-competitive behaviour that enable the extraction of extra dollars from consumers in a way that would not be possible in markets that are competitive, properly informed and that enable overcharged consumers to readily switch from one supplier to another. The fact that there is a widespread lack of competition in Australian markets means that pricing practices that might be accepted in very competitive markets are unduly exploitative of consumers in that setting. These practices include:

- Loyalty taxes
- Loyalty schemes
- Drip pricing
- Excuse-flation
- Confusion pricing
- Asymmetric pricing
- Algorithmic pricing
- Price discrimination

¹ E61 Institute, ["Flying under the radar: Australia's silent and growing competition crisis"](#), The Conversation, 30 August 2023:

More information on these practices and how corporations have become the source of anti-competitive behaviour can be found in *Inquiry into Price Gouging and Unfair Pricing Practices*², a report commissioned by the Australian Council of Trade Unions chaired by Professor Alan Fels AO.

What is clear from this is that the NCPs need to be reviewed and updated not just on a language level, but that a deeper consideration is needed to ensure that they can be updated to reflect the challenges to competition that exist today and that are causing the greatest harm to Australian consumers. The NCPs must be updated to tackle corporate anti-competitive behaviour and to acknowledge the need for new legislative and regulatory tools to ensure that profit-driven enterprises cannot continue to enjoy the power that the first iteration of the NCPs was so concerned would become concentrated in the hands of Government.

Responses to specific elements of the NCPS

Prices oversight

As the Discussion Paper highlights, the Prices Oversight Principle echoes the broader framing of the NCPs by focussing exclusively on government businesses pricing and their impact on competition. As the Discussion Paper also outlines, this principle has resulted in the formation of prices monitoring bodies, such as the ACCC, with a broader prices remit. However, the lack of a clear principled foundation for the monitoring of prices more broadly has made it too easy for some governments to reduce the powers of the ACCC in this area and for an environment that favours 'soft touch' regulation to be instituted with regard to non-government entities.

The findings of the PGI were clear - the Australian government must adopt a more proactive stance on pricing and pricing behaviour. Business practices, often facilitated by government policies, are contributing to unwarranted inflation. Post-pandemic, there is evidence of persistent overcharging that warrants investigation, and public concern about the legitimacy of many price increases is widespread. The ACCC should possess the necessary investigative powers to thoroughly examine pricing behaviour across various industries, including a broadening of its investigative remit from simple collusion to a wider range of unethical pricing practices. However, the government generally relies on the ACCC to initiate price investigations only when short-term political concerns arise, limiting its ability to conduct more comprehensive market studies.

Market studies are valuable tools for identifying underlying issues, such as excessive pricing or anti-competitive behaviour, in industries or markets. While such studies are becoming increasingly common globally, the ACCC lacks the authority to initiate them independently.

² Price Gouging Inquiry, Inquiry Into Price Gouging And Unfair Pricing Practices, ACTU, 2024
https://pricegouginginquiry.actu.org.au/wp-content/uploads/2024/02/InquiryIntoPriceGouging_Report_web.pdf

Reliance on ministerial referrals can lead to significant delays in urgent situations and may be influenced by political factors. Self-initiated ACCC inquiries would expedite and enhance the handling of rising price concerns.

Increased investigation, transparency, and exposure of pricing practices offer several benefits:

- Public education can empower consumers to make informed choices.
- Public scrutiny can incentivise businesses to modify their pricing practices.
- Government regulations can compel businesses to provide clearer information about pricing, components, and future trends.
- Market analysis can reveal the limited role of competition and potentially stimulate more competition, inform business behaviour, or reduce switching costs, ultimately benefiting consumers.

Historically, the government has utilised naming and publicising overcharging as a pricing regulation tool. During the introduction of the GST in 2000, the government granted the ACCC the power to declare certain industry prices as overcharged. Similar powers have been enacted in recent years to lower insurance prices in Victoria and New South Wales. The ACCC currently lacks this authority, hindering its ability to address overcharging in sectors such as early childhood education and care and NDIS providers. The efficacy of naming and shaming as a tactic was shown through the PGI, as part of which lamb prices were identified as unjustifiably high - which resulted in a price reduction. Reinstating this power, with appropriate safeguards, would enable the ACCC to effectively address pricing concerns and mean that consumers would not be required to rely on independent inquiries occurring to address pricing issues. The Australian government needs to act on high prices, to investigate their nature and causes and, where possible, their remedies. The remedies do not need to include price controls - there are many more options available.

The NCPs should be updated to reflect the risk to workers and consumers posed by corporate price abuse and create a framework for the following measures identified by the PGI as necessary:

- Price Gouging should be unlawful: the Australian Competition and Consumer Act should be amended to make it an offence to charge excessive prices.
- Power to name and shame: The ACCC should be permitted to name and shame businesses that overcharge, as they were able to when Howard introduced the GST. A permanent Prices Commission: the Government should establish a Competition and Prices Commission - separate from the ACCC - which has the power to unilaterally examine high prices and pricing practices. The purpose of the Commission would not be

to regulate prices but to investigate them and remedy anti-competitive behaviour which causes high prices.

- A stronger ACCC: the ACCC should have power of its own to initiate price and market studies to stamp out unlawful and unconscionable behaviour.

Competitive Neutrality

The current NCPs pay great attention to competitive neutrality and see it as a desirable objective for government policy. Attention must be given however to how this has manifested in the decades since the NCPs were adopted.

Competitive neutrality requires that government business activities not enjoy a net competitive advantage over competitors as a result of public ownership.³ While the principles only apply to the business activities of publicly owned entities,⁴ it is a significant scope of government activities that includes the provision of disability employment and hearing services. What is considered a business activity includes (but is not limited to) activities that charge for goods and services, where actual or potential competitors exist either in the private or public sector, and managers have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.⁵ The specific objective of the policy is to create contestable markets in the provision of goods and services.⁶

In the two decades since the competitive neutrality was adopted, it has become clear that the result of competitive neutrality is the reduction and dismantling of public provision. Competitive neutrality cannot be separated from corporatisation, introduction of contestability to and the subsequent privatisation of public services.

We acknowledge that competitive neutrality does not explicitly require privatisation or outsourcing⁷, however, the experience has been that the logic of competitive neutrality tends towards privatisation. On this basis, the inclusion of competitive neutrality in any new version of the NCPs should be clear that it makes no argument against public ownership or provision of services.

³ Department of Finance (2015, March). Contestability Programme Guidelines. Retrieved from http://www.finance.gov.au/sites/default/files/Contestability_Programme_Guidelines_March_2015.pdf

⁴ Productivity Commission (2001). Competitive Principles Agreements. Retrieved from <http://www.pc.gov.au/inquiries/completed/access/files/ncp-agreement.pdf>

⁵ The Treasury (2004). Australian Government National Competition Policy Annual Report - Covering the period 1 April 2003 to 30 June 2004. Retrieved from https://archive.treasury.gov.au/documents/945/HTML/docshell.asp?URL=National_Competition_Policy_AR-03.htm

⁶ The Treasury (2004), Australian Government National Competition Policy Annual Report - Covering the period 1 April 2003 to 30 June 2004. Retrieved from https://archive.treasury.gov.au/documents/945/HTML/docshell.asp?URL=National_Competition_Policy_AR-03.htm

⁷ National Competition Council (1999, 30 June). Second Tranche Assessment of Governments' Progress with Implementing National Competition Policy and Related Reforms - Volume 1. Retrieved from <http://ncp.ncc.gov.au/docs/AST2V1Pb-004.pdf>

Public interest test

As the Discussion Paper outlines, the public interest test under the NCP lacks clarity and it is unclear how and when it should be applied. It also fails to recognise that there can be instances when departing from the Competitive Neutrality Principle, (as outlined above) or the existence of Public Monopolies are in the public interest. This is concerning because, as above, the economic circumstances have changed significantly from when it was first drafted and there exists today a clear need for a precise and well-outlined public interest test. The current suite of competition legislation and regulations do not adequately address and protect the public interest, for example, with regard to corporate mergers. As the PGI found, Australia's lack of a compulsory pre-merger notification law distinguishes it from many OECD countries. This omission can lead to tactical behaviour by businesses, including non-notification, delayed or incomplete information provision, and other obstructive tactics. These actions hinder the ACCC's ability to effectively apply merger law and may exclude Australia from international merger coordination efforts.

Under Australia's current system, the ACCC bears the burden of proving in court that a merger would likely substantially lessen competition. This can be challenging, as the law focuses on future outcomes rather than past events. While the impact of many mergers is reasonably clear, some have uncertain or unknown consequences, allowing anti-competitive mergers to proceed. Additionally, large businesses often invest significant resources in defending mergers, further complicating the ACCC's task. Given the compelling evidence of growing market concentration stifling competition, a more appropriate approach would be to adopt a precautionary principle, placing the onus on merger applicants to demonstrate that the transaction is unlikely to have anti-competitive effects.

The current merger law's focus on "substantial lessening of competition" has also proven problematic. It replaced a previous test that focused on dominance, which, while limited in scope, had the advantage of emphasizing industry structure and immediate impact. The current test's focus on future conduct and long-term outcomes can make it difficult to prove anti-competitive effects.

A revised legal framework should reintroduce appropriate structural language while addressing the issue of small acquisitions that may have long-term anti-competitive consequences. The recent trend of "killer acquisitions" by digital platforms highlights the need for a legal mechanism to prohibit mergers that serve no purpose other than to expand existing market power.

This is just one of the areas where a clearer articulation of, and legislative action to pursue, the public interest would make the NCPs more relevant to the modern context and deliver significant benefits to the Australian economy.

Competition Reform Themes

Overall focus of the themes

Similar to the NCPs, the CRTs suggested by the Discussion Paper focus heavily on how Government, through legislation and regulation, might stifle or prevent effective competition in markets. As outlined above, this concern seems out of step with the reality of the modern economy, where much of the anti-competitive behaviour stems from corporate actors. The themes also raise many questions about markets where Government's desirable role might better be understood as market steward than as an enabler of competition – as will be outlined further later in this submission.

The CRTs focus on government action to stifle competition is inappropriate in many markets as they are no longer, if indeed they every were, the primary source of anti-competitive forces. In other markets, it is our contention that a focus on competition, rather than stewardship and the assurance of essential service delivery, would represent a misunderstanding of the needed role of Government. More detail on these issues will be provided below, but their very existence is indicative of the nuance required in developing and applying any reforms in this space.

Responses to specific themes

Net-Zero

The identification of net-zero as a space needing particular attention with regard to competition is both welcome and concerning. We welcome the policy attention that the net-zero transition is receiving from Government and appreciate that the Government's prioritisation of this means that it will necessarily be at the forefront of many reform agendas – including this one. However, we are concerned that a focus on fostering competition in this space may result in a lost opportunity to deliver other tangible benefits.

The Government clearly has a number of roles in the energy transition to net-zero emissions. It is a regulator, a market steward and of course, a significant purchaser and source of indirect funding. The market steward role clearly requires Government to ensure that the net-zero market is competitive and that it is made up of high-quality providers competing on quality and service and some competitive reforms may be necessary to achieve this. It is our view however that Government should hold a greater priority than competition in this space, namely that the net-zero transition achieves its Paris Agreement-aligned goals while delivering the greatest possible benefit to Australian workers and our broader economy. This requires a modern industry policy that is effectively building new markets (e.g. green hydrogen) and assisting to accelerate others (e.g. critical minerals processing). This is critical to creating and sustaining the social license necessary to accomplish the net zero transformation. That transformation must be something that happens for workers and communities, not to them. A focus on market competitiveness alone will not address the social license challenge, and may well exacerbate it, insofar as it fosters a “race to the bottom” on labour, environmental, and community engagement practices. The massive expansion of the net-zero space, and government's clear roles as regulator and purchaser, creates an opportunity for the industry to be built, and tax dollars to be spent, in a

manner which ensures the creation of stable, well-paid jobs for Australian workers and which fosters the creation and expansion of local businesses. We must be cautious that our aim does not become competition for its own sake – an outcome which has so often resulted in insecurity for Australian workers and the siphoning of tax-payer dollars and profits offshore into the accounts of large multinationals.

In developing principles for the fostering of competition in this sector, care should be taken to ensure that they do not preclude or create a narrative against the Government taking action to direct net-zero funding towards the greatest community and economic benefits, as the ACTU has previously called on the Government to do.

Additionally, Australia has a clear and compelling opportunity to build comparative advantage in many key sectors in the net zero transition, but government policy is required to facilitate this, for example through direct government intervention in the form of the construction of common user facilities that markets alone will either not provide or won't provide in a timely manner. These actions are necessary to ensure that Australia is able to seize the opportunity of the net-zero transition and competition policy should not undermine them. Energy markets in Australia are still highly concentrated and flawed, given mixed success in trying to privatise what are mostly natural monopolies. There is a case, as part of a fast and fair transition in the context of the history of public ownership of electricity systems and assets in Australia, for an ongoing and expanded role for public ownership in this sector and any consideration of competition in this sector should be clear that this can be a desirable option.

Labour Mobility

The discussion paper rightly identifies that increasing domestic labour mobility should be an aim of Government going forward however, in identifying possible solutions to this issue, the Discussion Paper proposes a combination of sensible solutions and dangerous ideas. While suggestions such as improving the recognition of migrant qualifications and changes to restraint of trade through non-compete clauses in employment contracts are welcome, suggestions of reductions in licencing requirements should not be considered.

The current skills assessment system for migrants in Australia is in need of reform. As it stands, the system often categorically fails to deliver effective, affordable and efficient services to migrant workers, who often, due to the difficulty and cost of having their qualifications and skills recognised in Australia, are employed in jobs well below their skill level. There are also significant gaps between the services being delivered by some assessment authorities and industry expectations of the standard of skills assessments for workers.

Below are a set of principles that unions have developed which we believe should guide any reforms to this sector.

- **A single, unitary system.**

- All migrants who wish to have their skills assessed against Australian qualifications should use the same system that operates in the same way – regardless of their specific visa or location (onshore or offshore).
- RPL processes should not be used for migrant workers outside of this process – even for partial recognition.
- **Tripartism as the backbone**
 - Skills Assessment Authorities should have the backing of relevant union and employer bodies (through the relevant JSC) for the industries they cover.
 - Authorities, in the event they refer migrants on for additional training, should only do so to industry-approved providers.
- **Well-regulated and transparent**
 - Providers of skills assessments should:
 - Be required to provide a certain suite of services as part of the contract.
 - Be required to provide meaningful feedback to migrants about which criteria they meet or do not meet, why and how they can be rectified.
 - Recognise the right of unions to represent their members in these matters and, with the migrant's consent, discuss their assessment and training needs with their union.
 - Costs to users should be capped as part of the contract. Capacity to pay should be considered, with subsidies potentially forming part of the response.
 - Consideration should be given to requiring NFP status for assessment authorities.
- **Robust, effective assessment**
 - Skills assessments must have as their fundamental aim the assessment of skills and training against Australian standards. This includes considering:
 - The course, provider, country and cultural context in which training took place.
 - How the qualification taken assessed skills and how that compares to Australian assessments.
 - How qualifications which are not offered in Australia can be mapped to Australian qualifications, if appropriate.
 - Effective practices in some industries, such as the use of compulsory industry-approved context gap training in the electrical industry following

successful assessment, should be considered for use in other high-risk industries.

Addressing the deficiencies in this system is clear win-win, in that migrants have a greater suite of economic opportunities and can pursue their career of choice more easily and in that the Australian economy benefits from a new source of skilled workers who are already living in Australia.

Non-compete agreements and other restraint of trade clauses in employment contracts also represent a significant barrier to labour mobility which need to be addressed. The use of non-compete clauses has increased (both in Australian and overseas) in recent years to the point where about one-in-five Australian workers are covered by a non-compete - and it's no longer just highly paid executives or special categories of workers that are covered by them.⁸ A survey by the e61 Institute found that around half of the Australian workforce was subject to a restraint of trade of some kind, with 22% of workers being subject to a non-compete.⁹ The survey also found that non-compete clauses: 'now apply to outward facing customer roles – childcare workers, yoga instructors and IVF specialists – in addition to senior roles in law, finance and business services'.¹⁰

'The existing law and practice in respect of the use of non-competes in Australia is manifestly unfair and contrary to the public interest. In most cases the parties to a non-compete cannot be certain of enforceability without a judicial determination and such uncertainty weighs more heavily on employees than employers. For many employees the mere threat of litigation is enough to secure compliance, irrespective of the enforceability of the non-compete. Further, the research literature suggests that non-competes are associated with the reduced employee mobility, with consequential negative impacts on wages and productivity.'¹¹

It is difficult to empirically quantify the precise effect on restraining trade that these clauses have. This is due to the "*in terrorem*" effect of them, whereby, as the court observed in *Rita Personnel Services v Kot*:¹²

"For every covenant that finds its way to court, there are thousands which exercise an in terrorem effect on employees who respect their contractual obligations and on competitors

⁸ Ross, Ian, Non-compete clauses in employment contracts: The case for regulatory response, ANU, https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies_crawford_anu_edu_au/2024-03/complete_wp_i_ross_mar_2024.pdf, 1 ;

⁹ <https://e61.in/the-ghosts-of-employers-past-how-prevalent-are-non-compete-clauses-in-australia-media-coverage/>

¹⁰ <https://e61.in/the-ghosts-of-employers-past-how-prevalent-are-non-compete-clauses-in-australia/>

¹¹ https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies_crawford_anu_edu_au/2024-03/complete_wp_i_ross_mar_2024.pdf, 1

¹² 229 Ga. 314,191 S.E.2d 79 <https://case-law.vlex.com/vid/richard-p-rita-personnel-890540050>

who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.”

However, recent ABS data showed that amongst employers surveyed on their use of restraint of trade clauses: ‘Non-disclosure clauses were the most common restraint clause, used by 45.3% of Australian businesses in 2023. The next most common was the Non-solicitation of clients (25.4%), followed by Non-compete (20.8%) and Non-solicitation of co-workers (18.0%)’.¹³ Most employers who reported using any restraint of trade clauses also reported using those clauses across all or a majority of their workforce.¹⁴

Restraint of trade clauses, and non-competes particularly, are largely unenforceable and needlessly prevent the free movement of labour and as outlined above, apply to a far wider range of workers than is typically imagined. Banning these clauses would represent an easy first step in improving labour mobility within the existing workforce. This should apply to all post-employment restraints of trade, during employment restraints on part-time and casual staff which prevent them seeking other employment and the building of restraint clauses into redundancy processes. This would not only support workers to find work that was better paid, more rewarding and that better matched their skills and experience, but it would also lead to significant improvements in economy wide productivity as more dynamic firms were able to pick up good staff.

However, the suggestions put forward by the discussion paper are not all workable. The Discussion Paper refers to a previous Productivity Commission finding that labour market mobility would be improved if licencing requirements for some occupations were loosened or lowered. While this may be the case, it pre-supposes that licencing requirements exist for either no good reason or exist purely to restrict labour mobility. Licenced occupations are not a continuation of the guild houses of Europe, jealously guarding the secrets of their trade and ensuring knowledge is kept within certain families. Licenced occupations are licenced because allowing workers to undertake those occupations without the requirements of the licence would represent an unacceptable risk to the quality of their work, of their safety and of the safety of the public. There are also some occupations which currently have no minimum requirements or registration which unions believe would benefit from such and we are deeply concerned that such measures taken to improve quality, and safety might be opposed on a ‘labour mobility’ basis. Unions strongly oppose the changing of any licencing or registration requirement that is

¹³ <https://www.abs.gov.au/articles/restraint-clauses-australia-2023>

¹⁴ <https://www.abs.gov.au/articles/restraint-clauses-australia-2023>

driven by any motivation other than ensuring the expertise and safety of workers in the occupation. Shortages of workers with these skills are better dealt with through investment in the training system and other reforms.

Human Services

The human services sector delivers critical and necessary services to the Australian populace. While competition may have some role to play in this sector, like in net-zero, it is critical that this role is not an unfettered one. Some of the measures the Discussion Paper considers are clear wins, such as the reduction of asymmetrical information and the creation of more informed human services consumers. It is clear that there are sections of the for-profit human services sector that are currently exploiting this informational imbalance and addressing that issue is the best way to make the competition we already have work more effectively. Human services however is also a quasi-market, in that the current level of competition and the sophistication of the providers as businesses can be very low. Quasi-markets must be treated with care as they are more fragile than other markets and can be fertile grounds for corporate anti-competitive behaviour. Market failure in these sectors can have very serious consequences for vulnerable people.

It is encouraging that the Discussion Paper appears to acknowledge this reality, stating “that a laissez-faire approach to competition and contestability in human services markets is unlikely to deliver better outcomes for service users and the community” which is hardly a revelation to most people familiar with the industry but represents a significant departure from the direction of the NCPs as they are now written.

We must be cautious to consider how competition is implemented in this sector as we have seen in the past that even pursuing important and praiseworthy principles such as user choice and control can have unintended consequences. We saw, during the early days of the NDIS, some providers respond to the valid demands for choice and control by NDIS participants by dramatically increasing the insecurity of their workforce. It was decided by those employers that if NDIS participants could choose to receive a service at a time of their choosing, they would ensure that they only needed to employ a worker for that precise time – a recipe for insecurity. This has also resulted in a significant increase in the use of ABNs by disability workers.

The NDIS experience has also shown the importance of government service provision in providing competition in quasi-markets. Service provision of some NDIS services, particularly in regional areas, can be very thin and the move by state government to exit many of these markets has often resulted in a far less competitive market – sometimes with only a single provider remaining. The CRTs should acknowledge this important role for government businesses or direct service provision.

Aged care too has seen the race to the bottom on costs and staffing that profit-driven competition can create. This has resulted in under-staffed facilities with staff driven to breaking point and residents receiving sub-standard care. Competition can, where utilised correctly, drive efficiency and innovation but it can equally hollow out workforces and leave consumers confused and receiving sub-standard care.

Public employment services provide a good example of how competition can fail and the broader problems with contestable quasi-markets. It is the Commonwealth Government's largest procurement outside Defence and over \$7 billion is forecast to be spent over the four years from 2022-23 to 2025-26. Despite this eye-watering amount being spent, the Select Committee on Workforce Australia Employment Services found that *"the employment services system has largely failed to improve employment outcomes for jobseekers, or more broadly to boost their capacity for social and economic participation"*.¹⁵ Instead of better outcomes, competition has meant less personal servicing and less qualified staff with higher workloads. Private providers have also been caught engaging in unethical behaviour to skim as much money as they can from taxpayers and have been forced to repay millions of dollars after making faulty claims.¹⁶ It is no surprise that few businesses use the system to fill vacancies.

The application and enhancement of competition in a sector as critical as human services needs to be very carefully considered and no significant steps should be taken without thorough and genuine consultation and co-design with unions, user groups and sector stewards. It should be considered, as part of this process, that an outcome of this consultation is likely to be that there is an ongoing role for public ownership and provision of services and this outcome is neither anti-competitive nor undesirable.

In summary

Unions welcome the opportunity to see the NCPs reviewed in order that they become more relevant and responsive to the realities workers and consumers face today. Competition policy is no longer a fight to restrain dominant government businesses and government-owned monopolies from controlling their markets. Market concentration, anti-competitive behaviour and exploitative pricing practices represent real and significant threats to the well-being of Australians, and it is critical that this is recognised.

¹⁵ Australian Parliament, *Workforce Australia Report*, 2023
https://www.aph.gov.au/Parliamentary_Business/Committees/House/Workforce_Australia_Employment_Services/WorkforceAustralia/Report/Chapter_2_-_Critique_and_analysis_of_the_current_Australian_system

¹⁶ Cait Kelly, Workforce Australia job agencies forced to return \$8.5m in taxpayer funds after huge surge in faulty claims, *The Guardian*, 12 Feb 2024 [Workforce Australia job agencies forced to return \\$8.5m in taxpayer funds after huge surge in faulty claims](https://www.theguardian.com/australia-news/workforce-australia/article/2024-feb-12-workforce-australia-job-agencies-forced-to-return-8.5m-in-taxpayer-funds-after-huge-surge-in-faulty-claims) | Welfare | *The Guardian*

It is also our view that the CRTs are generally well-conceived though care must be applied in how they are considered and operationalised. Competition can be a powerful tool in the hands of policymakers and can deliver real benefits. It is not however a silver bullet and should be applied judiciously and always with the aim of creating better outcomes for workers and consumers – not for its own sake.

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