



30 September 2024

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

By email: nationalcompetitionpolicy@treasury.gov.au

Dear Director

RE: Revitalising National Competition Policy consultation paper

Thank you for the opportunity to comment on the Government's Revitalising National Competition Policy (**NCP**) consultation paper (**Paper**). This is a joint submission made on behalf of CHOICE, the Consumers' Federation of Australia and ACCAN.

Our organisations welcome the Government's goal of increasing effective competition across the economy. However, we urge the Government to treat the primary goal of competition policy to be improving outcomes for end users in markets, rather than to promote competition as an end in itself. Policy settings should lead to markets that work for all consumers (or other end user participants) and account for the limits faced by consumers, including those experiencing vulnerability or disadvantage. We address selected questions from the Paper below, but urge this message to be a focus for the whole of the review.

Recommendation 1

The review of the National Competition Policies should be led by the goal of prioritising effective outcomes for the consumers, or end users, of markets, and account for distributional impacts.

Questions 1 and 2: Legislation Review Principle

The Legislation Review Principle requires reworking. It should be restructured to facilitate a more balanced review process, with determining the impact of delegated legislation or regulation on end users as the priority. Its current design prioritises the voices of better-resourced actors, and therefore is skewed towards findings that promote deregulation and pro-industry outcomes regardless of whether they are good for end users of markets, particularly consumers.

The Principle requires the review of delegated legislation or regulation under various subordinate legislation acts. In substance these processes require parties to submit evidence to the effect that regulation continues to address a defined policy problem and that the policy setting being reviewed remains fit-for-purpose and provides the greatest net benefits of available policy options.

These processes are often predicated on parties to a consultation having the requisite resources and technical skills to quantify relevant costs and benefits associated with policy options and to communicate these effectively to government entities undertaking reviews. This assumption is untenable, with consumer representatives having extremely limited capacity to provide evidence or research to demonstrate the benefits associated with existing or proposed regulatory settings.

Accordingly, while the principle appears theoretically sound, in practice it is skewed, as in the absence of quantifiable community and consumer benefits, and quantifiable business costs - deregulation will almost always appear to provide greater net benefits. This does not reflect the utility of deregulatory policies, but rather an inherent assumption that deregulation will always produce an optimal outcome for all market participants, which is an untested and frequently erroneous claim. It represents a substantive failure of measurement and is in conflict with the underlying theoretical framework underpinning regulatory impact assessment.

Large businesses and industry bodies will always be better placed to contribute data to regulatory impact assessments, and better support their interests. Consumer representatives operate on limited funding and are rarely in possession of high-volume statistical information – though will have detailed qualitative data and evidence of the real experiences of consumers in markets. Reviews of consumer protection regulation that seek to balance their benefits against competitive restrictions should be designed to better account for this discrepancy.

Recommendation 2

Amend the Legislation Review Principle so regulatory impact assessment processes account for the reduced capacity of consumers and consumer representatives to provide data and evidence of benefits to regulation, compared with large businesses and industry organisations.

We also urge the Government to consider its role in funding consumer groups to properly participate in competition policy processes. In this regard, we welcome the provision in the recently released merger reforms that give the Treasurer discretion to fund consumer organisations to participate in merger decision reviews by the Competition Tribunal. We ask that the Government consider whether there are further mechanisms that can be established within NCP to ensure proper consumer group participation across sectors.

Recommendation 3

The Government should explore ways to make it easier for consumer organisations to participate in all competition related consultations, including by making funding available.

Questions 3 and 4: Competitive Neutrality Principle

We agree with the transparency issues with the Competitive Neutrality Principle identified in Treasury's 2015 Competition policy review (**2015 Review**) and referred to in the Paper. Complaints are still virtually the only trigger for review or assessment of compliance with competitive neutrality policies across governments.

We note that the Australian Competitive Neutrality Complaints Office is currently housed in the Productivity Commission, and see value in establishing an expanded governance and reporting framework to provide oversight and transparency of the application competitive neutrality policy across governments.

Recommendation 4

Introduce a governance and reporting framework to improve transparency around the implementation of the Competitive Neutrality Principle.

Questions 7-9: Access principle

We support the proposal on page 23 in the Paper to explicitly update the Access Principle to address modern infrastructure access issues.

The Access Principle provides the basis for access to monopoly infrastructure services. However, despite access frameworks being defined by reference to 'infrastructure services' and there being no explicit limitation of this to physical infrastructure, contemporary infrastructure services have not been captured by the Access Principle.

The Access Principle has consequently been applied in an unduly narrow fashion, by reference to historical rather than contemporary conceptions of infrastructure. This approach is not consistent with the efficient use of infrastructure services and consequently, the Access Principle should be updated to align with modern conceptions of infrastructure, which include digital platforms and monopoly software platforms.

Recommendation 5

Update the Access principle to ensure that it provides a sufficiently clear mandate to allow for fair access to be provided to non-physical assets that are controlled by monopolies/oligopolies.

Questions 17-19: A purpose statement for the Principles

We strongly support the inclusion of a clear purpose statement to guide the interpretation and application of the Principles. We agree with the 2015 Review's view that the end goal of competition policy should be to improve consumer outcomes. The statement should reflect this, and also make explicit reference to measuring consumer outcomes with regard to distributional impacts and the real-life experiences of consumers, such as those experiencing vulnerabilities or barriers to empowered engagement in a market. This will require assessments of success that are based on broader outcomes than whole of economy data, such as seeking to support assessments with qualitative data and evidence.

We are also concerned that nearly all the potential outcomes from these reforms set out in the fact sheet published with the Paper are written from the perspective of improving business outcomes. Consumers should not be an afterthought in competition.

Recommendation 6

The National Competition Principles should be led by a clear purpose statement that clarifies that their overarching goal is to improve the consumer outcomes in markets, including for those experiencing vulnerability or whose agency in markets is otherwise constrained.

Questions 23-25: Consumer empowerment through the principles

We agree that the Principles should be improved to promote a greater focus on consumer empowerment. However, amendments also need to have sufficient nuance to recognise the limits to who consumer empowerment will help. The Principles must recognise that segments of the population experiencing vulnerability or disadvantage are very unlikely to be in a position to effectively exercise choice to their benefit in many markets. Those unable to do so are also often the people most in need of support in the marketplace. It is not sufficient for competition policy to disregard or leave these people behind – the policy should instead encourage interventions to help address these market shortcomings.

More acute examples of these limits can be found in markets for human services. A 2018 report commissioned by ACOSS and CHOICE identified that consumer choice was near non-existent in many human services markets. Factors such as limits on decision making capacity, information asymmetry and an absence of price signals stripped consumers of any theoretical right or ability to make informed choices.¹

These findings still apply equally today. Just a few examples of major markets where consumers are significantly hampered by these factors include:

- private health insurance, where complex product disclosure statements and completely opaque out of pocket fees make value for money impossible to ascertain; and
- services under the NDIS, where consumers can face various barriers to changing services and high, opaque fees can quickly eat up the funding available to them.

The Principles should make particular reference to the limits of consumer empowerment in human services.

Recommendation 7

Ensure that the principles:

- *make explicit reference to the limits of consumer empowerment, particularly in markets for human services and similar; and*
- *encourages market interventions that aim to pass the benefits of competition onto consumers when they are not in a position to exercise effective choice.*

¹ Competition Policy & Human Services: Where theory meets practice, 2018, R. L. Smith and A. Merrett, Commissioned by the Australian Council of Social Service (ACOSS) and CHOICE, available at:

<https://www.acoss.org.au/wp-content/uploads/2018/09/ACOSS-Choice-Final-Report.pdf>

Questions 26-28: Market design and stewardship

We welcome the recognition that Governments play a significant role in ensuring markets work well for consumers, including as regulator, funder or provider of goods and services. For too long, the orthodox approach to competition policy has put undue faith in the capacity of markets to solve all problems. This overemphasis was also highlighted in the 2018 Report commissioned by CHOICE and ACOSS, which highlighted that Governments often overestimate the benefits of competition and choice in human services and underestimate the regulation needed to make sure the market works safely for consumers.²

We support a new market design and stewardship principle that recognises the important role Governments play in making sure crucial markets work for consumers. As noted earlier, the focus of this should be on the desired consumer (or other end user) outcomes, rather than the stewardship or promotion of competition as an end in itself.

Recommendation 8

Introduce a new market design and stewardship principle into the Principles that recognises the need for Government to ensure markets are working for end users, and to intervene where they are not.

Further information

Thank you for considering our submission. To discuss this further, please contact Tom Abourizk, Head of Policy at CHOICE, at tabourizk@choice.com.au.

Yours sincerely,



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Director, Campaigns and Communications
CHOICE



Gareth Downing
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² Ibid.