

Revitalising National Competition Policy

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Introduction

Australian Chamber of Commerce and Industry welcomes the opportunity to contribute to the consultation of Revitalising National Competition Policy.

A diverse and dynamic business environment is essential to stimulate competition. It encourages individual businesses to innovate and find ways to work more efficiently. Competition drives lower prices, better quality products and services, and more choice for consumers, while increasing prosperity and welfare of all Australians. For competition to stay healthy, businesses must act in a fair and ethical way towards competitors and suppliers.

The landmark National Competition Policy emerged in the 1993 following the Hilmer review. It was agreed to by all the Australian, state and territory governments. Two decades later, the 2015 Harper Review revisited the issue of Australia's competition policies to determine if they were fit for purpose given the opportunities and challenges Australia was facing.

Implementation of the majority of the Harper review's recommendation has been slow. While most of the recommendations relating to competition law from the Harper Review were implemented, recommendations relating to competition policy and governance structures remain outstanding.¹

ACCI welcome the latest undertaking to review competition policy in the light of new markets that have emerged in recent years, including digital technologies and the net-zero transformation.

While a full comprehensive review is timely, a decade since the last review, it is crucial that these efforts align with the broader national competition policy. Any new examination of national competition policies should build on these earlier reforms and recommendations of these past reviews. It must also take into consideration and align with other processes currently underway, such as merger reforms review and inquiry into the supermarket code of conduct to address potential imbalances in market power.

Australian businesses are already over-burdened with regulation, so it is important that the current reviews don't just add new regulations that constrain competition and smother productivity. What is needed are reforms that reduce the regulatory burden on business and provide the structure, flexibility and entrepreneurial culture to create the dynamism, resilience and competitiveness needed for businesses to thrive.

An outlier in progress on competition policy reform is the nexus between the Commonwealth and state governments. In November 2015 the Australian Government [responded to the Competition Policy Review](#), *by committing to implement the majority of Harper review's recommendations and highlighting that all levels of government were working together to*

¹Bogaards 2019, Competition policy – further required, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/CompetitionPolicy

develop a new national framework aimed at fostering innovation and promoting economic growth.²

By December 2016, some governments - New South Wales, Western Australian, Tasmanian, Australian Capital Territory and Northern Territory governments signed the [Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms](#). However, the Queensland, Victorian and South Australian governments did not sign the agreement.³

Since 2016, there have been three Intergovernmental Agreements (IGAs), dealing with National Competition Principles (CPA), a Conduct Code (CCAg), and an implementation agreement. However, due to a lack of commitment by a number of states (non-signatories), there has been little progress in delivering reforms necessary to better harmonise regulation and apply competition laws uniformly across the states. This is critical to reducing compliance burden on business, particularly those operating in multiple jurisdictions, to increase competition and lift productivity.

To ensure the success of the National Competition Policy, it is critical that it gains support from all governments, at both at federal and state level. Without full cooperation, the intended reforms to increase competition and boost productivity will continue to stall.

The need for National Competition Policy

An effective competition framework should be focused on:

- improving productivity
- increasing market efficiency and
- delivering better prices for consumers.

Changes to the national competition policy needs to be guided by specific evidence of what is causing poor outcomes, what failed within the current framework and assessing the flexibility of the existing regulations to deal with the emerging competition concerns.

The nexus between competition law and workplace relations regulation has also raised concerns. In particular, multi-employer bargaining is contradictory to the priorities of the Treasury in relation to restraint of trade clauses, and ACCI would assert that they are anti-competitive.

These enterprise agreements result in multiple employers, with 'clearly identifiable common interests' – i.e., competitors in the same industry or geographical area – having the same wages, terms and conditions applied to their workforce, sometimes without their consent. The Minister for Employment and Workplace Relations indicated as much (emphasis added):

“The single-interest stream is still important. You’ll get – and not only for workers; you’ll also, for example, get a series of employers – take industries like sheet metal or air-

²https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/CompetitionPolicy

³https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/CompetitionPolicy

conditioning where the industry standard is well above the award and multi-employer bargaining allows the different competitors to have an agreement where they're not competing on a race for the bottom on wages, where people aren't just undercutting each other, that standard above-award industry standard gets reflected and then they compete on quality and everything else."⁴

This 'wage-fixing' approach presents a 'wage-fixing' problem that the Treasury Issues Paper on Non-Compete Clauses and Other Restraint Clauses argues can inhibit competition. The Issues Paper identified wage-fixing as "reducing competition between businesses".⁵ Hence, in the context of 'revitalising competition policy', such concerns are relevant here also.

The then Minister for Employment was, in effect, advocating for a form of wage-fixing to be implemented by employers and employees. He stated that employers will not be competing on wages under a multi-employer agreement. The Treasury should investigate whether these changes, and changes empowering the Fair Work Commission to set minimum standards for independent contracts in the road transport and "gig" sectors are potentially implementing an uncompetitive practice, namely that they may result in wage-fixing, and investigate whether those legislative changes need to be repealed to prevent anti-competitive outcomes and revitalise national competition policy.

Competition and business dynamism, when measured at an aggregate level, have clearly declined. Examination of particular sectors could help identify where consumers face limited product choice, where contestability is lacking, and where policy changes could improve market outcomes.

The Productivity Commission cautioned Government in their 5-year Productivity Inquiry: *A competitive, dynamic and sustainable future* inquiry report against creating unnecessary barriers to competition that could prevent markets from achieving gains in efficiency and productivity.

For example, in emerging areas such as climate change, the report emphasizes that governments must be particularly cautious not to introduce new barriers to contestability. By adopting technology-neutral approaches and ensuring consistent pricing for mitigation efforts, governments can promote a more competitive market environment. Arbitrary structures imposed by government against particular sources of fuel have the ability to impose significant costs on the economy. Given the enormous costs of transitioning to a net zero emissions economy, it is critical that the least cost pathways are available to utilise.

The improvements to competition dynamism will come through by enabling competition policy and workplace relations regulations work together. Similarly, the report identified that there are risks in designing specific competition rules for digital platforms.

Excess regulation brings high costs and those operating in such an environment will never be able to produce outcomes as efficient as a well-functioning market. Regulatory compliance is inherently time consuming to administer and requires considerable expenditure of resources.

⁴ Interview - ABC RN Breakfast with Patricia Karvelas, The Hon Tony Burke MP, 08 November 2022.

⁵ Issues Paper on Non-Competes and Other Restraint of Trade Clauses, the Department of the Treasury, page 32.

Regulation can be accompanied by unintended, often detrimental consequences, not only to consumers but the public interest.

Revitalising the National Competition Policy

The consultation paper identifies a number of principles to provide a direction to how the government through their actions and decisions, can remove impediments to and avoid restricting competition.

Following the 2015 Competition Policy Review (Harper Review), most recommendations relating to competition law have been implemented, but little progress has been made on recommendations relating to competition policy and governance structures.⁶

Clause 3 of the CPA, known as the Competitive Neutrality, aims to provide a level playing field between public and private enterprises, ensuring government businesses do not enjoy a net competitive advantage simply due to government ownership.

The introduction of competitive neutrality has gone some way to limiting the effect of the advantages GBEs receive through direct subsidies or credits from the government, and exemption from certain regulatory regimes. However, issues remain. The competitive neutrality is not enforceable in a court of law, instead provided to ministers and treated as a matter of public policy. Such recommendations are routinely ignored at the state and commonwealth level.

The different jurisdictions have assumed separate competitive neutrality mechanisms and have implemented their own processes for the dealing with complaints. Each jurisdiction is free to create policy to address their relevant issues.

Problems arise when each jurisdiction creates its own unit to deal with a complaint. These typically sit within a government department or agency. Such units are able to make recommendations to the Australian Government Competitive Neutrality Complaints Office (AGCNCO), however, these recommendations are not enforceable.

In most cases, there is no action required by law for a breach of competitive neutrality principles. In many cases, businesses are then forced to define their complaint within the confines of prohibitions found in Part IV of the CCA, such as misuse of market power – which of itself is often difficult to prove.

The Harper review recommended a review of competitive neutrality. One such review was initiated at the Commonwealth level in 2017, but was not completed. Similar reviews were initiated and subsequently abandoned in some states. Only New South Wales is continuing to undertake its review of NSW competitive neutrality regulations.

The Australian Government Competitive Neutrality Complaints Office (AGCNCO) in 2011 found that NBN Co was in potential ex ante breach of competitive neutrality requirements. In 2022, NBN Co was again found breaching the competitive neutrality principles. In the absence of a

⁶ Productivity Commission, National Competition Policy Analysis, <https://www.pc.gov.au/inquiries/current/competition-analysis/call-for-submissions/competition-analysis-call.pdf>

proper framework and unenforceable recommendation, NBN Co, continues to be in breach of the CPA principles.

Structural reform of Public Monopolies Principle/restraining monopoly pricing behaviour

Competition policy should set a level playing field for private businesses and Government Business Enterprises (GBEs). If left unregulated GBEs can produce monopoly outcomes by preventing new entrants or inefficient pricing. Monopolies typically do not have the same incentives to maximise output or operate efficiently as firms in a competitive market, which has flow-on effects for consumers and businesses.

GBEs often operate in industries where there are natural monopolies. They can also compete with service providers in other parallel sectors, such as Australia Post competing with parcel delivery services or public passenger rail in competition with private bus services.

More recent concerns are government investments in competitive markets, supressing private sector investment. For example, government investment in the ambitious Snowy 2.0 program, is crowding out private sector investors that are potentially more efficient in electricity generation. This public investment is disrupting price signals, as the true cost of Snowy 2.0 will not be reflected in the price charged for the electricity produced. The costs for the project had blown out of proportion, what was expected to be a \$2 billion program has escalated to being a \$12 billion, with the final cost once completed potentially of \$20 billion.

A National Competition Reform Program

The five provisional reform themes identified in the consultation paper are appropriate to competition problems, but require productivity enhancing reform to help achieve their respective policy objectives and create net public benefit.

Theme 1: Promoting a more dynamic business environment

The regulatory environment in Australia has the potential to influence firm behaviour to both promote competition and limit anti-competitive conduct. The increasing regulatory focus of the government, particularly the shift from voluntary reporting and codes of conduct to mandatory regulatory requirements, is weighing down business. This is reducing flexibility and stifling the entrepreneurial culture needed to create the dynamism and competitiveness.

For example, under the proposed new merger reforms, all mergers will be required to be assessed by the ACCC, with the ACCC given greater powers to identify and scrutinise transactions that pose a risk to competition, consumers, and the economy. This takes what is a voluntary process and makes it mandatory.

It is claimed this will reduce the risk of economic harm when firms are solely focused on squeezing out competitors to capture a larger percentage of the market. However, ACCI questions whether the government's concerns are justified.

Mergers and acquisitions are time sensitive and prompt decision making is critical. Requiring all mergers to undergo a 30-day review by the ACCC just compounds the regulatory/administrative burden on business, without a clear benefit to the community. In the past year, 300 of the 1,400 mergers were reviewed by the ACCC under the current voluntary arrangements. The merger reforms don't provide any greater certainty for entities seeking to merge, nor do they provide greater assurance to consumers and the public that anticompetitive mergers will be blocked. The changes are only likely to lead to a backlog of assessment, which will act as a handbrake on mergers.

The Productivity Commission, in its 5-year Productivity Inquiry report : *A competitive, dynamic and sustainable future*, has raised concerns about the need for a new formal authorisation regime for mergers, as proposed by the government. Instead, the Commission suggests that the ACCC should focus on improving its existing merger review processes. Additionally, the government should be cautious about introducing reforms that create perverse incentives across different merger clearance procedures. While addressing emerging competition challenges is important, the Commission emphasises that any reforms should adhere to sound regulatory principles and not impose unnecessary burdens on businesses or stifle competition.

The report goes on to identify that there a number of industries where regulatory restrictions and other government interventions are the cause for limited contestability or poor incentives for efficiency. This has the effect of lessening exposure to risk, which in turn can lower incentives for business dynamism and productivity growth, as well as for individual risk taking and entrepreneurship.

Regulatory reforms proposed in the Nature Positive Bills should be focused on streamlining environmental approvals. Instead, it is likely to increase the regulatory requirements for dealing with threatened and endangered species and cultural heritage, make environmental assessment processes more arduous and approval more difficult to gain. Worse, the climate trigger, currently being propose by the Greens to gain their support to pass the Bill, will create a further barrier to new investment. This will dampen productivity and force industries to leave our shores, ultimately reducing competition.

Theme 2: Harnessing the Benefits of Competition in the Net-Zero Transformation

As Australia transitions to a more sustainable economy, new markets are rapidly emerging in areas such as electric vehicles and associated charging infrastructure, hydrogen usage, the use of carbon offsets and/or mitigation investment. As the Government continues to expand in these areas either through Future made in Australia or National Reconstruction Fund, there are concerns about private investment being crowded out. The subsequent risk that may arise is that the established players in the market, are being challenged (outcompeted) by new entrants (the rent seekers) that receive government grants, subsidies or other support, which enables them to undercut the true market prices.

With government now focused on energy transition, the coordination of policy that is driving investment in generation, storage and transmission, must be aligned with national competition policy to ensure the best outcomes.

The government should adopt a fuel source-neutral approach to energy supply to ensure delivery of its emissions targets in the lowest cost manner. All options must be on the table, not just variable renewables (solar and wind), hydro, biofuels, batteries and hydrogen, but also gas, carbon sequestration and storage, and nuclear. It must be left to the market to decide whether these options are economically viable, not up to the government to block some forms of energy and favour others. Only through a market-driven, fuel source-neutral approach can Australia meet net zero by 2050 in the most cost-effective manner.

In particular, gas should not be demonised and given an accelerated exit from the market. Gas has an essential role as a transition fuel in the energy market. Restrictions on gas exploration must be removed and approval processes for new gas field developments streamlined, to increase domestic supply and lower energy costs.

There has been growing examples of Government undertaking investment in free markets, with the potential of undercutting competition in these free markets. For example, the Victorian Government's decision to re-establish the State Electricity Commission has raised concerns among the investor-owned producers, storage providers, and retailers, who fear that their ability to compete will be compromised if a state-owned entity can offer lower prices by accessing government-backed, low-cost loans. This would discourage private investor interest in clean energy and storage, without which the Government's renewable electricity targets will not be met.

Similarly, the Queensland government's announcement to set up 12 state-owned petrol stations and cap daily fuel prices could have a detrimental impact on the private sector and competition in fuel retailing at a local level. These investments risk crowding out private investment, as refined petroleum products are almost entirely imported, and prices are mostly determined at a global level. Privately owned retailers are likely to struggle to charge less than a GBE, leading to reduced competition.

The purpose of the GBEs should be to fill gaps in the market and coordinate investments across the industry, rather than directly competing on a level playing field with small and medium-sized commercial businesses.

If GBEs are to operate on a competitively neutral basis, then they shouldn't be in competition with and undercutting commercial businesses.

Adopting a technology neutral approach will foster a more competitive energy market and ensure we meet net-zero targets at the lowest cost.

Theme 3: Lowering barriers to mobility

Australia has experienced a decline in the job mobility, since the last 30 years. More recently, labour or job mobility was affected by the COVID-19 pandemic. However, in recent times it's affected by the bleak situation of the economy accompanied with the recent changes in the competition killing workplace relation legislation, exacerbating the situation of declining mobility. The Discussion Paper, at page 37, appears to reference contractual restraints as an inhibitor to labour mobility. The evidence to support that notion is weak and ACCI has already made a lengthy submission on these matters to the Treasury, which it reiterates here and asks that that submission be read complementary to this submission.

Restraint of trade provisions are a legitimate tool for employers to protect their legitimate business interests. The evidence raised in the previously released Issues Paper on Non-Competes and Other Restraint Clauses was of questionable utility, borrowing largely from overseas jurisdictions that have different employment systems or relying on case studies wherein the restraints mentioned would, in all likelihood, never be upheld by the courts (for example, an eye-lash technician having a restraint clause).

Recent industrial relations reforms increase barriers to mobility by driving up the costs and complexity associated with various forms of engagement and thereby reducing their incidence in the economy. The casual employment changes introduce a complex, legalistic test into the Fair Work Act which act as a disincentive to hiring casuals. Independent contracting changes make the use of contractors more uncertain and have introduced heightened risk that contractors will be reclassified as employees, deterring businesses from engaging them. Labour hire changes will dramatically increase the costs of labour hire and will reduce the incidence of it throughout the economy.

The Closing Loopholes Bills and the changes they have made to the FW Act therefore serve as a barrier to mobility by introducing unnecessary complexity and new costs to various forms of engagement, which in turn disincentivises their use. The Treasury should review the industrial relations framework in the context of revitalising competition in Australia, with regard to those changes contained in the Closing Loopholes Bills.

Theme 4: Better Harnessing choice, competition and contestability in human services

Increased government intervention in human services is increasing the demands on these sectors which is hampering productivity and reducing competition.

In these non-market sectors, there is less incentive for businesses to increase efficiencies and become more competitive.

Productivity will improve where businesses are able to introduce innovative and efficient work practices that enhance the value of employees. As more employees compete for more productive workers, wages rise and resources flow to more productive areas of the economy. However, the Government's push to increase access to healthcare, childcare, aged-care and disability services through increased subsidies to the sectors and subsidised wages of employees will reduce competition and lower productivity in these sectors.

Instead, it should encourage human service providers to innovate and compete to meet consumers' needs by providing citizens with more control over how government funding allocated to these services is spent.

The Government needs to reduce complexities between different programs and schemes across human services to allow providers to operate more seamlessly across markets. For example, allied health providers operating under different federal government schemes face duplication in compliance burdens by having to register with each scheme. Providers are also paid different

amounts for similar services under the different schemes. There is likely scope for a more coordinated approach to administration and pricing⁷.

Theme 5: Leveraging the Economic Opportunities of data and digital technology

Australia has significant potential to lead in emerging technologies, supported by a solid educational foundation, world-class research institutions and a vibrant entrepreneurial spirit. However, this potential remains under-utilised due to gaps in translating these strengths into global leadership.

The National Competition policy needs to ensure that the policy settings are right where there is effective collaboration between government and the private sector, which leads to new opportunities for digitisation and data sharing for both, without eroding the economic benefits that private organisations can realise from investing in data collection and analysis.

Additionally, there is a pressing need for improved funding of digital infrastructure and streamlining of cyber reporting regulations. These efforts will enhance the country's digital landscape and make it easier for businesses to innovate and compete globally.

The Government should undertake reforms enabling government data to be securely shared with the private sector, so that businesses can undertake research and develop improved products and services for Australians.

This could be enabled by undertaking the review of the Data Availability and Transparency Act which needs to be advanced to allow for data sharing with the private sector as a foundation for AI models and other technological development.

Institutional arrangements

When NCP came into effect in 1995, a set of institutional frameworks was put in place to ensure its successful implementation. The Council of Australian Governments (COAG) was set up as a forum in which the Prime Minister of Australia, the Premiers of the States and the Chief Ministers of the Territories provided oversight of the NCC's activities and work program.

A good example of the success of competition policy was the COAG agreement on a national gas policy and on a national electricity policy, which led to the establishment of a national market which for the first time enabled competition between individual State suppliers of electricity and gas.

⁷ A competitive, dynamic and sustainable future, Productivity Commission, <https://www.pc.gov.au/inquiries/completed/productivity/report/productivity-volume3-future.pdf>

Competition payments provided incentives for states and territories to commit to the reforms. Many state governments identified this regime a core part of NCP and as an appropriate mechanism to share the revenue benefits of the reforms with the States and Territories.

For example, the Queensland Government observed that:

The payments were crucial to reaching agreement on the introduction of NCP and they remain crucial if States and Territories are to continue with the current arrangements⁸.

In March 2020, in response to the pandemic, the Council of Australian Governments was abolished, and the National Cabinet was established to take on the operations of the COAG. However, it has not been effective in encouraging states to continue to implement competition reforms. In fact, states have seen advantage in going it alone. As a result, the states have become less aligned with national competition principles.

This could be seen with states like Victoria and Queensland announcing changes that are difficult to reconcile with national competition principles. For instance, the Victoria's Building legislation Amendment and Other Matters Bill 2024 empowers regulators to ban new gas connections in homes and restricts plumbers from installing or replacing gas systems. This move risks reducing investment in new gas production, even as AEMO warns of potential gas shortages. Such policies do not align well with the national Future Gas Strategy and will undermine competition and create unviable conditions for businesses.

Instead, what is needed is for the state government to review policies that act as a barrier to industry development. The states need to ensure their policies align with the policies of other states, as well as national level policies, to reduce duplication and inefficiencies which impact on the commercial viability and competitiveness of projects.

To reinvigorate NCP, new incentive structures are needed, along with a dedicated institution to ensure alignment between state and national policies. This would provide stewardship for the NCP, ensuring that both federal and state regimes support its successful operation in the present and future.

⁸ Review of National Competition Policy Reforms, Productivity Commission, <https://www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf>

About ACCI

The Australian Chamber of Commerce and Industry represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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