

BCA

Business Council of Australia

Revitalising National Competition Policy Consultation Paper

BCA submission

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1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to the *Revitalising National Competition Policy* consultation and contribute to the work of the Council of Federal Financial Relations to revitalise National Competition Policy and develop long-term, pro-competitive reforms.

Australians have benefitted from the hard-fought reforms undertaken by Commonwealth, state and territory governments following the landmark Hilmer Competition Review. As the consultation paper notes, these reforms transformed the way key segments of government services were delivered, influenced the way governments approached the design of legislation and regulation, and liberated competition in various essential services. They benefitted the economy to the tune of around \$67 billion in today's dollars, lifted productivity and delivered higher wages and living standards for all Australians.

Achieving reform was anchored in commitment across the federation and accountability to delivering change.

It would be a mistake to conclude that because Australia's National Competition Principles (NCP) are thirty-years old, they have become irrelevant. While elements of the principles may suffer from point-in-time references, general commitments around competitive neutrality, legislation review and access pricing, for example, remain relevant to the modern economy. There are benefits to be gained to rounding these principles out in the face of pressing economic transitions and today's challenges within the federation.

Nonetheless, the failure to derive real benefits in recent years from the NCP reflects a lack of willingness among the federation in the enduring value of the coordinated reform and a key challenge among states and territories to fund reforms. The Australian economy will naturally benefit in the medium term from the hard work of states and territories but navigating the short-term economic, fiscal and political impact of change is more challenging, and where prudent, the Commonwealth must consider incentivising the states and territories through performance payments.

The success of any reforms underpinned by revised institutions, policies and programs must be accompanied by reforms in related areas. While narrowly defined competition reforms can make meaningful contributions to the economy, they may not on their own unlock the transformational value that the reforms following Hilmer achieved. For example, achieving greater labour mobility through improved occupational licensing could assist with the cost of construction and housing affordability, but the drag of significant state stamp duty taxes or high cost of labour, bid up by multi-employer bargaining arrangements are likely to leave the benefits muted.

The BCA supports the general direction of the Taskforce's efforts to revitalise national competition policy, including institutions and the reform focus. The biggest achievement of governments during this time were supporting markets and enabling competition in areas where government dominated service delivery. We note that this was a key strength of the current principles and related reforms and commend to the Taskforce a similar program of opening the activities of government to competitive forces.

2. Key recommendations

- **Recommendation 1:** Develop and commit to reforms that reduce regulatory barriers to competitiveness, such as regulations around timely approvals; those that limit the ability to compete/trade; permits, licences and approvals; those that restrict ease of movement of resources across Australia; and those that restrict the ease and speed of meeting growing export markets.
- **Recommendation 2:** Any reforms around leveraging the economic opportunities of data and digital technology must carefully define the dimensions of each data set and not treat all categories of data alike. Detailed proposals must be subject to a comprehensive assessment that follows best practice principles.

- **Recommendation 3:** The implementation arrangements for any reforms should include high-level, genuine and broad political commitment; national coordination and institutional arrangements; productivity payments; and independent national oversight.

3. National Competition Principles

Australia's National Competition Principles are an important feature of Australia's economic landscape and include key requirements on:

- prices oversight of government business enterprises;
- competitive neutrality;
- structural reform of public monopolies;
- legislation review; and
- access to services provided by significant infrastructure facilities.

The BCA considers that the principles are enduring and remain relevant today. The BCA agrees with the Competition Taskforce's assessment that aspects of the principles have been superseded by time. We make the following comments on issues raised by the consultation paper:

- Commitments under a revitalised NCP should be well drafted and clearly articulate the commitments and obligations of signatories including clear accountability around performance. Principles that are nebulous are unlikely to be achievable, and it will be difficult to assess their merits. For these reasons the BCA is concerned about incorporating new principles to promote competition and consumer empowerment without a clear nexus to government mechanisms. To the extent that the Taskforce wishes to incorporate these elements, the BCA considers a better approach to be expressly including them in existing principles.
- The BCA supports the Taskforce's proposed areas where the Legislation Review Principle could be expanded to capture a wider range of government conduct including principles, processes and procurement along with the other items listed by the Taskforce.¹
- The BCA supports the Taskforce's recommendations to modernise competitive neutrality principles including asking governments to update their principles and ensure continued adherence to principles. The BCA is concerned that recent government decisions and announcements demonstrate competitive neutrality has either been paid lip service or readily dismissed. Examples include the Victorian Government's re-establishment of the State Electricity Commission and the current Queensland Government's proposals to establish another state-owned energy retailer and 12 state-owned petrol stations.
- The BCA supports the Taskforce's recommendations regarding structural reform of public enterprise including widening the areas that the principles apply to including procurement and provisions of services. The BCA agrees the clarifying and separating functions of a given service will be an essential enabler to improve contestability and competition.
- The BCA supports the continuation of the existing 'Access Principle' as it applies to natural monopoly infrastructure that is uneconomic to duplicate. The BCA is concerned about the access principle being applied to non-physical assets without clarity around whether it is a true natural monopoly.
 - Careful consideration and analysis must be undertaken of the economic characteristics of any non-physical assets to ensure it is indeed a natural monopoly of national significance. Intervening by way of access principles where there is no natural monopoly may actually undermine the benefits of increasing competition by increasing the risk of investing in Australia. In turn, this may undermine the

¹ Including that legislation should not restrict competition and for targeted reviews to be undertaken to assess the competitive effect of legislation.

- potential for innovation across the economy or risk Australia missing out on innovations available elsewhere globally.
- There are also already other tools that can be used to address potential competition concerns in non-physical assets, such as the recently expanded effects test and proposed ex-ante digital codes. Expanding the National Access Regime (NAR) to these services could also result in duplication, and dilute the original legitimate intent of the NAR to apply to clear natural monopolies.
 - The BCA supports an expanded application of prices oversight to government businesses and other activities of government.
 - The BCA supports reconsideration of the public interest test and, in particular, increased transparency about the grounds relied upon including the evidence and analysis to support it.
 - The BCA does not support the introduction of a purpose statement to the principles. The proposed introduction implies a deficiency in the drafting of the principles and their meaning. We would suggest that it would be more beneficial to clearly specify the commitments of governments and the accountability mechanisms to ensure that performance is achieved. It is otherwise unclear what value the purpose statement would achieve, noting that there are other mechanisms to assist readers understand the purpose of the principles including factsheets and other tools governments frequently deploy to ensure that the community understands government intent and action.
 - The BCA supports the introduction of a principle articulating how governments will support market design and stewardship functions.
 - The BCA is supportive of efforts by governments to provide access to public data to foster innovation and competition but is extremely concerned about the suggestion that the principle be used to require private sector companies to share their commercially acquired data. Mandating sharing of commercial data undermines the enterprise inherent in commercial activity and will disincentivise investment.

4. National Competition Reform Program

There are a range of regulatory and other barriers across all levels of government that constrain the ability of businesses to compete by introducing new products and services, entering new markets, changing business models, and growing in existing markets. Business needs to be agile to compete in an increasingly dynamic and global competitive landscape. Regulation that impedes the ease and timeliness with which businesses can restructure or innovate to more effectively compete detracts from Australia's potential growth.

Good regulation manages risk to the community, such as a health, safety or financial risk. Regulation should manage risks efficiently to provide benefits, without imposing costs that substantially offset these benefits, such as reduced competition or more costly and poorer quality goods and services.

Poor regulation can have a direct and large impact on competition or can collectively create disincentives to compete. When regulation is overly complex, prescriptive, slow or uncertain, it can be a barrier that makes all firms less competitive than they otherwise would be.

Key regulatory barriers to competitiveness include:

- **Delays to regulatory approvals**, such as, delays from planning and zoning which limit the ability of businesses to enter new markets or expand operations in a timely way.
- **Regulations that limit the ability to operate**, such as restrictions on retail trading hours and delivery curfews.
- **Permits, licences, approvals and other regulations that restrict business growth**, such as overly onerous professional licensing requirements.

- Regulation that restricts ease of movement of resources across state markets , such as trade licensing arrangements.
- Regulation and policies that restrict the ease and speed of meeting growing export markets , such as coastal shipping regulation and slower product approvals than international peers.

The BCA would welcome the opportunity to meet with the Competition Taskforce to provide further information around specific policy proposals.

The reform themes reflected in the consultation paper should capture these regulatory barriers. However, key reforms raised from a business perspective, in contentious – but important – policy areas, have proved harder to implement and not been followed through despite previous commitments. To illustrate, trade measurement and business names reforms were easier than occupational health and safety and payroll tax harmonisation reforms. Similarly, detailed recommendations to reform Australia’s Corporations Law, impacting businesses of all sizes and not-for-profits, by the Australian Law Reform Commission have not been advanced. This is despite the review articulating widespread benefits for businesses, consumers and the community such as improving competition by lowering barriers to entry and increasing productivity through more effective and efficient regulation.²

Recommendation 1

Develop and commit to reforms that reduce regulatory barriers to competitiveness, such as regulations around timely approvals; those that limit the ability to compete/trade; permits, licences and approvals; those that restrict ease of movement of resources across Australia; and those that restrict the ease and speed of meeting growing export markets

Harnessing the benefits of competition in the net zero transformation

The BCA **supports** the proposed program to support the transition to net zero and makes the following additional comments for program refinement.

The final market structures supported by governments need to be competitive and contestable. However, policy and regulatory settings must be sufficiently flexible and have regard to need for any cooperation that may be needed along supply chains during the transition. This will enable scale investment risks to be lowered and reduce unit costs in new green industries.

Failure to provide scope for cooperative effort, not just in research and development but more widely in commercialisation, will put at risk Australia’s energy transition.

Better harnessing choice, competition and contestability in human services

The BCA broadly **supports** *Reform theme 4: better harnessing choice, competition and contestability in human services* as part of the National Competition Policy consultation. The BCA is concerned that consideration of competitive neutrality is absent from much of the health, care and human services policy development and implementation, both at a Commonwealth and state and territory level. Achieving competitive neutrality in service delivery is essential to ensuring choice and contestability is at the centre of human service delivery to ensure Australian needs can be met. The ageing population, increasing chronic disease burden and decreasing relative taxpayer base, mean real expenditure is expected to increase significantly over the coming decades.

By ensuring the market for delivery of human services is competitive, Australians can maintain good health which will enable them to participate in the economy/society. We recognise competition concerns have been raised in

² Australian Law Reform Commission, *Confronting Complexity: Reforming Corporations and Financial Services Legislation*, Summary Report, ALRC Report 141, November 2023, p6.

certain regulatory settings in human services, with a focus on restricting supply inputs.³ With any proposed changes, government needs to ensure Australians can access quality and safe services in a timely manner.

The BCA notes the Harper Review's consideration of human services and recommends that Treasury focus on progressing those recommendations alongside the following principles:⁴

- user choice should be placed at the heart of service delivery;
- governments should retain a stewardship function, separating the interests of policy (including funding), regulation and service delivery;
- governments commissioning human services should do so carefully, with a clear focus on outcomes;
- a diversity of providers should be encouraged, while taking care not to crowd out community and volunteer services; and
- innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.

Objective 1: Allow consumers to choose the most suitable service provider

Extending choice and contestability in government provision of human services will help Australians meet their individual needs. It is paramount Australians have access to free and appropriate information which enables them to make their own decisions on the services they require. There will be instances, such as for thin markets, where policies may need to be designed to incentivise providers to address the needs of individuals.

Objective 2: Streamlining regulations that have unintended impacts on labour mobility in human services

Governments should work with the respective bodies, including the private sector to ensure any changes do not negatively impact the delivery of human services or outcomes. The BCA welcomes the Commonwealth Government's \$90 million commitment over three years to fund the implementation of the health-related recommendations of the *Independent review of Australia's regulatory setting relating to overseas health practitioners* (the Kruk Review) to grow and support the health workforce.⁵ This will enable Australia to access a greater workforce pool more quickly, and the BCA emphasises all governments must also continue to address issues around access to labour and talent.

We note that the Harper Review previously highlighted the impact that anti-competitive regulations (such as occupational licensing) can have on the mobility and supply of the workforce. For example, medical colleges can unduly restrict entry into their profession which can lessen competition.⁶ Separately, inconsistencies and anomalies in regulation can result from professional restrictions, such as advertising restrictions for the same services based on the provider.

Further, the BCA recommends that the Competition Taskforce give due consideration to the following matters that may affect the competitive neutrality of government's provision of human services:

- The way in which governments compete with each other as well as not-for-profit and private providers to attract staff including bidding-up general conditions and provision of special inducements for public sector staff. For example, the Victorian Government's decision to cover students' higher education fees or loyalty bonuses to staff employed in the Queensland public system.⁷

³ Treasury. 2015. Competition Policy Review. Final Report. P. 42.

⁴ Treasury. 2015. Competition Policy Review. Final Report. P. 36.

⁵ Treasury. 2024. Budget Paper No. 2. P. 111.

⁶ Treasury. 2015. Competition Policy Review. Final Report. P. 141.

⁷ Premier of Victoria. 2022. Making It Free to Study Nursing and Midwifery. <https://www.premier.vic.gov.au/making-it-free-study-nursing-and-midwifery>; Queensland Government. 2023. Palaszczuk Government delivers additional investment to attract health workers. <https://statements.qld.gov.au/statements/97709>

- Fringe benefits tax benefits for public and not-for-profit sector employees can impact the private sector workforce's ability to compete for staff.⁸
- Decisions by governments to intervene in workplace matters, particularly work value matters, that have implications for the private sector.⁹ These may increase the cost of labour for both public and private systems, with a more limited ability for the private and not-for-profit sectors to absorb these costs.

Objective 3: Reduce costs and improve access to necessary health services and products

Government should not be a substitute for the private sector where markets are, or can, function effectively. All governments must ensure tender processes are based on clearly defined criteria and articulate system design principles which enable fair tendering of applications for all providers (i.e. for-profit, government and not-for-profit). Some governments continue to limit tender processes to only the not-for-profit sector which does not enable other providers to engage in the tender process or even deliver the necessary services.

Other matters to be considered under this objective should include:

- The importance of separating the interests of both the regulator and policymaker from the interests of the provider in circumstances to ensure that decisions are made transparently and independently, particularly in instances where government is also a service provider.
- Consideration of how government funding and allocation decisions can undermine market signals, structures and viability.
 - The government must lay the groundwork for the private sector to support delivery of health and care services, including business certainty and investment. Funding arrangements must be carefully calibrated to deliver adequate, efficient and sustainable funding, and value for money for government, taxpayers and users. Funding principles must also provide adequate flexibility to support both choice for users and scope for service providers to innovate, while including an adequate safety net.
- Legislative and regulatory frameworks should provide flexibility and incentives that enable and encourage the use of technology and data. At times, government policy can be a barrier to the uptake and use of such services.¹⁰

Leveraging the economic opportunities of data and digital technology

The BCA is supportive of the dimensions of this reform proposal as the Taskforce seeks to support greater innovation and consumer choice through leveraging data. However, the BCA would urge governments to be clear about the classes and categories of data it seeks to liberate in service of greater competition to avoid unintended consequences including undermining individual privacy and commercial incentives.

For example, it is important to distinguish between data held by government which may be considered a public good. This compares with personal data that an individual has provided or is directed at an individual, or commercial data that the public sector holds or is privately held. Striking the wrong balance may impact an individual's privacy or undermine continued investment in commercial undertakings at a time where Australia must lift business investment.

Recommendation 2

Any reforms around leveraging the economic opportunities of data and digital technology must carefully define the dimensions of each data set and not treat all categories of data alike. Detailed proposals must be subject to a comprehensive assessment that follows best practice principles.

⁸ Productivity Commission. 2010. Contribution of the not-for-profit sector research report. P. 216.

⁹ Fair Work Commission. Work value case – Aged Care Industry. <https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-aged-care-industry>; Fair Work Commission. Work value case – Nurses and midwives. <https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-nurses-and-midwives>

¹⁰ Treasury. 2015. Competition Policy Review. Final Report. Pt. 1.

5. Implementation arrangements

Establishing and successfully implementing a wide-ranging program of reform to reduce regulatory barriers to competition will require a coordinated effort across all levels of government. Experiences from previous reform efforts, such as National Competition Policy and Seamless National Economy reforms, have shown that effective intergovernmental arrangements are critical for substantial and lasting progress. The right institutional structures have the potential to build commitment that delivers over the long term, rather than succumbing to the vagaries of individuals and political cycles.

Australia must find a better way of implementing reforms, rather than repeatedly analysing and making recommendations about the same regulatory barriers. Modelling a framework on the past success of National Competition Policy is a sensible starting point. Intergovernmental arrangements also need to be enduring in nature. This is because the dynamic nature of markets, government regulation and service delivery mean that competition policy reform is an ongoing task for all governments.

Key elements of effective implementation arrangements

High-level, genuine and bipartisan political commitment

Australia will unlikely realise the benefits of major microeconomic reform without high-level, genuine and broad political commitment across all governments. An effective institutional framework must start with building a broad level of support for a reform agenda that all governments can endorse and be accountable for. It cannot be seen as just a responsibility for the Commonwealth Government. Commitment from all governments will help ensure momentum, resources, and support to sustain implementation.

National coordination and institutional arrangements

National coordination is critical for realising the gains of reform – but this should not be mistaken for a national approach. This will help jurisdictions to select and prioritise reforms, while also providing latitude and flexibility in their application. Good institutional arrangements will help drive high-quality reforms and engender trust between the states and territories and the Commonwealth that reform and funding commitments will be honoured. The governance arrangements around reforms must ensure that:

- the most important reforms are identified and prioritised for action;
- all jurisdictions are appropriately incentivised to follow through on their commitments;
- any funding is secure from short-term budgetary and political pressures; and
- payments are made based on outcomes rather than administrative milestones.

An intergovernmental agreement, such as *Competition Principles Agreement* as part of the National Competition Policy reforms, should contain the high-level outcomes and funding arrangements, and be supported by a detailed implementation plan. All jurisdictions must commit to delivering practical outcomes – that is, on-the-ground changes, such as removal of restrictive legislation – not just undertaking processes (such as a review) or producing outputs (such as establishing new entities).

The experience of the *National Partnership Agreement to Deliver a Seamless National Economy* demonstrates that commitment to delivering agreed reforms can wane following a change of government. These reforms were also more focused on administrative outcomes (such as undertaking reviews) rather than reform outcomes (such as legislating the recommendations from reviews). States were able to achieve most milestones without necessarily delivering reform benefits on the ground.

Productivity payments

The BCA has previously called for the establishment of a National Reform Fund to provide ongoing payments for states and territories that implement beneficial reforms, such as tax and regulatory changes. The successful use of this approach as part of National Competition Policy reforms saw the Commonwealth Government make approximately \$5 billion of payments to the states and territories for following through on implementation¹¹. These reforms benefitted the economy to the tune of around \$67 billion in today's dollars, lifted productivity and delivered higher wages and living standards for all Australians. The purpose of the payments was to encourage a continued commitment to reform, and to ensure that the states and territories shared the benefits.

The need for payments reflects the design of Australia's tax system, which means a greater share of revenue flows to the Commonwealth Government. For example, for every dollar of revenue raised from a growth-enhancing measure, around 80 cents will go to the Commonwealth and around 20 cents will go to the states and territories.

The magnitude of any payments would need to both be sufficient to create strong incentives for all governments to implement reforms but be proportionate to the fiscal dividend. Any incremental funding would make an important contribution to the ability of states and territories to deliver better services.

Payments should be triggered by the delivery of tangible reforms that generate higher growth and thus higher Commonwealth tax revenues. The payments would commence with the delivery of reforms and would grow over time if more reforms are delivered, reflecting growth via the opportunities created by the reforms.

The payments should stop growing after a period (for example, after a decade), when all the reforms would be expected to have been completed and not contributing to further growth. However, subject to the Commonwealth and all states and territories meeting their ongoing commitments (particularly regarding gatekeeping institutions to prevent backsliding) the payments should continue at the same per capita level in real terms, which would reflect the ongoing contribution of those reforms to higher output levels.

Reforms that generate state and territory budget savings or allow for improvements to service delivery should only benefit from a Commonwealth fiscal dividend if they could be shown to contribute to higher Commonwealth revenues. This approach would create an incentive for states and territories to undertake pro-competitive reforms to government service delivery via greater transparency of each jurisdiction's approach and outcomes, rather than financial incentives.

It would also be important for local governments to be involved where appropriate, as they were with the National Competition Policy reforms. State governments can either mandate that all councils must comply (and ideally include this obligation in their local government legislation as was done with some jurisdictions under National Competition Policy) or make compliance voluntary. A model where state governments share some of the fiscal dividend with their local governments – as was done by Queensland, Victoria and Western Australia with the National Competition Agreements payments – would allow each local government to decide whether to participate, or whether to forego these funds.

Independent national oversight

An independent national oversight institution (not the Commonwealth Government) will be needed, with a transparent assessment process, annual reporting against outcomes, and a critical analysis of each jurisdiction's progress. It would independently assess the extent of any withholding of payments due to non-compliance with any intergovernmental agreement or commitment.

The Productivity Commission could be assigned the role of assessing whether each jurisdiction is delivering its agreed outcomes. It could make recommendations, for example to the Commonwealth Treasurer, on whether each jurisdiction warrants receiving its productivity payments, or whether some amount should be withheld. This

¹¹ Total payments between 1998 and 2006 in original dollars – see National Competition Council, About the National Competition Policy <http://ncp.ncc.gov.au/pages/about> accessed October 2024.

should be treated as a technical compliance process to help ensure an enduring and meaningful commitment to reforms. For example, the National Competition Council assessed performance and made recommendations as part of the National Competition Policy reforms – but its recommendations were a highly contested judgement by those affected. In contrast the Seamless National Economy reforms were assessed by the Council of Australian Governments Reform Council and the Prime Minister assessed if any funds should be withheld. Despite milestones being missed and some states withdrawing their agreements to key deliverables, no jurisdiction had any payments withheld.

Independent national oversight is also important as the Commonwealth Government – not subject to any withholding of payments as part of previous reform efforts – has demonstrated a relatively poor performance in terms of meeting its obligations. For example, as part of the Competition Principles Agreement process, ‘priority’ legislation should have been reviewed and made compliant by 2004. The Commonwealth and South Australia had completed only 60 per cent of its commitments, outperforming only Western Australia with 46 per cent. In contrast, the other states and territories had around 80 per cent of priority legislation compliant.¹²

Recommendation 3

The implementation arrangements for any reforms should include high-level, genuine and broad political commitment; national coordination and institutional arrangements; productivity payments; and independent national oversight.

¹² Productivity Commission, 2005. *Review of National Competition Policy Reforms*. February. Canberra

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