

30 September 2024

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

By email: nationalcompetitionpolicy@treasury.gov.au

Dear Treasury

Revitalising National Competition Policy

The Law Council welcomes the opportunity to contribute to the Treasury's consultation on revitalising National Competition Policy (**NCP**). This response to the issues raised in the Consultation Paper has been informed by the Queensland Law Society and the Competition and Consumer Committee of the Law Council's Business Law Section.

On 1 December 2023, the Commonwealth, state and territory Treasurers agreed to revitalise NCP, and committed to developing an agenda for long-term pro-competitive reforms under the auspices of the Council on Federal Financial Relations—the national forum of Treasurers.¹

In principle, the Law Council supports revitalising NCP, and exploring whether a program of reform is needed to address barriers to competition that might continue to exist in state, territory and Commonwealth legislation, or the application by governments of their competitive neutrality policies. Steps such as removing inefficient and burdensome regulatory barriers and better aligning state regulatory frameworks are welcomed.

However, the detail of any proposed new principles and associated reforms should be carefully considered to ensure they achieve the objective of boosting competition to increase productivity and economic growth in an efficient and sustainable way. In particular, the Law Council agrees that detailed economic modelling of any proposed reforms should be undertaken prior to commencement. This position is further articulated in an earlier submission to the Productivity Commission dated 17 May 2024 from the Business Law Section's Competition and Consumer Committee (**attached**).

The Law Council is not supportive of any extension of NCP principles and reforms more broadly to the private sector which would simply add another layer of regulation. The *Competition and Consumer Act 2010* (Cth) (**CCA**) is a comprehensive economy-wide statute with which all entities carrying on business or engaged in trade or commerce in Australia must comply—including the Crown in right of the states and Commonwealth so far as it is carrying on a business.

The object of the CCA, to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection, is clear and the competition

¹ The Hon Dr Jim Chalmers, 'Treasurers meet in Queensland' [media release], Australian Government Treasury, 1 December 2023.

provisions of the CCA are well understood. There are specific regimes in place for certain industries or sectors, and some are still under development, such as the proposed digital platform reforms. The Law Council is not aware of any evidence that supports the need for a further overlay of competition policy principles with which those entities would also need to comply.

Establishment of a new competition oversight body

The Law Council has received mixed views in relation to the need for a new competition oversight body.

The Queensland Law Society suggests that a new body, which is focussed solely on advising in the areas of competition policy would be of great assistance, noting that adequately resourced and funded governance and institutional structures for competition policy are critical to ensuring reforms are appropriately implemented and managed.

However, the Business Law Section's Competition and Consumer Committee expresses concern about the establishment of another regulatory body, without a clear articulation of the remit of that body, and a clear delineation between that body's role and responsibilities and those of the Australian Competition and Consumer Commission (**ACCC**) and other existing regulatory bodies, including the Productivity Commission. In the Committee's view, the establishment of another regulatory body, particularly one with an apparent remit to undertake ongoing market reviews and recommendations for intervention (or 'competition stewardship'), would add a regulatory burden that on its face is not warranted and would appear to be inconsistent with the Government's objectives of encouraging investment and innovation, and reducing barriers to business dynamism.

Access Principle

While it supports the Access Principle in appropriate cases, the Business Law Section's Competition and Consumer Committee considers that any expansion of the concepts of third party access to new areas such as data holdings or digital infrastructure should be carefully considered, because these assets have very different characteristics to the natural monopoly 'facilities' to which Part IIIA of the CCA and the industry specific access regimes apply.

Any such regime would also risk overlapping with the range of specific regulatory interventions that are already being considered by the ACCC, including those related to consumer data rights and arising from its Digital Platform Services Inquiry. Any such proposal should therefore be fully tested and modelled, and should only be developed if there is identified harm that is not addressed by the current or proposed regimes. Until that time, any Data Sharing Principle (as proposed for consideration) should be limited to the sharing of government data.

Competitive Neutrality Principle

As noted in the Consultation Paper, the Competitive Neutrality Principle aimed to correct any advantages held by government businesses. Feedback to the Law Council suggests that a narrow view has been taken about governments' obligations in this area, and it may not be fit for purpose. The Consultation Paper similarly outlines issues with its application.

The Law Council supports a review of the current operation of the competitive neutrality framework and, in particular, the complaints process. Experience suggests that the process for management and resolution of competitive neutrality complaints is time-consuming, and practical outcomes can be of limited practical utility for affected businesses.

Energy transformation

A key issue for the Australian economy is in the area of energy transformation and whether competition policy frameworks are ready and fit for purpose. During the COVID-19 pandemic, competitor collaboration through ACCC authorisation and notification procedures worked well.

However, Australia is likely to see challenges in energy transformation especially where energy costs are high and there are questions around the capacity of existing systems to service the growing population. Therefore, all governments need to view competition reform in that context: that is, within a background of transformation.

Implementation arrangements

The Law Council endorses the need for implementation arrangements to support a revitalised NCP, which take into account the observations of the 2015 Harper Review so that states and territories adopt the principles consistently. The National Competition Council's work has previously included providing advice to governments on implementing the NCP. However, its scope has been significantly reduced since its establishment.

Current institutional arrangements, particularly in the context of transformation, are not adequate to consider these issues taking into account, for example, the existing workload of the ACCC.

Contact

To discuss this submission further, please contact Mr Nathan MacDonald, Deputy General Manager of Policy at [REDACTED] or on [REDACTED]

Yours sincerely



Juliana Warner
President-elect