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National Competition Policy Unit
Competition Taskforce Division
The Treasury
Langton Crescent
Parkes ACT 2600

Via email: nationalcompetitionpolicy@treasury.gov.au

Dear Director,

Submission to Revitalising National Competition Policy consultation paper

Thank you for the opportunity to provide a submission to the Revitalising National Competition Policy consultation paper.

As the Productivity Commission has previously observed, the original National Competition Policy (NCP), which was implemented in 1995, was instrumental in driving productivity, innovation and economic growth in Australia over the first 10-years of its operation.^a It also yielded a range of benefits for Australian consumers, including lower prices, higher quality goods and services and increased consumer choice.^b

While the original NCP delivered a range of economic benefits, the scale of those benefits has subsided over time. IPART therefore welcomes the decision by Australian, state and territory treasurers to revitalise the NCP and ensure it is fit for the purpose of driving competition and government policy and action into the future.

This submission sets out our views on some of the specific issues and questions posed in the consultation paper. In general, IPART supports the proposals set out in the consultation paper to:

- revitalise the National Competition Principles (Principles) including by adopting a more pro-competition and consumer focus and ensuring the Principles are appropriately targeted, fit for purpose, and provide for sufficient accountability and guidance on how and when they should be applied
- establish a National Competition Reform Program that will guide national and jurisdictional reform agendas and while we see merit in the proposal to focus on transitioning, new and emerging sectors, we encourage governments to continue to progress reforms in more traditional sectors where there is the potential for material economy-wide efficiency benefits
- implement institutional and governance frameworks that best support the revitalised NCP.

^a Productivity Commission, Review of National Competition Policy, 2005, p. xii.

^b *ibid.*

The National Competition Principles should be revitalised

The consultation paper identifies a range of potential changes that could be made to revitalise the existing Principles. IPART's views on those potential changes are summarised in Table 1.

Table 1: IPART's views on potential improvements to the existing Principles

Principles	Summary of view
Competitive Neutrality	<p>IPART supports revitalising the Competitive Neutrality Principle, including by:</p> <ul style="list-style-type: none"> ensuring it captures the right local and state government business activities and appropriately addresses government advantages and disadvantages providing greater guidance on the best practice approach to competitive neutrality policies and processes (including complaints handling). <p>On the latter point, it is worth noting that IPART has recently completed a review of NSW competitive neutrality policies and processes and recommended a number of changes to implement a best-practice approach to competitive neutrality. Attachment A provides further detail on these recommendations, which could inform the changes to this Principle.</p>
Structural Reform of Public Monopolies	<p>IPART agrees the Structural Reform Principle could be revitalised and strengthened by:</p> <ul style="list-style-type: none"> providing more guidance on the matters governments must consider before privatising monopolies, which could include an express requirement to consider the measures to be put in place to mitigate the risk a privatised monopoly will exercise market power requiring greater transparency of how this Principle has been applied when a government decides to undertake structural reforms of public monopolies reinforcing the importance of separating the natural monopoly elements from potentially competitive elements of a public monopoly, which remains as important today as it was in the 1990s. <p>The importance of the first of these points cannot be understated. This is because, irrespective of the form it takes, exercises of market power can have a detrimental effect on economic efficiency in the relevant market, related markets and the broader economy, the costs of which are ultimately borne by consumers.</p> <p>A good example of where this type of requirement could have had an impact can be found in the NSW port privatisation process. Rather than measures being put in place to mitigate the risk of the privatised ports exercising market power, the privatisations were instead accompanied by deeds that sought to protect the privatised ports from competition, which has in effect, entrenched their market power.</p>
Access to Significant Infrastructure	<p>IPART agrees that the Access to Significant Infrastructure Principle should be revitalised.</p> <p>Given the number of issues that have been raised with this Principle and the associated National Access Regime in Part IIIA of the <i>Competition and Consumer Act 2010</i> (Cth), we would suggest a more detailed review be undertaken and consider, amongst other things:</p> <ul style="list-style-type: none"> the changes required to ensure this Principle and the National Access Regime are fit for purpose in a more modern economy, including by potentially expanding their scope to include non-physical infrastructure whether this Principle and the National Access Regime can adequately deal with the broader economic harm associated with monopoly pricing by significant infrastructure, or if additional policy instruments may be required to address this harm how the operation of the National Access Regime could be improved, including by: <ul style="list-style-type: none"> streamlining the certification process for state-based access regimes^c addressing the concerns raised about the lengthy nature of access processes

^c In 1997 the NSW government went through a lengthy process to obtain certification for the NSW Rail Access Undertaking. While this status was eventually achieved, it was only valid for one year. The time taken to obtain the certification, coupled with the short period of time over which it was granted, highlights some of the impracticalities associated with the current certification process. See NCC, *Application for Certification of the NSW Rail Access Regime Recommendation*, March 1999.

Principles	Summary of view
	<ul style="list-style-type: none"> ▪ how to address the risk of forum shopping between state and Commonwealth regimes.^d
Prices Oversight of Government Business Enterprises	<p>IPART has a standing price oversight function with respect to NSW government business enterprises operating in the water, public transport and rail sectors.</p> <p>While the manner in which we perform this function is set out in NSW legislation, we would support amending the Prices Oversight Principle to include more guidance on how and when prices oversight of government business enterprises should occur.</p> <p>We also support considering whether this Principle should be amended to provide more guidance on government pricing of other goods and services that are not provided through a GBE. In particular, we would support providing guidance that this principle may still apply even though the government business is operating at a loss – although this requires coordination with other branches of government</p>
Legislative Review	<p>IPART agrees that there could be value in amending the Legislative Review Principle to:</p> <ul style="list-style-type: none"> ▪ require, where relevant, consideration to be given to whether legislation is promoting competition, where that is in the public interest ▪ broaden its scope to include policies and processes that could affect competition ▪ allow for more targeted reviews to be undertaken.
Public Interest Test	<p>IPART supports greater guidance being provided on when and how the public interest test should be applied. From an accountability perspective, we would also support greater transparency of any decisions made under the public interest test.</p>

In addition to amending the existing Principles, the consultation paper notes the potential to:

- include an overarching purpose statement for the Principles, which could be used to guide any actions or decisions that must be made under, or pursuant, to the Principles
- adopt a more pro-competition and consumer empowerment focus in the Principles by, for example, requiring governments to consider the promotion of competition and how to activate the demand-side of markets through the Principles or purpose statement
- include a new Market Design and Stewardship Principle.

IPART supports all of these initiatives.

Adopting a more pro-competition and consumer empowerment focus

The proposals to amend the Principles to require governments to consider both the promotion of competition and the demand-side of the market, in particular, are likely to be quite transformative and deliver longer lasting economic benefits. This is because there are a large number of decisions that governments make that can influence, either directly or indirectly, the structure of markets, consumer participation in markets, competition and the overall performance of markets.

^d For example, the *Transportation Administration Act 1988 (NSW)* allows rail infrastructure owners to submit a voluntary access undertaking to the ACCC under Part IIIA of the CCA. If they do not do so, or if they decide to withdraw the undertaking, or let it expire, the owner will become subject to the NSW Rail Access Undertaking. The ability for rail infrastructure owners in NSW to choose the regulatory framework that will apply to their rail network creates uncertainty for access seekers and can be used as a bargaining tool in negotiations with access seekers.

A requirement to consider the promotion of competition when making such decisions could therefore have a material impact on a large number of markets. So too could a requirement for governments to consider how to effectively activate the demand-side of markets, particularly if it is accompanied by guidance in the Principles on how this can be done, or the matters governments should consider.

As the consultation paper points out, the focus of the Principles to date has been on the supply-side of markets. However, the supply-side on its own cannot deliver the full benefits of competition. Rather, the full benefits of competition can only be realised when the demand-side of a market is also activated.

A good case study for this can be found in energy retail markets, which have been subject to significant supply-side reforms over time, but are yet to realise the full benefits of competition. We touched on this in our 2022-23 monitoring report on NSW energy retail markets, noting that:^e

We are concerned that there are signs that the energy retail market is not delivering the level of competition which customers might expect in a competitive retail market. It appears to be difficult for customers to find and move to better offers. If customers cannot engage in and navigate the market easily, they will not benefit as much from energy retail competition as they could.

As noted in this extract, if consumers are to effectively engage in markets and realise the full benefits of competition, they must be able to make informed decisions and be able to readily navigate the market and exercise choice. There are a range of actions governments could take to support this and to activate the demand-side of markets more generally, which is why we support the proposal to reflect consumer empowerment in the Principles.

Market Design and Stewardship Principle

We also support the inclusion of a Market Design and Stewardship Principle.

As outlined in the consultation paper, governments can play a significant role in establishing, shepherding, and maintaining markets through functions including regulator, purchaser, funder and provider of goods and services. A new principle could therefore provide more guidance on how governments are expected to perform this role and the emphasis they should place on facilitating competitive and contestable outcomes.

We also think it would be important for such a principle to recognise that when new markets are established, governments should:

- allow the market to be the primary determinant of price and seek to ensure that any interventions do not interfere with the ability of the market to play its role as the primary allocator of resources
- ensure that any government interventions are focused on supporting the integrity and proper functioning of the market, including by having market rules that clearly set out the obligations of market participants and that are appropriately enforced.

Similar points were made in our recent Biodiversity annual market monitoring report:^f

^e IPART, *Monitoring NSW energy retail markets 2022-23 - Annual Report*, November 2023, p. 2.

^f IPART, *Biodiversity Market Monitoring - Annual Report 2022-23*, December 2023, pp. 3 and 44.

Allowing the cost of offsetting biodiversity loss to be determined by the market reduces the risk that development will occur without sufficient offsets in place, and provides much needed incentives around where to develop. Government intervention should focus on reducing establishment and transaction costs, while allowing the market to address the remaining costs.

Government interventions that support the proper functioning of the market are key to fostering an effective and efficient market. Government interventions should aim to make entry to, and trading in, the market easier and more efficient, and not be designed to lower credit prices for proponents below the cost of offsetting biodiversity. Interventions should also instil confidence in the market and the outcomes it can achieve.

The National Competition Reform Program should focus on new & traditional sectors where there is potential for material efficiency improvements

We understand that as part of the development of the revitalised NCP, consideration is also being given to establishing a National Competition Reform Program that will guide the reform agenda over a 10-year period. The proposed National Competition Reform Program will comprise both a National Competition Reform Agenda and jurisdiction-specific reform plans.

Some of the potential reform themes that have been identified for the national agenda include:

1. Promoting a more dynamic business environment
2. Harnessing the benefits of competition in the net zero transformation
3. Lowering barriers to labour mobility
4. Leveraging the economic opportunities of data and digital technology
5. Better harnessing choice, competition, and contestability in human services.

IPART agrees that these reform themes are good candidates for the national agenda. Labour mobility, in particular, has been a key issue in both our recently completed review of *Early childhood education and care affordability, accessibility and consumer choice* and our current review of *Out-of-Home Care costs and pricing*. For instance:

- In our early childhood education review, which we completed in December 2023, we found that workforce availability, expertise and sustainability were critical to the supply and accessibility of quality early childhood education and care services, and constitute a significant problem currently facing the sector.⁹ We therefore recommended that the NSW Government advocate for more urgent implementation of the National Workforce Strategy, take more of a leading role in implementing this strategy and refresh the 2018-2022 NSW Early Childhood Education Workforce Strategy.
- In our out-of-home care review, which is due to be completed in May 2025, we are also finding that staff shortages and the difficulties associated with attracting and retaining staff and carers are key issues affecting this service.^h

We therefore strongly support the inclusion of this reform theme in the National Competition Reform Agenda.

⁹ IPART, *Affordable, accessible early childhood education and care – Final Report*, December 2023.

^h IPART, *Out-of-home care costs and pricing – Interim Report*, September 2024.

While we also support the inclusion of the other reform themes listed above, which appear to be primarily focused on transitioning, new or emerging sectors, we encourage Australian, state and territory governments to continue to progress reforms in more traditional sectors where there is the potential for material economy-wide efficiency benefits. This includes those sectors that continue to play an important role in the broader economy, such as the rail, ports, water, energy and road transport sectors.

For instance, in mid-2023 we concluded a review of the NSW Rail Access Undertaking. Through this review, we found that changes to this rail access framework could increase the efficient use of, and investment in rail in NSW, drive greater competition with road freight and lower freight costs, and increase productivity.¹ Given rail is an important input for many businesses, realising these benefits can be expected to have broader reaching efficiency benefits across the economy.

Institutional and governance frameworks should support the revitalised NCP

IPART does not have any specific comments on the institutional or governance frameworks that should be put in place, but agrees that any such frameworks that are put in place should effectively support the revitalised NCP in both the implementation stage and on an ongoing basis.

We would also observe that the institutional and governance frameworks that were put in place for the original NCP were critical to its success. The national competition payments, for example, played an important role in encouraging state governments to implement reforms where the Commonwealth did not have jurisdiction. While it is unclear at this stage whether similar payments would be necessary for the revitalised NCP, we would encourage Treasury to carefully consider how to effectively incentivise and support the implementation of the revitalised Principles and the National Competition Reform Program.

Contact

IPART's contact officer for this submission is [REDACTED] contactable on [REDACTED].

Yours sincerely,

23/09/2024

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Signed by: [REDACTED]

¹ IPART, [Review of the NSW Rail Access Undertaking – Final Report, May 2023](#).

A IPART's competitive neutrality review

In 2022, IPART was asked to review NSW's competitive neutrality policies and processes.

Through this review, stakeholders, which included state and local government businesses, non-government businesses and policy owners, told us they were dissatisfied with the current policies and supported change. Many of them also told us they were concerned about the competitive impact of both state and local government activities.

Businesses also raised concerns about the lack of clarity and transparency surrounding which government activities are subject to competitive neutrality and how it has been applied. Government businesses also told us about the challenges they face identifying when and how to apply competitive neutrality principles. The review also revealed areas where policies were out of date, ambiguous or not fit for purpose and highlighted the significant barriers associated with making competitive neutrality complaints.

The findings of our review were published in May 2023. In short, we found there was a strong case for reforming NSW's competitive neutrality policies and processes and that the costs of not doing so were considerable and likely to be borne by a range of stakeholders. The package of reforms that we recommended, which are summarised in Table A.1, provides for the implementation of a best practice approach to competitive neutrality. That is, through the adoption of:

- clearer objectives, tests and obligations that stakeholders can easily engage with and apply and that can respond to changes in the way government services are delivered over time
- a more accessible and effective complaints handling process
- transparency measures that provide clarity on whether and how the policy has been applied
- policies and processes that are responsive to changes in the way in which services may be delivered over time.

We also recommended that the NSW government provide additional resources to help local and state government businesses understand their obligations and assist them in applying the competitive neutrality principles to their business.

Table A.1: Summary of recommendations from competitive neutrality review

Area	Recommendation	Why
 Policy structure	A single policy that applies to both state and local government activities, with a clear statement of objective and a simpler, more logical structure	A clear, well-structured policy makes it easier to identify who is subject to the policy and what the policy requires them to do
 Scope	Retain the existing scope of the policy and deal with out-of-scope issues through other policies.	Competitive neutrality cannot easily be applied to non-business activities and there is currently not enough evidence to justify such a change.
 Government ownership test	Competitive neutrality should apply to activities undertaken by an entity that is fully owned or, if partly owned, controlled, by government.	The current test has not kept pace with changes in government ownership structures.

Area	Recommendation	Why
 Business activity test	Competitive neutrality should apply to activities that are commercial in nature; are undertaken by a public corporation; or are bidding to provide goods and/or services; and that are not exempt activities.	A clearer test that is similar to business activity tests in other policies and legislation makes the test easier to apply and will deliver more consistent outcomes
 Significance test	Competitive neutrality should apply to significant government business activities. An activity is significant unless its annual turnover is under \$3.7 million (to be indexed) or it has a market share below 10%; and the Minister has not declared it significant.	The current test is too complex and lacks certainty. An updated monetary threshold is a simple, low-cost approach. Options to undertake a simple market assessment or recommend Ministerial declaration provide flexibility without adding unnecessary cost and complexity.
 Pricing/other obligations	All 'significant government business activities' are required to estimate a price that would be 'competitively neutral' in the market by establishing their costs and adjusting for advantages and disadvantages of government ownership.	Clarifies what obligations the policy imposes, including on state owned corporations and not-for-profit business activities.
 Public interest test	A proportionate approach to assessing whether charging below the competitively neutral price or retaining a non-cost advantage is in the public interest.	A detailed, quantitative public interest assessment may not always be appropriate or within the capability of smaller government businesses.
 Reporting	Clear and consistent obligation to report on competitive neutrality in the annual reports of government entities undertaking business activities.	Effective governance and transparency arrangements are important for ensuring that the competitive neutrality policy is followed as intended.
 Complaints	A simpler complaints process that is clear and easy to access, removing the requirement for the Minister to refer the complaint for investigation, and with a single complaints body.	An independent and accessible complaints handling process is an important accountability measure for government policies.
 Regular review	Review of the policy every five years by the policy owner to determine whether it is operating effectively and is adapting to changes in government service delivery.	The current policy has not been reviewed for over 20 years and is outdated.
 Transition and guidance	A transition process, accompanied by tools and resources, to assist government businesses to apply the new policy.	Allowing government businesses to adapt to the changes over time will lower compliance costs and help boost compliance with the policy.
 Other issues	Competition issues be considered systematically by the NSW Government when making decisions that impact competition.	Systematic consideration of competition issues ensures that the most productive businesses thrive and helps raise standards of living.

Source: IPART, *Competitive neutrality in NSW – Final Report*, May 2023, pp. 8-10.