

Submission

Australian Government (Commonwealth Treasury)

Consultation paper: Revitalising National Competition Policy

Summary of Submission

National Access Regime

It is recommended that there be an express review of whether the National Access Regime should be repealed or replaced, either as part of the proposed 2025 review or separately. The review should also consider replacing the current two step declaration process with a single step involving only the relevant minister. It should also consider making the access arbitration function contestable.

Public interest test in the Competition Principles Agreement

The Competition Principles Agreement should be aligned with the objectives in the competition law. It is recommended that consultation occur on proposed objectives that should be included in a new Principles document and in the competition law, based on emerging competition policy objectives and on evidence and experience across jurisdictions.

Competition reform themes – the medical profession and allied health

It is recommended that there be a review of the medical profession and allied health with a focus on areas including admission rules, the recognition of foreign qualifications, whether some medical services can be delivered by other professionals, the transparency of medical fees, ownership and advertising rules.

Institutional arrangements to support a revitalised National Competition Policy

It is recommended that Australia have a standing competition policy body, utilising either an existing institution (like the Australian Competition Tribunal) or a new institution as proposed by the Harper committee. In addition to supporting Australian competition policy, the policy body should advance Australia's strategic engagement in the Asia Pacific through research, education, capacity building and other soft diplomacy initiatives through Australia's membership of regional institutions.

Introduction

This submission is in response to the Australian Government's Consultation Paper *Revitalising National Competition Policy*, August 2024 (**Paper**).¹

The submission addresses four issues in the Paper. First, the future of the national access regime. Second, the public interest test in the Competition Principles Agreement and the related objectives in Australia's competition law. Third, competition reform themes for the modern Australian economy and the need for a further reform focus related to the medical profession and allied health. Fourth, the institutional arrangements to support a revitalised national competition policy, in particular the need for a national policy body.

1. Revitalising the National Competition Principles - Access to Services

Australia is unique in having a legislative access regime. In the United States a refusal of access has been addressed under the essential facilities doctrine.² In the European Union, a refusal of access is addressed as an abuse of dominance³ - the equivalent of section 46 Competition and Consumer Act 2010 (**CCA**). The United States and European positions are also supported by dedicated access regimes in select sectors.

The Hilmer committee proposed an Australian access regime of universal application, assessing that industry specific regimes and state-based regimes are inadequate.⁴

The Hilmer committee did contemplate that there may already exist state-based regimes. It proposed that where such regimes provide access on fair and reasonable terms there will

¹ Australian Government, Consultation Paper: *Revitalising National Competition Policy*, August 2024, 22 (**Paper**).

² The doctrine developed under section 1 (restraint of trade) and section 2 (monopolisation) Sherman Act 1890: *United States v Terminal Railroad Association of St Louis* (1912) 224 US 383; *MCI Communications Corporation v American Telegraph and Telephone Co* (1983) 708 F.2d 1081; *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP* (2004) 540 US 398.

³ Consolidated Version of the Treaty on the European Union [2008] OJ C 115/13, art 102 (**Treaty**); Case C- 7/97 *Bronner v Mediaprint* EU:C:1998:569.

⁴ Report by the Independent Committee of Inquiry, *National Competition Policy*, August 1993 (Australian Government Publishing Service 1993) 248-249 (**Hilmer**)

usually be no need for declaration.⁵ This was accommodated by the ability of a state or territory to apply for certification of an effective access regime.⁶

However, almost from the beginning, the idea of a universal regime applying to nationally significant infrastructure gave way to separate national and state-based regimes, including in telecommunications,⁷ electricity,⁸ gas,⁹ water¹⁰ and ports¹¹, beyond that contemplated by the Hilmer committee.

In its 2013 review of the National Access Regime (**NAR**),¹² the Productivity Commission (**PC**) noted that only a limited number of infrastructure services have been declared under the NAR.¹³ As the Harper committee notes, in the main the operation of the NAR has been limited to rail.¹⁴

More recently the NAR has been applied to services provided by the Port of Newcastle. The explanation for its limited recent use is likely that most of the nationally significant infrastructure is already subject to access regulation in some form.

The operation of the National Access Regime

Neither the terms of reference for the Harper review or the PC review of the NAR expressly asked those bodies to consider alternatives to the NAR.

⁵ Hilmer, 259.

⁶ CCA, s 44N.

⁷ CCA, Part XIC.

⁸ National Electricity Law and Rules.

⁹ National Gas Law and Rules.

¹⁰ See Water Industry Competition Act 2006 (NSW).

¹¹ See Maritime Services (Access) Act 2000 (SA).

¹² Part IIIA Competition and Consumer Act 2010 (**CCA**).

¹³ Productivity Commission, *National Access Regime, Inquiry Report* No. 66, (Commonwealth of Australia 2013) 244 (**PC 2013**).

¹⁴ Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan, *Competition Policy Review, Final Report* March 2015 (Australian Government Publishing Service 2015) 425-6 (**Harper**).

Nevertheless, the Harper committee turned its attention to the future of the NAR. It concluded that the NAR should be retained, as a back up to cater for possible new industries in future.¹⁵

Like the Harper committee, the PC concluded that the NAR should be retained.¹⁶ However, as the PC noted, the NAR has continued to play a back stop role because of the limited empirical evidence to measure the costs and benefits of the NAR, even though the majority of access regulation occurs under industry-specific and facility-based access regimes.¹⁷ Further, the effect of the threat of access regulation on incentives for service providers and access seekers to reach negotiated outcomes cannot be measured.¹⁸

That is, in part the NAR has been retained because of an inability to empirically assess its utility.

An additional reason for the PC recommending retention of the NAR is that the High Court's 2012 decision means that merits reviews of decisions by the Australian Competition Tribunal (**ACT**) are likely to be more confined, take less time, and thus be less costly, than in the past.¹⁹

The 2012 decision to which the PC refers is the High Court's decision in *Pilbara*.²⁰ Despite the PC's expectation that *Pilbara* may result in processes taking less time, that has not occurred. The subsequent litigation involving the Port of Newcastle has involved multiple appeals and arbitrations including an application for leave to the High Court which was rejected. That access application has taken a considerable amount of time and involved enormous cost.²¹

¹⁵ Harper, 426.

¹⁶ PC 2013, 244.

¹⁷ PC 2013, 244. Also, Harper 426.

¹⁸ PC 2013, 244.

¹⁹ PC 2013, 245.

²⁰ *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* [2012] HCA 36.

²¹ The history of this matter is detailed in *Application by Port of Newcastle Operations (No 2)* (2020) A CompT 3 at [6]-[11].

Apart from the Port of Newcastle, no significant infrastructure has been declared under the NAR since the Harper committee and the PC's review of the NAR almost ten years ago. The idea that the NAR should serve as a backup has not proven to be necessary.

The Port of Newcastle decision reinforces the view in the Paper that processes under the NAR can be slow, particularly for contentious matters which take an average of six years to resolve.²² The uncertainty and financial cost is undesirable for access providers and access seekers.

Review of whether the NAR should be replaced

It is recommended that there be an express review of whether the NAR should be replaced, either as part of the proposed 2025 review or separately.

This submission is not intended to pre-empt such a review but rather to suggest that there have been several developments since the PC's review and the Harper committee's recommendations which ought to now inform that review.

When the Harper committee and the PC considered the NAR, section 46 CCA provided that a corporation with a substantial degree of power in market must not 'take advantage' of that power for a proscribed 'purpose'.

Although acknowledging that section 46 was capable of applying to a denial of access, the requirement to establish a proscribed purpose was considered difficult. Also, the Hilmer committee considered that the courts were not well placed to determine price and other terms of access.²³

²² Paper, 22.

²³ Hilmer, 243.

The Hilmer committee considered the features of and the applicability of the United States essential facilities doctrine.²⁴ However, the committee expressed concern that the limits of the doctrine were not clear and its application inconsistent.²⁵ The Hilmer committee was also influenced by the fact that the High Court has not embraced the doctrine and the Federal Court had expressly rejected it in *BHP*:²⁶ The High Court in *BHP* resolved the issue of a denial of access under section 46, without relying on an essential facilities doctrine.²⁷

However, in *NT Power Generation* the High Court said that section 46 can be used to create access regimes.²⁸ Although not endorsing the United States essential facilities doctrine, the High Court accepted the application of section 46 to issues of access on the basis of taking advantage of substantial market power,²⁹ for a proscribed purpose³⁰ under the formulation of section 46, as it then was.

The PC considered *NT Power Generation* but concluded that ‘There is divergence in views on whether section 46 could be used as a stand-alone mechanism to address concerns about access to infrastructure services.’³¹

The PC also considered that ‘access would only be available where an access seeker was able to prove that it had been denied access, or access on reasonable terms, because of a proscribed purpose’.³²

The Harper committee did not consider the essential facilities doctrine or the High Court decisions, likely because its terms of reference required it to consider the NAR ‘taking into

²⁴ Hilmer, 244.

²⁵ Hilmer, 244

²⁶ Hilmer, 243.

²⁷ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6 at [22] per Mason CJ and Wilson J; at [11] per Deane J.

²⁸ *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 at [86] per McHugh ACJ, Gummow, Callinan and Heydon JJ (**NT Power**).

²⁹ *NT Power* at [120] per McHugh ACJ, Gummow, Callinan and Heydon JJ.

³⁰ *NT Power* at [150] per McHugh ACJ, Gummow, Callinan and Heydon JJ.

³¹ PC 2013, 69.

³² PC 2013, 96.

account the Productivity Commission's recent inquiry'.³³ The Harper committee supported the PC's recommendation.³⁴

There have been significant legislative amendments to section 46 since *NT Power Generation* and the PC's report. This includes the removal of the 'taking advantage' requirement and the introduction of an 'effects' test³⁵, replacing the 'purpose' test which concerned the PC.

Arguably section 46 in its current form renders it easier to establish a denial of access as occurred in *NT Power Generation*. It would also be open to make a relatively minor amendment to provide that section 46 is capable of applying to a denial of access. That amendment would not require importing a legislated essential facilities doctrine.

The NAR has provided few examples of final access rights and has undergone extensive review and amendment in a relatively short time. Those considerations alone suggest that the regime is not functioning well.

Addressing the costs and delays associated with the National Access Regime

As part of a review of the NAR or pending such review, it is recommended that options be implemented to address the delays and costs associated with the NAR, identified in the Paper.

It is recommended that consideration be given to two reforms to the NAR. First, a one-step declaration process. Second, making the arbitration function contestable.

The declaration process

The Hilmer committee was concerned that 'the existence of a broad discretionary regime may create pressures on the Minister to declare an essential facility to advance private

³³ Harper, Terms of Reference, para 3.3.6.

³⁴ Harper, 431.

³⁵ Introduced by the *Competition and Consumer Amendment (Misuse of Market Power Act)* 2017.

interests.’³⁶ It prompted the committee to recommend an independent declaration body - the National Competition Council (**NCC**) while accepting that ultimately the decision is one for Government.³⁷

The declaration process under the NAR therefore involves two steps. First a recommendation by the NCC whether a service should be declared.³⁸ Second, on receiving a NCC recommendation, the relevant Minister must decide whether or not to declare the service.³⁹

It should be noted that the two-step process for declaration is not a constitutional or other legal requirement but a policy choice. Jurisdictions considered the process by which declaration ought to occur. It is likely that there are a number of reasons why jurisdictions settled on a two-step declaration process.

First, at the time of the NAR’s establishment, most of the nationally significant assets were in state ownership. There was a concern that if left to a relevant state minister, they may be reluctant to declare state assets for fear of losing some degree of control over the asset and future income streams. The Commonwealth also possibly feared that state ministers would be reluctant to declare state assets. For states minister’s there was also a degree of comfort in an independent NCC making a declaration recommendation, should the decision later come under scrutiny.

Second, competition payments were tied to a state’s compliance with the National Competition Policy (**NCP**) principles. The NAR was one of those principles. The NCC was charged with assessing States’ compliance with NCP. Having the NCC involved in the declaration process gave it visibility over the assets for which declaration was sought and enabled it to credibly assess whether a Minister’s response was appropriate.

³⁶ Hilmer, 250.

³⁷ Hilmer, 250.

³⁸ CCA, s 44F.

³⁹ CCA, s 44H.

Third, the NAR was new. The declaration criteria as originally enacted⁴⁰ or as amended following the PC's recommendation⁴¹ reflect complex economic principles. Assessing whether those principles are satisfied can take a considerable amount of time and expertise. During NCP, the state agencies responsible for NCP implementation were small and lacked the resources to undertake the work required for a declaration. The declaration criteria were also new and there were no judicial decisions to guide decision making, unlike now.

Much has changed since the Harper and PC reviews. First, the Hilmer committee's concern that the NAR would create pressures on a minister to declare an essential facility to advance private interests has not proven to be the case.

Second, as noted, most of the significant assets have either been declared or are subject to other access regimes. The likelihood of the NAR being required for other assets is limited. Even if required, there are more efficient options for access rather than the NAR, including specific access regimes better targeted to unique assets.

Third, the NCC no longer plays a role in assessing jurisdictions initiatives on NCP. Very few assets are under State control which would involve a state minister as the relevant decision maker.

Fourth, ministers and their agencies are now much more familiar with NAR principles unlike in the past.⁴² Ministers have departments and agencies with the expertise to independently assess the declaration criteria or else seek that expertise from other central agencies of government, for example Treasury.

For these reasons it is credible to consider reducing the declaration process to a single step. Under a single step, the minister would be the only decision maker and would apply the

⁴⁰ CCA, s 44G

⁴¹ CCA, s 44CA introduced by the Competition and Consumer Amendment (Competition Policy Review) Act 2017.

⁴² For example, see Hon Mathias Corman, Acting Treasurer 'Decision and Statement of Reasons concerning Glencore Coal Ltd's Application for Declaration of the Shipping Channel Service at the Port of Newcastle', 8 January 2016.

same declaration criteria in making a decision. The timeframes will need to be adjusted to give the minister additional time for decision making. An appeal to the ACT could remain to provide for independent review so that no party need be prejudiced by a decision, any more than they would have been by a two-step declaration process.

The advantage of a one step process is that it is a considerably more truncated process without unduly prejudicing any party.

The Institution responsible for a declaration recommendation

A one step process as recommended necessarily means that neither the NCC (or indeed any other institution) would have a future role in making recommendations concerning declaration.

If, despite the recommendation above, the states and territories desire to retain a two-step declaration process, the issue arises as to the institution which should make the recommendation.

The Harper committee recommended that the NCC be dissolved.⁴³ The committee recommended that access and pricing issues be addressed by a new single national Access and Pricing Regulator.⁴⁴

The previous Government did not accept the committee's recommendation but indicated that it remained open to the recommendation and would continue discussions with states and territories on how a new national framework could be developed.⁴⁵

It is recommended that a new national access and pricing regulator not be established. As noted, the Himer committee's vision for a national access regime has not eventuated. As

⁴³ Harper, 76.

⁴⁴ Harper, 81.

⁴⁵ Australian Government, 'Australian Government Response to the Competition Policy Review' (Commonwealth of Australia 2015) 38.

indicated the Commonwealth, states and territories have established separate access regimes. Some states have also established independent price oversight bodies, for example the Independent Pricing and Regulatory Tribunal NSW (**IPART**). Given the fracturing of regimes, there is little need for a national access and pricing regulator.

As noted, the future application of the NAR is also likely to be limited. In these circumstances it is hard to justify the creation of a new institution whose function is only to make declarations concerning access. The capacity of existing institutions to do so should first be assessed.

An alternative body that is capable of making a recommendation on declaration is the ACT. The PC considered the ACT as a possible primary decision-making body instead of a relevant minister. Ultimately it rejected the idea over concerns relating to the ACT's role as a merits review body and whether it would involve time saving.⁴⁶

However, neither the Harper committee or the PC considered the ACT as a *declaration* body. There are possibly several reasons for this. First as the PC alluded, there is the issue of the ACT's review function.

Second, the ACT (and equivalent bodies)⁴⁷ have traditionally operated as adjudicative bodies, not as administrative bodies. However, this is by design – it is not a legal requirement. Although the ACT currently operates only as a quasi-judicial body it need not do so.⁴⁸ There is no legal obstacle to a Commonwealth tribunal like the ACT being invested with broader functions, provided that the ACT does not exercise the judicial power of the Commonwealth.

An advantage of the ACT is that it already comprises members that have qualifications in law, economics, business and other relevant disciplines and is able to exercise an analytical

⁴⁶ PC 2013, 299.

⁴⁷ For example, the Competition Appeal Tribunal (UK); Competition Appeal Tribunal (Canada); Competition Tribunal (South Africa); Competition Appeal Tribunal (Malaysia); Competition Appeal Board (Singapore).

⁴⁸ Subject to the CCA and Regulations, the procedure of the ACT is subject to the discretion of the ACT: CCA, s 103(1).

function. During the period when the ACT had jurisdiction over energy matters,⁴⁹ the ACT showed that it was capable of conducting consultation with stakeholders. Alternatively, under a revised NAR, recommendations concerning declaration could be made by the ACT on the papers – that is, only on the basis of written submissions.

An alternative is the proposed national body recommended by the Harper committee.⁵⁰ As discussed below, that body is intended as a policy body. Nevertheless, given the limited future application of the NAR, an access role is unlikely to distract that body from its core policy function. The body would represent a credible option.

Arbitration of access disputes

A feature of the NAR is that once declared, a service provider and access seeker would negotiate access terms. If negotiations prove unsuccessful, the NAR mandates arbitration, to be conducted by the Australian Competition and Consumer Commission (**ACCC**).⁵¹

The involvement of the ACCC is not a legal requirement but a deliberate policy choice. In practice, the arbitration function has rarely been used. Nevertheless, as the PC has noted, the *prospect* of arbitration being triggered will affect the outcome of negotiations, regardless of whether arbitration is used.⁵²

Although the PC regards the negotiate - arbitrate framework as providing a sound basis for resolving access disputes,⁵³ it did not consider who ought to conduct an arbitration. If the prospect of arbitration in itself imposes an important discipline on access parties, then options for alternative means of arbitration ought to be considered.

⁴⁹ Prior to the removal of this function by the Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017.

⁵⁰ Harper, 76.

⁵¹ CCA, Part IIIA, Subdivision C.

⁵² PC 2013, 118.

⁵³ PC 2013, 128.

The rationale for the ACCC's involvement as access arbitrator relates to its obvious expertise in competition matters. Even so, the formality which attaches to arbitration by the ACCC may impose transaction costs on the parties. It is also inconsistent with competition law to mandate a *monopoly* provider of access arbitration services.

Australia has taken a very restrictive approach to the arbitration of competition matters generally. In other commercial areas the use of third-party arbitration services is common and is regulated by Commonwealth⁵⁴ and State laws⁵⁵ that give effect to the UNCITRAL Model Law on International Commercial Arbitration.⁵⁶

There is no reason why competition matters, including access disputes ought not to be arbitrated by commercial arbitrators.⁵⁷ The apparent arbitration of complex consumer matters under the Australian Consumer Law, including very recently,⁵⁸ suggests that arbitration by commercial arbitrators should also be available to access parties if they wish. Their decision will undoubtedly be guided by efficiency, formality and cost, among other factors.

It is not suggested that the ACCC ought not conduct an arbitration, only that the service ought to be contestable and left to the choice of the parties, or failing agreement, by direction.

⁵⁴ International Arbitration Act 1974 (Cth).

⁵⁵ For example, Commercial Arbitration Act 2010 (NSW).

⁵⁶ Adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006.

⁵⁷ See Izak Hodge-Englishby 'Can Australia Compete? A Tri-Jurisdiction Analysis of Competition Law Arbitrations' (2020) 5 *Perth International Law Journal* 29, 37-38.

⁵⁸ See for example the arbitration discussed in *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24.

Intellectual property and digital platforms

Declaration may only occur in relation to a service provided by a 'facility'. The expression 'facility' is not defined, though it has been interpreted as extending to physical assets.⁵⁹ The definition of 'service' expressly excludes the use of intellectual property.⁶⁰

An issue is whether the NAR could extend to services delivered through digital platforms which rely on significant intellectual property rights. This includes access to data which may be required by other service providers. The challenge is that the NAR in its current form is not well equipped to address possible access in markets characterised by significant intellectual property.

In the European Union, the Digital Platforms regulation was enacted to respond to the challenges of digital markets, including imbalances in economic power.⁶¹ Article 6(7) expressly mandates effective interoperability with, and access for the purposes of interoperability to certain hardware and software features – a form of mandated access. The regulation applies alongside the Treaty provisions,⁶² though it is recognised that those provisions may in themselves be inadequate to respond to platforms.⁶³

The operation of the NAR needs to be reviewed in relation to its capacity to respond to emerging market issues, including digital technology and platforms.

2. Public interest test - Objectives of competition law

The Paper poses the question whether changes are required to the 'public interest test' in the Principles to make it more effective.⁶⁴ It also asks a related question - whether the

⁵⁹ Re *Review of Freight Handling Services at Sydney International Airport* [2000] ACompT 1.

⁶⁰ CCA, 44B (Paragraph (e) of the definition of 'service').

⁶¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265 (**Digital Markets Act**).

⁶² Treaty, arts 101 and 102.

⁶³ Digital Market Act, Recital 5.

⁶⁴ Paper, 26.

Principles should include a purpose statement/principle and the considerations that should be taken into account in drafting and implementing a purpose statement/principle.⁶⁵

It is apparent there is intended to be consistency between the Principles and the CCA. For example, one of the matters to be considered under the Principles is the interests of consumers.⁶⁶ This is also reflected in the CCA's objectives.⁶⁷ The Principles also refer to the efficient allocation of resources⁶⁸ which is a core objective of competition law. There ought to be an alignment of the Principles with the objectives of the CCA.

The Principles were implemented almost thirty years ago. The objective statement in the CCA was inserted the same year, following the Harper committee's recommendation. Yet, there has been no recent review of those objectives, despite considerable current debate about the appropriate objectives of competition law.

In its early development consumer welfare was the primary goal of competition law and policy.⁶⁹ It has been suggested that the objective of competition law is best described by combining economic efficiency, consumer welfare, and inter-firm rivalry into a single working principle of competition welfare.⁷⁰

At the core of consumer welfare is a recognition that in competitive markets both efficiency and consumer welfare is maximised.⁷¹

⁶⁵ Paper, 28.

⁶⁶ Competition Principles Agreement, clause 1(h).

⁶⁷ CCA, s 2.

⁶⁸ Competition Principles Agreement, clause 1(j).

⁶⁹ Deborah Healey 'The ambit of competition law: comments on its goals' in Deborah Healey, Michael Jacobs and Rhonda Smith (ed) *Research Handbook on Methods and Models of Competition Law* (Edward Elgar 2020), 20.

⁷⁰ Joseph Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) 62 *New York University Law Review* 1020, 1023-1024; 1032.

⁷¹ Josef Drexel 'Consumer welfare and consumer harm: Adjusting competition law and policies to the needs of developing jurisdictions' in Michael Gal and Mor Bakhoum *et al* (ed) *The Economic Characteristics of Developing Jurisdictions: The implications for Competition law*, (Edward Elgar 2015) 268.

The primacy of economic efficiency as the core objective of competition law has begun to be questioned. Some have suggested that competition policy should serve broader goals,⁷² including social goals,⁷³ the promotion of small business, ensuring fairness and equity,⁷⁴ eliminating inequality⁷⁵ and promoting democratic governance, among many others.⁷⁶

Competition law can also assist with poverty reduction⁷⁷ the support of trade liberalisation by creating more competitive domestic markets⁷⁸ and better accommodate socio-economic trends such as the rising importance of sustainability.⁷⁹

It is recommended that consultation occur on proposed objectives that should be included in a new Principles document and in the CCA, based on emerging competition policy objectives and on evidence and experience across jurisdictions.

3. Competition reform themes for the modern Australian economy

The Paper identifies several reform themes. It is recommended that a further reform theme be included – namely the **medical profession and allied health**. Allied health includes, physiotherapy, psychology, pharmacy occupational therapy and social work.

⁷² See Ben Van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy?: Nonefficiency Considerations Under Article 101 TFEU* (Kluwer Law International, 2012).

⁷³ David W Barnes, 'Nonefficiency Goals in the Antitrust Law of Mergers' (1989) (30) *William and Mary Law Review* 787, 809-819.

⁷⁴ Eleanor M Fox, 'Competition Policy at the Equity-Efficiency Intersection' in Damien Gerard and Ioannis Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (Cambridge University Press 2019), 443.

⁷⁵ Anthony Atkinson *Inequality: What Can Be Done?* (Harvard University Press 2015) 126. On the links between concentration and inequality see Andrew Leigh and Adam Triggs 'Markets, Monopolies and Moguls: The Relationship between Inequality and Competition' (2016) 49 *Australian Economic Review* 389, 398.

⁷⁶ See Oles Andriychuk *The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust through the Lens of Legal Philosophy*, Chapter 3 'Doctrinal Foundations of Competition law' (Edward Elgar 2017).

⁷⁷ Eleanor M Fox 'Economic Development, Poverty and Antitrust: The other path' (2007) 13 *Southwestern Journal of Law & Trade in the Americas* 211, 219.

⁷⁸ Eric Bond 'Trade policy and competition policy: Conflict vs mutual support' in Manfred Neumann and Jurgen Weigand (ed) *The International Handbook of Competition* (Edward Elgar 2004) 130.

⁷⁹ OECD (2022) <https://www.oecd.org/competition/the-goals-of-competition-policy.htm> accessed 10 September 2024.

In its 2005 report, the PC, found that an efficiency improvement of 10% in service delivery in the health sector would provide cost savings equivalent to around 1% of GDP at the present time and, given likely expenditure trends, as much as 2% by 2050.⁸⁰ It said that this dividend could be applied to help improve service quality and to provide better access to the health care system, including for Indigenous Australians and those living in remote and regional areas.⁸¹

The case for a review of health care was expressed by the PC as follows:⁸²

It is already a key sector in terms of both economic and social outcomes, and will become even more important in the future as Australia's population ages and as advances in medical technology expand the range (and cost) of treatment options. And it is also a sector where the complexity and diversity of service provision, and shared responsibility between the Australian and State and Territory Governments for funding and delivering those services, put a premium on effective coordination.

Yet there is general acknowledgement that previous efforts to coordinate delivery between different services and levels of government have been found wanting. This has contributed to sizeable inefficiencies in service delivery, cost and blame shifting and, most importantly, lower quality or less accessible services for the Australian population.

The areas of reform articulated by the PC relate broadly to what may be described as the health care system. The health care system and the ways in which federal and state governments interact in delivering health care services was the subject of Council of Australian Government's agreements in 2005.⁸³ Despite the recommendations there has not been significant progress and there is still considerable scope for further reform.⁸⁴

⁸⁰ Productivity Commission, *Review of National Competition Policy Reforms*, Report No. 33 (Commonwealth of Australia 2005), 367 (**PC 2005**).

⁸¹ PC 2005, 367.

⁸² PC 2005, 371.

⁸³ Council of Australian Governments, Communiqué 3 June 2005 (Department of Prime Minister and Cabinet, 2005) pp 2-3.

⁸⁴ Jayne Hewitt 'National Competition Policy and Australia's Health Care System: A Look at the Policy Landscape with New Eyes' (2018) 26 *Journal of Law and Medicine* 103, 116-118

However, the concerns over health care are broader than the PC noted. Unlike the reform of other professions under NCP, the medical sector and allied health largely escaped scrutiny under NCP and has not been systematically reviewed since.

In the case of pharmacy, the Harper committee has recommended the removal of existing pharmacy and location rules.⁸⁵

This submission recommends a review of the medical profession and allied health with a focus on the following areas:

- Local admission rules
- Recognition of foreign qualifications and admission of foreign practitioners
- The rules for admission to specialist colleges, associations and societies
- Whether some medical services are capable of being delivered by other professionals
- Governance and funding arrangements
- Transparency of pricing for medical services
- Disclosure of out-of-pocket fees
- Ownership and restriction rules
- Professional standards
- Advertising rules

These features have the capacity to limit competition in several ways. First, admission rules, the recognition of foreign qualifications and restrictions on who can deliver some types of medical procedures raise structural barriers to new entry. It has the potential to limit access to new services providers at a time when Australia is facing a shortage of medical practitioners. It may also the raise the cost of service delivery.

Restrictions on the conduct of medical services, including fees and fee scales, advertng and ownership restrictions also have the potential to raise the costs of service delivery.

⁸⁵ Harper, 190.

Inadequate disclosure of fees deprives consumers the choice to compare services and can lead to inefficient decision making and higher costs to consumers.

It is likely that the principal reason that these issues have not been addressed is intensive lobbying which has wrongly conflated competition reform with a risk to patient safety or a decline in the quality of service delivery. However, well-functioning markets enable consumers to choose the right mix of service delivery with cost. Indeed, in informed markets both price and the quality-of-service delivery is maximised in the interests of consumers.

It is recognised that a review of the medical profession and allied health, perhaps more than any other sector, requires the co-operation of all levels of Government. This is because funding and service delivery is a shared responsibility of Commonwealth, State and Territory governments.

4. Institutional arrangements to support a revitalised NCP

The Harper committee considered that reinvigorating competition policy requires leadership from a dedicated policy body.

The development of Australian competition policy has been characterised by one- off inquiries that are not conducive to on-going progress or in responding to issues raised by a dynamic economy.

It is recommended that Australia have a standing competition policy body, utilising either an existing institution or a new institution as proposed by the Harper committee.

The House of Representatives inquiry into economic dynamism also recommended examination of governance arrangements for the development and advancement of

competition policy either through the creation of a new institution or utilising an existing institution.⁸⁶

Among the institutional options is the ACCC. However, even at the time of its establishment the ACCC (then the Trade Practices Commission), already had considerably more jurisdiction than any other comparable international regulator.⁸⁷ Since 2015, its jurisdiction has been further expanded to include payment surcharges,⁸⁸ consumer data right ⁸⁹ and energy market misconduct.⁹⁰

Such an expanded role would place considerable strain on a single body and risks diverting the ACCC from effectively fulfilling its core function as a competition and consumer regulator.

More recently the ACCC has been charged by the Government with undertaking several broader industry inquiries.⁹¹ The fact that those inquiries have been commissioned supports the need for a policy body.

However, as the Harper committee also noted, tasking the ACCC with performing a reform function, risks compromising the ACCC:⁹²

Too often this has fallen by default to the ACCC, which can be an uneasy role for a regulator to fulfil. Advocacy on particular issues may be seen to prejudice the outcome of investigations.

⁸⁶ House of Representatives Standing Committee on Economics, *Better Competition, Better Prices Report on the inquiry into promoting economic dynamism, competition and business formation*, March 2024 (Commonwealth of Australia, 2024) 44.

⁸⁷ Michael Jacobs 'An Outsider's Perspective of Australian Competition Law' in Ray Steinwall (ed) *25 Years of Australian Competition Law* (Butterworths 2000) 159-160.

⁸⁸ CCA, Part IVC.

⁸⁹ CCA, Part IVD.

⁹⁰ CCA, Part XICA.

⁹¹ Supermarket inquiry 2024-2025; Childcare inquiry 2023, Retail deposits inquiry 2023; Digital Platforms Service Inquiry 2020.

⁹² Harper, 453.

An alternative is the NCC. Following the completion of the NCP reforms of the mid 1990s the NCC role has been limited to that under the NAR and coverage determinations under the National Gas Law National Gas Law and the Western Australian National Gas (Access) Law.

The NCC's role under the NAR is now limited given the significant decline in the reliance on the regime. In June 2023 the NCC received a single application.⁹³ The NCC is now almost thirty years old. It served a different policy agenda to now. It will be difficult for the NCC to shake off some of the scepticism which characterised part of its role under the NCP⁹⁴ and to provide future leadership on competition policy.

As discussed above, it is recommended that the NCC be dissolved as proposed by the Harper committee.⁹⁵

A further alternative is the PC. Although the PC has undertaken several reviews of Australia's competition law and the NCP – and clearly has the expertise to do so – it is an advisory body on a range of economic, social and environmental issues affecting Australians: It is not a body dedicated only to competition issues.

An alternative body is the ACT. As noted, although the ACT currently operates only as an adjudicative body, it need not do so. An advantage of the ACT is that it already comprises members that have qualifications in law, economics, business and other relevant disciplines. Another advantage is that utilising the ACT does not require the creation of a new institution.

A good example of a Tribunal invested with broad functions is IPART. IPART has a range of functions including price determination, arbitration of access disputes, licensing, competitive neutrality and undertaking reviews of industry and competition.⁹⁶

⁹³ This application was for a 15 year no coverage determination by the APA Group for the Northern Goldfields Interconnect: National Competition Council, *Annual Report 2022-23* (Commonwealth of Australia 2023) 7.

⁹⁴ Ray Steinwall 'National Competition Policy's 25th anniversary: A reflection and observations on learnings for policymakers' (2020) 27 *Competition and Consumer Law Journal* 94, 102 (Steinwall).

⁹⁵ Harper, 76.

⁹⁶ See Independent Pricing and Regulatory Tribunal Act 1992 (NSW).

Of course, the ACT will need to retain its critical adjudicative role under the CCA. The CCA would need to be amended to reflect the enhanced role and to provide greater flexibility for how it is structured and organised. It will also need to be established as a standing body with its own resources. Currently it is constituted only as needed and is supported by the Federal Court of Australia.

If the desire not to create a new institution is paramount, then the ACT could serve that role.

The Harper committee recommended the establishment of the Australian Council for Competition Policy (**ACCP**) with a mandate to provide leadership and drive implementation of the evolving competition policy agenda.⁹⁷

In its response the Government supported the need for a body to oversee progress on competition reform and indicated it will discuss its design, role and mandate with the states and territories.⁹⁸

There are many lessons from NCP that should be applied to a new body. First, it should be a truly national body, not a commonwealth body.⁹⁹ The states and territories should have significant input into its design and composition and its work priorities. Jurisdictions should be permitted to refer competition matters to the body, under appropriate safeguards that ensure the body is not politicised and to ensure that resource constraints are adequately managed.

Jurisdictions should agree a forward work program and deliverables. The policy body should be a permanent independent body with a dedicated and guaranteed funding package reflected in commonwealth, state and territory budgets, as appropriate.

⁹⁷ Harper, 76.

⁹⁸ Australian Government, Australian Government Response to the Competition Policy Review (Commonwealth of Australia 2015), 34-35.

⁹⁹ See Steinwall, 102.

Functions of a new national competition policy body

The German Monopolies Commission provides an example of possible functions which could be discharged by a policy body. Every two years, the Monopolies Commission is to prepare an expert report in which it assesses the status and foreseeable development of the concentration of undertakings.¹⁰⁰ However, the Australian policy body ought to have a much broader set of functions.

The Harper committee envisaged that the ACCP would have a broad role to advise Governments on how to adapt competition policy in changing circumstances. It proposed the following functions for the ACCP:¹⁰¹

- advocacy, education and promotion of collaboration in competition policy
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design issues, regulatory reforms, procurement policies and proposed privatisations
- undertaking research into competition policy developments in Australia and overseas
- ex-post evaluation of some merger decisions
- market studies

Although it will be important for the policy body to monitor progress on competition reforms, any incentives provided to the states under a new NCP should not be assessed by the reform body (as the NCC did) but rather directly by the jurisdiction providing those incentives or by another institution. A lesson from NCP is that care should be taken not to transform the body into a policeman and undermine trust in the body or compromise its integrity.¹⁰²

¹⁰⁰ Acts Against Restraints on Competition 1998 (Germany), ss 44(1), 47.

¹⁰¹ Harper, 77.

¹⁰² Steinwall, 102.

Contribution to regional competition policy

Importantly the Harper committee identified that the policy body should have the function of undertaking research into competition policy developments in Australia and overseas.

There have been considerable developments since the committee made this recommendation. This includes the growth of competition regimes in the Asia Pacific as well as geo-political tensions in the region. The Australian response has included an increased focus on regional engagement, including through regional institutions.

The Australian Government's Asian Century White Paper, recognised that Australia needs to deepen its ties with regional economic institutions, business and other institutions. It noted that the institutions that should expand their links with Asia include Parliament, the judiciary, academia, among others.¹⁰³

Asia's ascent has been even greater than that envisaged when the White Paper and the Harper report was released. The imperative to engage with the region for economic, political and security reasons is even greater today.

The competition policy body could perform an important role in supporting Australian engagement in the region. Its international function should not be limited only to research. It should assist Australia's educational and capacity building initiatives on competition policy in the Asia Pacific, by supporting existing institutional arrangements. This includes through Australia's membership of the Pacific Islands Forum and the Asia Pacific Economic Cooperation (**APEC**).

Australia has already shown its willingness to support regional capacity building initiatives. For example, the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) Consumer Affairs Program is a consumer law focused cooperation program that supports fair and efficient

¹⁰³ Australian Government, *Australia in the Asian Century*, White Paper, October 2012 (Commonwealth of Australia 2012) 257.

markets and consumer welfare. It is supported by the AANZFTA Economic Cooperation Support Program.

The APEC Competition Policy and Law Group envisages a dynamic Asia-Pacific community by 2040, including identifying areas for technical cooperation and capacity building among APEC member economies, promoting exchanges on experiences and best practice on competition policies and competition law enforcement and emerging issues.¹⁰⁴

Through research, education, capacity building and other soft diplomacy initiatives the competition policy body can meaningfully advance Australia's engagement in the Asia Pacific, in addition to advancing competition policy within Australia.

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¹⁰⁴ <https://www.apec.org/groups/economic-committee/competition-policy-and-law-group> accessed 10 September 2024.

¹⁰⁵ The views expressed are personal and do not necessarily reflect those of any other person or organisation.