

National Competition Council

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26 September 2024

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

Dear Director,

National Competition Council submission to the Treasury consultation paper on Revitalising National Competition Policy

I attach the National Competition Council's (NCC) submission to the Treasury Competition Taskforce's consultation paper on Revitalising National Competition Policy (NCP), released on 26 August 2024.

The NCC has considered the consultation paper and is strongly supportive of the need for a revitalisation of the NCP. We welcome the strong commitment from federal, state and territory governments to the core areas for reform outlined in the paper, and their agreement to seek to finalise new competition principles by the end of this year.

If you have any questions regarding the NCC's submission, please contact NCC Executive Director Scott Rogers on [REDACTED] or by email at [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to read 'Julie-Anne Schafer'. The signature is written in a cursive style with a large initial 'J'.

Julie-Anne Schafer
President
National Competition Council

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Submission to the consultation paper on Revitalising National Competition Policy

The National Competition Council (NCC) welcomes the opportunity to make a submission to the Treasury Competition Review consultation paper on Revitalising National Competition Policy.

Role of the National Competition Council

The NCC is an independent advisory and research body that was created in 1995 by agreement of the Council of Australian Governments (COAG), under Part IIA of the *Competition and Consumer Act 2010* (CCA). The NCC was established to assist in the delivery of the original National Competition Policy (NCP) and associated reforms that followed the NCP Review (the Hilmer Review).

The NCC has an important role in assisting Commonwealth Ministers to determine whether significant infrastructure services should be subject to regulation under the National Access Regime, as well as the certification of state and territory access regimes. The NCC is also empowered to carry out research and provide advice on other matters referred to it by the Minister, as well as functions conferred on it by a law of the Commonwealth, or a law of a State or Territory with the agreement of the Commonwealth.

Previously, the NCC had the role of assessing the performance of Commonwealth, state, and territory governments in implementing agreed reforms under the original NCP. It also promoted awareness of the NCP to assist the community to better understand the objectives and processes of the NCP.

The NCC has considered the consultation paper and is strongly supportive of the need for, and the process in place to realise, a revitalisation of the NCP and the suggested reform themes, including through the development of a shared understanding between jurisdictions on the way forward. The NCC welcomes the agreement by all governments to seek to finalise new competition principles by the end of 2024.

The NCC makes the following comments on the three core areas raised for consultation.

Core area 1: Revitalising the National Competition Principles

The NCC supports revitalising the National Competition Principles. In particular, we agree that the access principle would benefit from review and amendment, to take account of changes in the Australian economy, to the nature of important infrastructure, and to reflect changes to the access regime under Part IIIA of the CCA that have been made since the original access principle set out in the 1995 NCP.

Access principle

Decisions under the National Access Regime promote the welfare of Australians by promoting competition in markets dependent on access to infrastructure services, while at the same time ensuring they do not discourage efficient investment in the infrastructure needed to provide these services.

By providing independent expert advice to ministers on the regulation of nationally significant infrastructure, the NCC ensures that ministers are able to make appropriate decisions for the economic benefit of Australians, in a timely manner.

The NCC has consistently met its statutory time limits for making recommendations to the designated Minister, following receipt of an application for declaration. The time limits were reformed following amendments to the CCA in 2021. These changes provide that the NCC is required to make a declaration recommendation to the designated Minister within 180 days (noting that there are provisions enabling it to 'stop the clock' in certain circumstances which can lengthen the overall time for its consideration of a matter).

For their part, the Minister must make a decision on whether services should be declared within 60 days of receiving a recommendation. If the Minister does not publish their decision within the 60 day limit, they are taken to have made a decision in accordance with the NCC's recommendation. Where there have been extended delays in decision making under Part IIIA, it has largely been associated with appeal processes (through the Australian Competition Tribunal and the Federal and High Courts), rather than processes associated with the NCC recommendation and ministerial decision making.

Questions 7-9 of the consultation paper raise the effectiveness, and possible changes to, the Access Principle of the Competition Principles Agreement. The NCC notes that the access regime is confined to the services of major infrastructure facilities where it would be uneconomic to develop another facility to provide the service and where access is needed to promote competition in another market.

As noted in the consultation paper, in recent decades new forms of 'non-physical' infrastructure have emerged that may similarly not be economically feasible to duplicate, such as digital platforms and large data holdings. However, the extent to which the National Access Regime applies to such assets is currently unclear, including whether they would fall within the definition of 'service' for the purposes of Part IIIA, or fall outside exemptions to the regime including the use of intellectual property or production processes.

As a result, where such infrastructure is regulated, it has been done at the level of individual entities or by industry. In the NCC's view, the National Access Regime should apply to digital infrastructure, in appropriate circumstances – that is, for services provided by significant monopoly infrastructure to promote competition in a market, regardless of whether the infrastructure is physical, digital or a combination of both. Access to digital infrastructure is also likely to be effective in facilitating the demand side of markets, further promoting competition.

Core area 2: Developing a 10-year National Competition Reform Agenda

The consultation paper outlines a National Competition Reform Program as the second core area of a revitalised NCP, as part of a National Competition Reform Agenda. All jurisdictions would work collaboratively to develop a 10-year program of reforms, with each jurisdiction also able to develop its own jurisdiction-specific reform plan. The Productivity Commission would model the economic impact of proposed reforms under consideration, to help inform the shape and scope of reforms on the Agenda.

Five provisional reform areas have been identified in the consultation paper. The NCC supports all these themes, noting that the NCC has previously advocated for possible new reform in the areas of general efficiency, the use of market-based approaches to sustainable natural resource management, and the application of competition principles to the provision of public goods by governments and the non-market sector (see the NCC's *Submission to the Productivity Commission review of National Competition Policy arrangements*, June 2004).¹

In particular, the proposed themes of promoting a more dynamic business environment, harnessing the benefits of competition in the net-zero transformation, and harnessing choice, competition and contestability in human services are consistent with this previous analysis by the NCC. The increased role of government in areas such as net zero and human services underlines the importance of reinvigorating competition policy and promoting competition in relevant markets, to ensure the benefits of these reforms are fully realised.

Core area 3: Institutions and governance

In addition to its role under the National Access Regime, the NCC was assigned a number of roles under the 1995 Competition Principles Agreement (the 1995 Agreement), with a focus on the practical application and implementation of competition principles under the 1995 Agreement in participating jurisdictions.

These roles included a number of areas where the NCC operated in an advisory capacity, providing assistance to governments:

- when examining issues associated with prices oversight of Government business enterprises
- with the implementation of competitive neutrality principles in their jurisdictions
- when conducting reviews into public monopolies operating within their jurisdictions, and
- in considering whether the review of a particular piece of legislation should be the subject of a national review, as well as undertaking national reviews so identified.

As noted above, the NCC no longer carries out these functions. However, the above list indicates the scope of what was envisaged in the 1995 Agreement, and provides a baseline of what the NCC could carry out under a revitalised NCP. The NCC was required to provide assistance to the parties to the 1995 Agreement in accordance with its work program, which was determined by the participating jurisdictions and would be a function of the NCC's overall resourcing.

¹ <https://www.pc.gov.au/inquiries/completed/national-competition-policy/submissions/71/sub071.pdf>

In light of the lived experience of waning support for the original NCP, the NCC considers there is merit in governments carefully considering the governance and resourcing arrangements for the NCC, to better support the implementation and sustainability of a revitalised NCP.

Competition payments

Based on its experience under the original NCP, the NCC considers that the inclusion of a type of 'reform payment' for achievement of reform objectives is desirable, and the application of these payments to the Commonwealth is a worthwhile extension.

In the NCC's view, such payments assist in focussing attention and effort on removal of barriers to reform and could provide a metric for achievement. The NCC recognises that payments cannot be a replacement for a genuine commitment to reform and the political will to address embedded vested interests.

Nonetheless, under the original NCP the payments were a relevant factor in the decision-making processes for jurisdictions when considering the benefits of competition reform, and led to better policy outcomes. This was true even in cases where individual payments were relatively small – the payments had a greater impact on policy development and government decision-making, demonstrating their effectiveness as a mechanism to drive reform.

Governance arrangements

The consultation paper reports commentary by some that, under the original NCP, COAG did not provide sufficient oversight of the NCC's work program and activities, and notes that that several states considered that the standards against which the NCC assessed progress against the original NCP did not accord with what governments had agreed. Amendments were introduced into the Competition Principles Agreement in 2000 regarding this issue.²

The NCC observes that, since the implementation of the original NCP, a number of improvements have been made to agreements supporting federal financial arrangements, and alternative governance arrangements could be explored for the NCC to improve jurisdictional involvement in and support for the work of the NCC.

- At present, the Competition Principles Agreement provides that appointments to the NCC are made by Governor-General on recommendation from the Commonwealth as to who it proposes be appointed. The Commonwealth's recommendation is made following consultation with State and Territory governments on suitable appointments, and the majority agreement of States and Territories in support of the recommended appointee (or fail to object within the required time).
- A more direct form of nomination by jurisdictions could be contemplated, thereby enhancing their involvement in the work of the NCC under a revitalised NCP. For example, the intergovernmental agreement underpinning the establishment of the Australian Energy Regulator (AER) provides for members directly nominated by State and Territory governments, as well as members nominated by the Commonwealth. This arrangement is enshrined in the Commonwealth legislation that establishes the AER (Part IIIA of the *Competition and Consumer Act 2010*), with all appointments ultimately made by the Governor-General.

² COAG agreed to amend the Agreement to provide further guidance to the NCC on how to assess whether jurisdictions had met their legislative review commitments, broadly that when making assessments it is a matter for government to determine what policy is in the public interest.

Alternative arrangements could be considered. Importantly, the NCC considers that, in keeping with the original 'twin peaks' design contemplated by the Hilmer Review for the original NCP, all roles associated with a revitalised NCP can be accommodated between existing institutions (specifically, the NCC and the Australian Competition and Consumer Commission (ACCC)), without the need to create new Commonwealth or multi-jurisdictional bodies.

Later examination of institutional arrangements for competition policy by the 2015 Harper Review also posited the creation of an Australian Council for Competition Policy, accountable to all jurisdictions and subject to an agreement between governments. The remaining functions of the NCC associated with the National Access Regime would be transferred to a national Access and Pricing Regulator. These recommendations were not progressed by governments.

The NCC considers that the concerns raised by the Harper Review regarding the need for separation of market studies and competition regulation have overstated the potential conflicts between policy and regulation/enforcement functions. Since the time of that Review, the ACCC has conducted a number of market studies and inquiries into competition and consumer protection issues in individual markets and on an industry-wide basis. The 5-year program for rolling reports into markets for the supply of digital platform services is a prime example.

The NCC considers, in light of the past roles it has successfully undertaken in relation to implementation, accountability, coordination and advocacy under the original NCP, its ongoing role in relation to the National Access Regime, and the ACCC's contributions in relation to both market studies and competition regulation, the creation of any new federal-state institutions is unnecessary. The roles needed for the successful implementation of a revitalised NCP can be accommodated between the NCC and the ACCC, in close coordination and cooperation with federal, state and territory senior officials.

Resourcing arrangements

It was originally envisaged that the NCC would not be a large institution, but rather comprise a secretariat of around 20 people and contracting out much of the analytical work required when providing assistance to governments under the original NCP. Notably, as a body jointly accountable to Commonwealth, state and territory governments, it was also envisaged that all governments would commit resources to it. Ultimately, the original Competition Principles Agreement provided that the Commonwealth is solely responsible for funding the NCC.

The NCC is an independent entity with its current responsibilities and membership set out under Part IIA of the CCA. While the NCC remains independent, it is a very small agency. Since its role in assessing the performance of Australian governments under the original NCP ended in 2005, the NCC has been confined to considering third party access-related applications under Part IIIA of the CCA and similar applications under the National Gas Law. Consequently, the NCC's current workload is largely application-driven, which by their nature are sporadic, unpredictable and relatively infrequent.

The NCC considered alternative means of obtaining secretariat services, and decided to cease directly employing staff and instead enter with an arrangement to contract with another agency to provide it with secretariat and corporate services. After considering a range of possible options, the NCC identified the ACCC as the most suitable agency to provide these services. As a result, the NCC does not employ any staff directly, but rather obtains staffing and corporate support from the ACCC, with that agency to make available secretariat services as required to deal with third party access applications as these are

received, and for the ongoing administration of the NCC as a Commonwealth agency. The agreement with the ACCC includes provisions to address the risks of possible conflicts of interest and to provide appropriate oversight of work undertaken by ACCC staff for the NCC. These arrangements came into effect from 1 July 2014.

Going forward, the NCC considers that the overall resourcing model for a revitalised NCP should be revisited, including the funding of institutions, to enable them to sustainably and independently deliver on their mandate and to ensure that a revitalised NCP can endure beyond its proposed 10-year reform agenda.