



Revitalising National Competition Policy Consultation Paper

ACCC initial submission

September 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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Executive summary

The ACCC welcomes governments' commitment to revitalising Australia's competition policy framework through the Australian Treasury's Competition Taskforce and the engagement of states and territories.

We encourage governments to be bold in pursuing the updated competition principles and a competition reform agenda. A reason the National Competition Policy reforms of the 1990s were so successful is that they were ambitious and brought competition considerations to the forefront of key government processes. For lasting benefits to Australians, competition policy should look not just to prevent anti-competitive behaviour but to actively promote lasting competitive outcomes to benefit consumers, over both the short and longer term.

In this short initial submission to the public consultation, we draw on our [February 2024 submission](#) to the Taskforce and set out:

- Some areas of Australia's competition principles that require clarity to ensure there is a shared understanding of the basis for areas of potential reform, including:
 - Price oversight versus price controls and their relevance to Government Business Enterprises (GBEs); and
 - The related but distinct issues that arise in access to non-physical infrastructure and data access to promote competition.
- The benefits of new competition principles on the demand side, to reflect that consumers can enliven competition.
- To address governments' role in market stewardship and design, including in sectors like the care economy and markets to manage environmental challenges.
- Important clarifications to the competition principles to ensure government privatisations and monopoly pricing by key infrastructure providers with natural monopoly characteristics can be appropriately dealt with by competition policy.
- The need to subsequently update competition laws to ensure interactions between the ACCC and markets can be as effective and targeted as possible to maximise the benefits for consumers and minimise the costs for business.

We also briefly set out the ACCC's ability to support reform as a champion of competition policy, including through the role the ACCC plays by undertaking studies or inquiries of sectors where a competition problem arises, to critically examine issues and identify options for policy and law reforms.

Included in this submission is a potential list of updated competition principles that could be used as a basis for stakeholder discussion. The ACCC considers this could complement the Consultation Paper and facilitate subsequent discussion on actual wording for updated principles. They are an ACCC draft for discussion and are not intended to represent the views of the Australian Government.

The ACCC may make a further submission once we can consider and reflect on the views of stakeholders to the consultation process.

ACCC draft competition principles for discussion

1. Competition policy, laws and institutions should promote the long-term interests of Australians.
2. Legislation and government policies should:
 - Not restrict competition unless it can be demonstrated that the benefits to the public outweigh the costs, and
 - Seek to promote competition.
3. Governments will address frictions in the demand side of markets, as effective competition is enlivened by empowered and confident consumers who can engage effectively in markets and exercise choice.
4. Governments will reduce regulatory barriers to being able to buy and sell goods and services, work, and operate businesses, across the country.
5. Governments will have mechanisms available to apply independent oversight of prices and markets where competition issues arise, including where such interventions facilitate the flow of information to consumers, ensure fair trading, prevent collusion, and address market failures.
6. Before a government monopoly is privatised or exposed to competition, governments will conduct a public review to determine the appropriate supporting policies and regulatory frameworks.
7. Where significant infrastructure facilities (including digital infrastructure) have natural monopoly characteristics, governments will act to ensure there are effective frameworks in place to ensure third parties can access the infrastructure on reasonable terms, including at efficient prices.
8. Governments will ensure that government businesses that compete (or could potentially compete) with other providers will be subject to measures to neutralise any competitive advantage they receive due to their ownership.
9. Where governments have a significant role in markets, including through procurement, the delivery of social services, or designing markets for environmental objectives, the mechanisms should promote competition where possible, including over the longer term.
10. Recognising the role that data can play in driving competitive advantage, governments should establish streamlined and modernised arrangements to facilitate access to and sharing of government data sets, where it is in the public interest to do so.
11. Governments will apply these principles transparently in all cases, and to all levels of government.

1. Competition principles – a shared understanding for discussing reform

1.1. Price oversight and price controls

The way competition and related laws address issues with pricing in a market vary between jurisdiction and even between industries within a jurisdiction.

In the [1995 Competition Principles Agreement](#), the prices oversight principle (clause 2) was directed towards GBEs and required that jurisdictions ‘consider establishing independent sources of price oversight advice where these do not exist’. The principle considers that the oversight ‘should apply to all significant GBEs that are monopoly or near monopoly suppliers...’ but is directed towards oversight and advice, not price controls.

In considering questions 10 and 11 in the Consultation Paper the following questions may be helpful when considering existing arrangements or potential reform options:

- Are prices subject to monitoring, surveillance or oversight, or do the laws constrain or set prices?
- Are the laws making the mechanisms available, or are they applying them?
- Are mechanisms just directed to GBEs, or to any business or goods/services?

ACCC functions for price monitoring, price inquiries and price notifications have been in place since the Prices Surveillance Act 1983 was introduced, with the key concepts and provisions subsequently incorporated into the new Part VIIA of the Trade Practices Act 1974. Part VIIA remains an important part of the Competition and Consumer Act 2010 (CCA). Accordingly, at the Commonwealth level, Part VIIA of the CCA has always provided that price monitoring, price inquiries and price notification were *available* for the Minister to apply broadly to any particular persons (businesses) or goods or services, and those functions have been applied in a range of markets.

Accordingly, since before the Hilmer report and the NCP reforms, these laws have considered price oversight as being broader than GBEs and as not extending to price setting or price control.

For this reason, we consider that updating a price oversight principle to reflect the status quo—that oversight (not control) be *available* to apply to any business, or good or service—appears uncontroversial. As previously, oversight should be applied to monopoly or near-monopoly GBEs.

By way of clarification, the language of the legislation providing for price notification (Division 4 of Part VIIA) is not particularly clear. It is an oversight mechanism and does not provide for any control of prices outside the 21-day assessment period, even if the ACCC objects to an increase. Any price controls beyond those 21 days would need to be provided for under other laws, such as the Minister’s separate ability to deny certain Australia Post price increases under the Australian Postal Corporation Act 1989. However, this separate ability does not exist for most notified services.

1.2. Data and non-physical infrastructure

In an increasingly digital economy, competition issues are complex and revitalised competition principles need to ensure they are applicable to these markets in a technology neutral way.

In discussing these issues there are conceptual challenges to consider. For instance, which data can enhance competition, and should significant monopoly infrastructure be covered by the National Access Regime in Part IIIA of the CCA even where the monopoly characteristic is not primarily physical in nature?

As flagged in questions 29-31 of the Consultation Paper, access to data raises questions such as: what data would benefit competition, whose and what sort of data should be accessible, and what limitations need to be imposed. If looking beyond government data there would need to be consideration of the breadth of entities that might be covered by any obligation, as well as intellectual property rights and any implications for personal privacy.

Natural monopoly infrastructure has traditionally been large physical assets that, when combined with geographic or regulatory constraints, are uneconomical to duplicate and provide an enduring monopoly position in a market. Ports, airports, and rail networks are examples of the types of physical infrastructure that have been covered at times by the National Access Regime. However, where access to a digital system or network raises similar monopoly concerns, the application of the National Access Regime is less clear. This lack of clarity arises to the extent that digital services involve the use of production processes and intellectual property, which are excluded from the definition of 'service' in Part IIIA. More generally, the role of the 'national significance' criterion for declaration may need further consideration to ensure that state, regional or sectoral monopolies are not excluded from the regime.

In the context of this uncertainty, industry-specific regimes have been developed, such as that for the ASX clearing and settlement facilities, which has meant that the application of the National Access Regime to digital services is untested. Regarding questions 7-9 in the Consultation Paper, the ACCC considers that it should be made clear that the competition principles and National Access Regime are capable of being applied to any type of significant infrastructure with natural monopoly characteristics.

In considering how to give clarity to the application of the competition principles and National Access Regime to non-physical infrastructure, care should be taken to ensure the most appropriate terminology is used. For example, the term 'digital infrastructure' is not to be conflated with the term 'digital platforms'. Entities regarded as 'digital platforms' refer to specific entities that provide services that are typically two-sided or multi-sided services, where the existence of network effects is often strong. Digital infrastructure, on the other hand, encompasses a wide range of physical and software-based technologies that enable digital services. For these and other reasons it should not be considered that digital platform issues could necessarily be dealt with simply by including them with principles or laws around access to significant monopoly infrastructure.

2. Revitalising the competition principles

Australia's competition principles have contributed substantially to the wellbeing of Australians. Many of the key concepts remain just as relevant today but there are important opportunities to build on the principles and update them for the modern economy. Further to the ACCC's February 2024 submission to the Taskforce, we consider certain aspects of updated competition principles are of particular importance.

2.1. Recognising the role of consumers in driving competition

Consumers being able to drive an enlivened demand side is essential to driving competition and, in turn, economic efficiency and productivity growth. We need empowered and confident consumers and small businesses that can engage in markets and choose effectively between the offers of suppliers.

As we set out in our February 2024 submission, general consumer laws cannot always address high levels of product or service complexity, or other aspects of the market that prevent or inhibit consumers or small businesses from exercising choice effectively. Moreover, information disclosure alone has generally not proven to be effective, particularly for complex products or markets.

Through our market studies work looking at energy, banking, and insurance, we have found that consumers often do not, or cannot, make best use of the offers in markets. If transaction costs, switching costs, complexity or other barriers prevent or significantly inhibit consumers exercising choice, the full benefits of competition cannot be realised.

The cost to consumers to switch providers can be significant, particularly for products or services which are more differentiated or more complex due to the different terms and conditions applicable. For example, obtaining three online quotes and reading the Product Disclosure Statements for three combined home and contents insurance products could take a consumer over five hours. Our Northern Australia Insurance Inquiry report in 2020 found high retention rates for combined home and contents insurance, which were 94% in north Queensland, 87% in the Northern Territory and 83% in northern Western Australia in 2018-19.

There are significant potential benefits to consumers and small businesses from reducing switching costs. For example, the potential benefits to consumers from greater demand side engagement are significant. Our 2023 Inquiry into the National Electricity Market demonstrated that 79% of customers could achieve a better offer if they switched to a competitive acquisition offer. Research at that time undertaken by Energy Consumers Australia in its December 2023 Sentiment Survey found that 48% of households had not investigated changing their energy company or plan for a better offer for over 2 years.

There is a role for Governments to evaluate the effectiveness of competition in essential services markets to identify barriers or frictions to consumer switching and consider policy measures to facilitate competition and better outcomes for consumers. Market oversight enables identification of barriers to consumers effectively engaging in the demand side and

where necessary facilitates the development of specific targeted reforms to support consumers. There is also a range of tools that governments can consider to help consumers engage in markets.

In some industries, governments have made clear interventions to support switching. In banking, while home loan exit fees have been significantly limited for over a decade, there are still substantial barriers to switching, with account numbers still bank-specific and ambiguous arrangements for transferring direct debit authorisations. We also note the Australian Government has recently legislated a framework for improved water markets information to support confidence and participation in rural Murray-Darling Basin water markets. In telecommunications, number portability rules have ensured consumers can retain their phone numbers when changing providers.

In addition to switching, other measures can help consumers benefit from competitive markets, whether their engagement is positive or passive. Recent telecommunications measures have reduced information asymmetry and fostered competition between service providers, including the Measuring Broadband Australia program, the ACCC's speed claims guidance, and the Australian Communications and Media Authority's NBN Consumer Information standard and Better Practice Guide for NBN providers.

In electricity markets, government price comparison websites as well as a common comparison price (the default market offer (DMO) and Victorian default offer (VDO), set by independent regulators) have helped promote competition by supporting consumers to compare energy plans in this complex market. Governments have also required energy retailers to provide clear information to customers when they could save by being on a better offer through clear messaging on customer bills. At the same time, there are protections for customers that are unable to engage in energy markets.

Consumer outcomes and regulatory settings in electricity markets are closely monitored. Energy and Climate Change ministers have recently agreed to progress a package of consumer reforms to help households aimed to help consumers access cheaper energy deals, increase support for people experiencing hardship, and deliver more protections for consumers. Consumers also have a reasonable expectation that the products they purchase are safe, but they might not be well-equipped to assess product safety. If suppliers obtain a competitive advantage by compromising on product safety, market outcomes can be distorted and consumer confidence undermined.

Where governments create or support markets that deliver environmental objectives, market design must have regard to the demand side. Consumers need to be able to make informed purchasing decisions when it comes to environmental claims, including in relation to key environmental policy areas such as emissions reduction, biodiversity, nature positivity, and economic circularity. There is substantial benefit in empowering consumers to drive competition, yet greenwashing, difficulty in comparing products, or the potential for anti-competitive conduct and market concentration make this challenging.

Accordingly, in response to questions 23-25 of the Consultation Paper, the ACCC believes updated competition principles must encourage governments to promote competition through considering both the demand side and supply side of markets when designing policy or legislation.

2.2. Markets with substantial government involvement

The ACCC supports a new competition principle (questions 26-28 of the Consultation Paper) that addresses the need for governments to consider competition in markets with high levels of government involvement—both in the short and longer term.

In sectors where governments have an enduring role and there are high levels of government subsidies available to users (for example, in childcare, aged care, the National Disability Insurance Scheme, or in which the government is offering financial support for clean energy or circular economy projects), the subsidies may broaden supply, reduce prices, and subsequently increase demand. Subsidies raise the cost to government and price signals become less effective in supporting efficient consumption decisions. While competition may not be a comprehensive solution in these markets, it should still be considered wherever practical, through governments considering the impact of policies on competition, as well as how to promote competition or to design markets where it can still be effective. This can include when (or if) to reintroduce or maximise market contestability once a fledgling market initially shielded from competition matures.

Challenges in meeting significant environmental objectives may require prompt action to achieve important policy goals within specific time periods. Wherever possible, such interventions should ensure competition issues are front of mind in policy design to avoid being at the expense of competition and well-functioning markets in the longer term.

Discussion of the competition principles has rightly included consideration of competition issues in the transition to net zero, which has been described by Ministers and the Net Zero Economy Agency as the most significant economic transformation Australia has faced since post-world war economic rebuilding. Australia's net zero targets are intertwined with goals for a nature positive and circular economy. As such, updated competition principles should reflect that competition issues could arise not only in tackling emissions reduction, but also in driving the development of nature repair (biodiversity) markets, circular economy initiatives and delivering other environmental objectives through markets.

Net zero and other environmental transitions are transforming markets, with the ACCC playing a key role by supporting integrity and competition in these markets, encouraging compliance with competition laws, and taking proportionate enforcement action for breaches of competition and consumer law. As markets transform there may be collusion between competitors, incumbents exercising market power to raise the barriers to entry for green innovators, or firms leveraging their market power in existing supply chains to become dominant in new markets.

It is widely recognised that achieving the Australian Government's 2030 and 2050 emissions reductions targets and other environmental calls for cooperation, including public and private sector collaborations. Governments are increasingly calling for, or actively facilitating or participating in, coordination and collaboration to overcome barriers to entry, such as the first mover disadvantage or a lack of economies of scope or scale. In some cases, these may not raise competition concerns and perceived or actual competition law risk should not unnecessarily deter collaboration with demonstrable environmental benefits. Australia's authorisation regime enables the ACCC to take real, verifiable and significant environmental benefits into account as part of the 'net public benefit' test.

The competition law regulatory framework in Australia, which includes the authorisation regime, provides scope for parties contemplating such collaboration to meet both their

environmental and competition law goals and obligations. Australia's competition principles should provide that, wherever possible, governments should seek to retain competition over the longer term when addressing these important challenges.

2.3. Unconstrained monopoly pricing and privatisations

Australia continues to have markets characterised by infrastructure with natural monopoly characteristics. The resulting monopoly pricing and market power have a negative impact on efficiency and productivity.

Currently, the legal framework on Part IIIA of the CCA focuses on direct competition impacts on upstream or downstream markets—to address the historical issue of denial of access by vertically integrated monopolies. While we agree vertically integrated monopolies require a framework for economic regulation, key monopoly infrastructure, such as our airports and ports, is not vertically integrated but can extract economic rents by applying much higher, monopoly pricing for access to the infrastructure services. This monopoly pricing also causes inefficient supply chains, resulting in higher costs for consumers and exporters due to the absence of competition.

As an example, if unregulated monopoly pricing results in a price that is just 15c per tonne higher than the efficient market price, and the annual tonnage was 200 million, the monopoly rent would be in the order of \$30 million per year. This monopoly rent would be kept by the monopoly rather than flowing to businesses in competitive markets or to consumers. If that example is just one charge by one infrastructure monopoly, the potential impact of monopoly pricing throughout Australian supply chains is very substantial.

Responding to questions 7-9 of the Consultation Paper, it is critical that Australia's competition principles and laws are updated to ensure monopoly pricing can be constrained effectively where it needs to be, whether by an entity that is vertically integrated or standalone.

Existing laws could be amended to provide that monopoly pricing, not just the effect on downstream competition, was sufficient for a regulatory framework to apply. However, the existing laws have a further range of challenges. Alternatively, a new law could provide a more straightforward process for the Minister to require infrastructure with natural monopoly characteristics to have an access undertaking accepted by the ACCC, which would have recourse to binding arbitration. This could also be part of a broader reform process to provide a more flexible, targeted and proportionate suite of regulatory arrangements that governments could apply to markets with limited competition and significant monopoly infrastructure.

Many of Australia's existing infrastructure monopolies should already have been, but are not, subject to a regulatory framework that effectively constrains them from exercising their market power. Regarding questions 5-6 of the Consultation Paper, this has generally been caused by governments privatising infrastructure monopolies without first establishing adequate regulation. It is important that our competition principles require governments to conduct an independent and public review before they privatise significant monopoly infrastructure. This would ensure the appropriate regulatory framework is put in place *before* the sale process.

3. Institutions to support competition reforms

The ACCC is an independent Commonwealth statutory agency that promotes competition, fair trading, protection of consumers' rights, and product safety for the benefit of consumers, businesses, and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading, and product safety provisions of the CCA, regulate national infrastructure, and undertake market studies. The ACCC program of work is to achieve compliance with the CCA and other relevant legislation to protect, strengthen and supplement the way competition works in Australian markets and industries, to improve the efficiency of the economy and to increase the welfare of Australians.

The Consultation Paper indicates that responsibilities for an institution that would play a leadership role in advocating for competition policy, driving implementation of the decisions and conducting independent, transparent reviews of progress could include:

- Proactively recommending policy changes where there is a net community benefit from a more seamless national economy or where a national approach is needed;
- Providing advice to governments on potential competition issues as policy is being formulated; and
- Educating and drawing awareness to potential areas for National Competition Policy reform by undertaking studies of particular markets.

The ACCC agrees that carrying out these responsibilities will be important to support the revitalised National Competition Policy, and there should be investment in the resources required for these responsibilities to be carried out. The three potential responsibilities for an institution described on page 54 of the Consultation Paper are attributes of the activities undertaken by the ACCC to achieve our purpose of 'making markets work for consumers now and in the future'. These activities require active stewardship to facilitate competitive outcomes and outcomes for consumers. The ACCC has existing expertise and capability to shepherd competition policy reform and could be formally recognised in revised competition principles as having this role.

There are existing measures that align with these responsibilities, which are being fulfilled by several Commonwealth institutions including the ACCC, which contribute to the promotion and development of competition policy. While there could be consideration of ways to enhance how existing institutions such as the ACCC fulfil these responsibilities and interact, it is not clear these arrangements are ineffective, nor that that all these responsibilities would necessarily need to be conducted by a single institution to be effective.

A combination of Treasury, the ACCC, the National Competition Council (NCC), and the Productivity Commission perform functions that contribute to competition policy and are consistent with the ongoing support for the revitalised national competition principles and competition reforms. These bodies have complementary roles in competition policy. For example, the ACCC and the Productivity Commission both conduct studies and inquiries into markets. However, these roles have distinct focuses.

Relevant ministers may direct the ACCC to undertake certain activities, including market studies, inquiries, and monitoring of particular goods and services. The ACCC can also undertake self-initiated market studies and research reports. These all enable us to:

- Develop a sophisticated understanding of how well competition and markets are working in particular sectors;
- Bring transparency and awareness to issues and areas of market operation that allow more efficient market behaviour from businesses and consumers; and
- Identify options for government about ways to improve the functioning of markets.

ACCC market studies and inquiries have wide-ranging impacts in terms of scope and on markets through time. These activities contribute to policy debates, compliance and enforcement work, and internal expertise that helps to improve the ACCC's other functions, such as merger assessments and competition exemption assessments. In comparison, the Productivity Commission has a whole of economy perspective with, among other things, productivity and social outcomes as a focus. These roles complement each other, as the ACCC compels information and interrogates market data (potentially including underlying cost information) that the Productivity Commission can utilise to model and assess overall economic and societal impacts of policies.

When examining how to maximise the benefits of the three responsibilities identified in the Consultation Paper, consideration should be given to ways to enhance the work of existing institutions and promote collaboration between them. For example, collaboration between the ACCC in conducting monitoring and market studies, and the policy departments responsible for enhancing competition in the markets, is important in achieving the aims of competition policy. Modernising the laws governing the ACCC's collection and publication of information to allow closer collaboration within government while protecting privacy and commercial sensitivities is one area that could deliver valuable enhancements.

Finally, the Consultation Paper acknowledges the NCC's primary role during the implementation period of the original NCP, which was to assess jurisdictions' progress in implementing the NCP commitments and make recommendations to the Treasurer on competition payments to be made to jurisdictions. The ACCC is supportive of the NCC having a specific role like its original NCP role, to support the implementation phase of a revitalised NCP and review reform progress against implementation milestones.