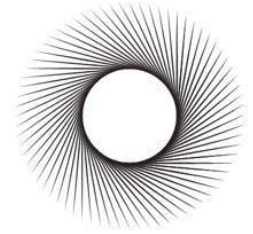


30 September 2024



MANDALA

By email:

nationalcompetitionpolicy@treasury.gov.au

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

RE: Submission to the National Competition Policy Unit on Revitalising National Competition Policy

Mandala welcomes the opportunity to make a submission to the National Competition Policy Unit on Revitalising National Competition Policy.

Competition will be key to unlocking productivity and ongoing prosperity in Australia. There is now an opportunity to revitalise competition through a refresh of the *Competition Principles Agreement*, and through a targeted National Competition Reform Agenda which focuses on issues that have the most significant impact on competition in Australia's future economy.

This submission to the Unit has been informed by Mandala's recent research across a cross-section of sectors in the economy, including retail, superannuation, health care, and financial services. Our research is included in the footnotes to this submission.

About Mandala

Mandala is a research firm with offices in Melbourne, Canberra, and Sydney. Mandala specialises in combining cutting-edge data and advanced analytical techniques to generate new insights and fresh perspectives on the challenges facing businesses and government.

Views and opinions expressed in this document are prepared in good faith and based on Mandala's knowledge and understanding of its area of business, markets and technology. Opinions expressed herein are subject to change without notice.

Further information

We would welcome the opportunity to provide the National Competition Policy Unit with further information based on our submission if it would be of assistance.

The relevant contacts at Mandala for this work are myself or Dr Adam Triggs and we can be reached at admin@mandalapartners.com.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Amit Singh', with a stylized, cursive script.

Amit Singh
Managing Partner
MANDALA

The National Competition Principles need to be revitalised to meet the changing needs of our economy

The *Competition Principles Agreement (CPA)* promoted competition when it was established in 1995, but needs to be refreshed to ensure that it continues to do so in the future.

The *CPA* sets out agreed principles for all levels of government to unlock the benefits of competition, and to ensure that government legislation does not restrict competition. These principles are broadly appropriate, but must be revitalised to ensure that the intent of these principles can be realised in the markets of the future. We have structured our response around the questions set out in the Consultation Paper.

Question 2: Are changes required to the **Legislation Review Principle** or its implementation to make it more effective and/or to address new challenges. If yes, what changes could be made?

The NCP Unit should consider three updates to the Legislative Review Principle (Clause 5):

- (i) Require more regular reviews, to ensure that legislation can adapt to the dynamic competitive environment of many modern markets.

Under Clause 5(6), governments that are party to the *CPA* are required to systematically review legislation at least once every ten years. However, the rate of change in many markets has accelerated, and competitive dynamics now routinely transform over much shorter timeframes. For example, in less than a decade:

- Some parts of the payments sector have been disrupted by new entry. The proportion of debit card transactions acquired in Australia where the debit card was issued and acquired by the same institution fell from over 18 per cent in 2017 to under 10 per cent in 2023.¹
- The competitive dynamics of retailers transformed. Bricks-and-mortar retailers rapidly increased their online share of sales. For example, Myer's online share of sales increased from 5% to almost 25% between 2017 and 2022.²
- Australia's AI industry has grown significantly. In the five years to 2023, foreign investors contributed \$7 billion in AI technologies. There are now over 650 AI companies headquartered in Australia.³ The ACCC has highlighted how AI technologies may augment the competitive dynamics of many markets in Australia.⁴

A more regular review cadence may be more appropriate, given the accelerated rate of change in many markets in Australia. Financial services is a sector where more frequent legislative reviews are warranted due to the rapid pace of change both domestically and internationally. The Murray Review of the financial system has recommended that the state of competition in the financial system should be reviewed every three years, including an assessment of barriers to international entry.⁵

¹ Reserve Bank of Australia (2023) *C2 debit cards – seasonally adjusted series*; Reserve Bank of Australia (2022) *The cost of card payments for merchants*; Mandala analysis.

² Mandala (2024) *Surf, Shop, Save: Online retail helps lower the cost-of-living*.

³ Australian Trade and Investment Commission (2024) *Australian critical technologies prospectus*.

⁴ Australian Competition and Consumer Commission (2024) *Digital Platform Services Inquiry – March 2025 – Final report: Issues paper*.

⁵ Treasury (2014) *Financial system inquiry: Final report*.

- (ii) Broaden the principle to include a review of government policies and principles that impact competition.

As the Harper Review identifies, government policies such as procurement policies and policies relating to public-private partnerships have the potential to promote or restrict competition in markets that interact with government.⁶ As such, government policies and principles that impact competition should also fall within the scope of legislative review.

- (iii) Update the principle to require consideration of how competition can be promoted through legislation.

The current Clause 5 is expressed in the negative: ‘legislation... *should not restrict competition unless it can be demonstrated that: (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition.*’ The principle should be updated to require governments to consider how competition, not just how legislation can avoid being an obstacle to competition. There are many ways that governments could actively promote competition through the design of legislation. For example, a government could enhance competition by enabling consumer choice through legislation that required businesses to report certain information on a public register.

Question 9: Do you think any potential changes to the **Access Principle** or its implementation should be considered? What are they and why are they important?

The Access Principle (Clause 6) should be updated to explicitly address digital and non-traditional infrastructure regulation. The original Clause 6 was developed three decades ago, in contemplation of more traditional forms of infrastructure such as rail and ports. Clause 6 should be updated to capture access issues associated with digital forms of infrastructure, such as access to gatekeeper hardware or technology inputs where access is necessary to enable effective competition upstream or downstream.

For example, Clause 6(1)(a), which examined whether it is ‘economically feasible to duplicate the facility’ may operate well when applied to traditional infrastructure, but may not apply appropriately to digital infrastructure. This is because, while it may be economically feasible to duplicate a particular digital facility, the duplicated facility may not be adopted to a comparable extent to the original due to strong network effects.

Question 13: Are changes required to the ‘**public interest test**’ in the Principles to make it more effective? If so, what changes could be made and why?

The public interest test should be updated to require decision-makers to publish reasons for the decision. Not only does this enhance transparency and accountability, and public trust in the decision-making process, publishing decisions can help to ensure that decision-making is consistent across the many decision-makers that apply the CPA, or that departures from consistency are justified and documented.

⁶ Harper et al (2015) *Competition Policy Review*.

Question 17: Should the Principles include a **purpose statement/principle**?

The inclusion of an explicit overarching purpose statement in the *CPA* can help ensure alignment in interpretation of the principles between the many parties that are party to the *CPA*. While the Competitive Neutrality Policy and Principles contains a statement of objectives, an overarching purpose statement.

Question 23: Should the Principles promote ‘**consumer empowerment**’ or the ‘**demand-side**’ of competition? What are the costs and benefits?

The Principles should enable decision-makers to promote ‘consumer empowerment’ as a means of enhancing competition. Legislative design that promotes ‘consumer empowerment’ could be facilitated through a revitalised Legislative Review Principle that requires parties to the *CPA* to consider how legislation can promote competition.

We consider ‘consumer empowerment’ to be an important lever with which legislation can revitalise competition. Please see our response to Question 33 below (under (iv) Better harnessing choice, competition and contestability in human services’).

The National Competition Reform Agenda should prioritise key competition issues across the reform themes

Question 33; What specific reform actions could governments pursue in the **National Competition Reform Agenda**? What are the potential benefits and costs?

We have set out recommended reform actions that governments could pursue in the National Competition Reform agenda under the five reform themes below.

(i) Promoting a more dynamic business environment

a. Reviewing planning and zoning regulations

Planning and zoning legislation may present unnecessary barriers to entry to several markets. As planning and zoning powers are generally decentralised across the states and territories, the National Competition Reform Agenda should ensure that there is a consistent national approach to planning and zoning reform.

The Harper Review⁷ and the Productivity Commission⁸ also identify planning and zoning as a priority area for review. The Productivity Commission estimates that there is \$1.5 billion per year in value that could be unlocked for the Australian economy from reforms to planning and zoning, due to among other factors, reduced costs from development delays and a more efficient allocation of land.⁹

Planning and zoning reform has the potential to enhance dynamism in the supermarkets and grocery sector. ACCC’s Supermarkets Inquiry interim report finds that planning and zoning laws may be significant barriers to entry and expansion, especially for smaller or independent grocers. It also observes that differences in zoning and land use regulations across states and territories adds additional complexity to competitors that wish to enter or expand.¹⁰

⁷ Harper et al (2015) *Competition Policy Review*.

⁸ Productivity Commission (2017) *Realising the productive potential of land*.

⁹ Productivity Commission (2017) *Realising the productive potential of land*.

¹⁰ Australian Competition and Consumer Commission (2024) *Supermarkets inquiry: interim report*.

b. Removing unnecessary import restrictions

Legislated import restrictions have the potential to restrict import competition, resulting in higher prices and worse outcomes for consumers. Governments should review import restrictions to ensure that they are still fit-for-purpose and do not unnecessarily restrict competition.

Mandala collected data on thousands of used cars and found that second-hand EVs and hybrids were 41 per cent more expensive in Australia than in New Zealand. In New Zealand electric and hybrid vehicles, controlling for key observable characteristics, are on average \$9,025 cheaper than in Australia.¹¹

A major reason for this difference is that, unlike Australia, New Zealand does not have a ban on the parallel imports of second-hand vehicles. Many Australians would be surprised to learn that we have regulations in place that allow foreign companies to determine what cars Australians can and cannot buy, even when those companies do not make cars in Australia.

The regulations in question are parallel importation restrictions. The regulations were established when Australia had a domestic car manufacturing industry. These regulations stopped people from importing car models that were made in Australia to protect the car manufacturers that operated here.

These regulations still exist today even though these car manufacturers no longer make cars in Australia. By allowing foreign car manufacturers to stop Australians from importing electric vehicles that they sell in Australia we are doing four things, all of which are damaging to the economy, environment and cost-of-living.

First, we are forcing Australian consumers to pay millions of dollars each year to foreign car manufacturers. By constricting the supply of electric vehicles on sale in Australia, we are pushing up the price considerably. This is great for foreign manufacturers who get higher prices but terrible for the average Australian who pays more. It's a direct wealth transfer from Australian consumers to foreign car manufacturers.

Second, we are making it harder for the private sector to help fight climate change, meaning the government has to tax and spend and do more of the heavy lifting. The amount of investment required to stop a global 1.5 degree increase in temperatures will be in the tens of trillions of dollars. Governments simply cannot afford it. Private sector investment will be critical.

Third, we have driven up the price of cars through a regressive policy that hurts people on low incomes the most. People on lower incomes have a better chance of affording electric vehicles in other countries, such as New Zealand. In Australia they are more out of reach. The rising price of cars has been a major source of inflation after the pandemic. If there was ever a good time to make cars cheaper, it's now.

Fourth, we are hurting Australia's mechanics, car repairers and parts suppliers who would otherwise be making more money servicing these vehicles. Those who oppose this reform will argue that car safety is reason we need these regulations by stopping people from importing dangerous cars from overseas or cars for which there are no parts in Australia. Neither argument stacks up.

New Zealand's experience shows that car safety is not a realistic justification for banning parallel imports. After all, local safety standards still apply. Cars can only be imported if they satisfy these safety standards. Information sharing between jurisdictions similarly makes it easy to identify consumers impacted by product recalls.

¹¹ Fels (2024) *Inquiry into price gouging and unfair pricing practices*.

(ii) Harnessing the benefits of competition in the net zero transition

a. Enhancing competition in superannuation

There is an opportunity to review regulatory settings relating to superannuation to improve competition and enable different patterns of investment, including sustainable investment.

The government recently concluded a consultation process on options to change the *Your Future Your Super* performance tests to boost competition.¹² The consultation paper outlined several options, including Option 2b, which proposes a peer comparison of risk-adjusted returns. This approach aims to address concerns that the current test may be influencing investment decisions to the detriment of member outcomes, including discouraging investment in asset classes that may otherwise be in the best financial interest of members. Mandala analysis found that:¹³

- The current test incentivises ‘benchmark hugging’, reducing funds’ appetite for higher-return investment strategies if they raise the risk of failing the performance test.
- Treasury’s Option 2b (peer comparison of risk-adjusted returns) is preferred as it would encourage competition by motivating improvements and innovation, avoiding incentives for funds to ‘hug’ benchmarks.

In separate analysis, we found that the *Your Future, Your Super* performance tests are limiting funds from fully participating in the green transition. Failing the performance tests forces funds to notify their members of underperformance and inhibits them taking on new members. The significant consequences of failing the test discourages the deployment of capital into assets with longer term investment profiles, including sustainable assets.¹⁴

b. Enabling sustainability collaborations

Legislation should ensure that competition regulations do not impede collaborations between organisations to pursue sustainability objectives.

The ACCC has recently published a draft guide on sustainability collaborations and Australian competition law. This draft guide intends to ‘make it clear competition law should not be seen as an immovable obstacle for collaboration on sustainability that can have a public benefit.’ It highlights the exemptions process as the primary tool for giving comfort to organisations wishing to engage in low-risk sustainability collaborations that they not in breach of competition laws.¹⁵ We consider that greater guidance to help organisations identify whether their conduct is likely to be low-risk, and a greater application of a streamlined authorisations process and class exemptions for low-risk collaborations, could enable greater action in furtherance of Australia’s net zero transition.

(iii) Lowering barriers to labour mobility

a. Removing anti-competitive post-employment restraints

About one in two Australian workers are subject to post-employment restraints, including non-compete, non-poach and non-solicitation clauses.¹⁶ There is recent international evidence that post-employment restraints reduce labour market competition and stifles start-up formation. Empirical evidence suggest

¹² Treasury (2024) *Annual superannuation performance test: Design options*.

¹³ Australian Investment Council (2024) *Annual superannuation performance test: Submission – design options consultation paper*.

¹⁴ Mandala (2022) *Superannuation and climate change: Better returns for a better climate*.

¹⁵ Australian Competition and Consumer Commission (2024) *ACCC consulting on guide to sustainability collaborations*.

¹⁶ Australian Bureau of Statistics (2024) *Restraint clauses, Australia, 2023*; Andrews and Jarvis (2023) *The ghosts of employers’ past: how prevalent are non-compete clauses in Australia?* See also Triggs (2023) *Time to ban non-compete clauses* as published in the Canberra Times.

that these clauses have a particularly significant impact on lower income workers.¹⁷

While the Australian Treasury has recently completed consultations on post-employment restraints, there remains a continued imperative for governments to review legislated and regulatory approaches to post-employment restraints. There is currently inconsistency to state and territory approaches to restraints of trade. For example, the *Restraints of Trade Act 1976 (NSW)* uniquely permits a court to add words to allow an otherwise reasonable restriction to survive. State and territory governments could explore ways to harmonise their approach to the law of restraint of trade to enhance labour market competition.

b. Reviewing scope of practice

There is an opportunity to review and remove barriers to labour mobility in health care, particularly in primary care. The strengthening Medicare Taskforce report identifies that for many Australians accessing primary care is becoming harder, with more people presenting in emergency departments or delaying care, and falling bulk billing rates.¹⁸ The funding and regulatory arrangements in the primary care sector limit workforce capacity and therefore the supply of services to healthcare consumers, contributing to increasing costs for consumers. The Scope of Practice Review identifies that the poor recognition of qualifications across health care professions, and profession-specific (rather than risk-specific) regulations restrict health care professionals from working to their full scope of practice.¹⁹

Reducing unnecessary restrictions on scope of practice may unlock greater competition and choice across many health care services. In particular, measures to expand scope of practice will empower a growing cohort of nurses to utilise their full clinical skillset. Mandala analysis has found that Australia's nursing and midwifery workforce has grown by 20 per cent between 2017 and 2022 to 340,000 full-time equivalent workers, and is now almost triple the size of the medical practitioner workforce. However, 34 per cent of experienced nurses report their skills are being underutilised.²⁰ While recent regulatory reforms have removed barriers to nurse practitioners and midwives providing services under Medicare, there remain restrictions on the ability of health funds to pay experienced nurses to be involved with, run and manage chronic disease management programs. The national reform agenda should seek opportunities to review scope of practice in health care and other regulated professions.

(iv) Better harnessing choice, competition and contestability in human services

a. Improving price transparency in health markets

Effective price transparency mechanisms have the potential to unlock the 'demand' side of markets to intensify competition. As part of the national reform agenda, governments should investigate potential price transparency mechanisms that could be introduced through regulation for markets with low levels of competition and barriers to demand-side switching.

Healthcare has significant information asymmetry between consumers (patients) and suppliers (medical practitioners/providers), with very limited price transparency. Vulnerable patients, who are either experiencing a health issue or supporting a loved one experiencing a health issue, are subject to very high fees for procedures with no information available that would allow them to shop around or negotiate. With limited ability for the Government to regulate or set prices, price transparency is one way to encourage competition in the sector to drive down prices for consumers.

Mandala analysis has found that price transparency in health care markets drives down out-of-pocket

¹⁷ Treasury (2024) *Non-competes and other restraints: understanding the impacts on jobs, businesses and productivity*.

¹⁸ Department of Health and Aged Care (2022) *Strengthening Medicare Taskforce report*.

¹⁹ Department of Health and Aged Care (2024) *Unleashing the potential of our health workforce – Scope of Practice Review*.

²⁰ Australian Primary Health Care Nurses Association (2023) *Nurse skills, experience being wasted despite nursing shortage - national survey*.

costs. While there are opportunities to improve the design and implementation of the Medical Cost Finder, consumers in states and territories with data available on the Medical Cost Finder experience lower out-of-pocket costs, and lower increases in out-of-pocket costs, for routine procedures such as total hip replacements. Competition could be further intensified if the Medical Cost Finder were implemented in full, as originally intended, with benefits flowing directly to healthcare consumers.²¹

b. Introducing greater market-based competition for medical devices

The current pricing model for medical devices in the private health sector in Australia is demonstrably anti-competitive. Our analysis shows that Australians pay 2.4 to 4.7 times more for common medical devices compared to international benchmarks. For example, Germany and Sweden pay only a quarter of the price for identical devices. In 2022, prices for 25 common devices were 67 per cent higher in Australia than in New Zealand. These price discrepancies persist despite ample supply and multiple suppliers for most devices in the Australian market. The disparities cannot be explained by Australia's geographic location or market size, as similar-sized markets achieve significantly lower prices.²²

Prices set on the Prescribed List of Medical Devices (PL) are negotiated between the federal government and medical device manufacturers, without the input of payors. The PL has isolated device prices from market forces: its high prices are unreflective of supply. The medical device sector is globally diversified and mature, with prices in other markets being much cheaper because of the falling cost of these well-established technologies. The PL also does not encourage competition to drive prices down. Reference pricing means device sponsors are not incentivised to introduce lower prices below the minimum benefit amount.

Introducing greater market-based competition will help reduce prices and improve patient outcomes. Compared to peer countries, Australia's PL sets non-bundled and non-competitive prices for medical devices. Other international markets ensure efficient prices and overall costs for medical devices through bundling and competitive tendering or negotiation. Bundling of payments by episode of care encourages efficient allocation of spending and encourages suppliers to lower prices to compete. This helps healthcare markets overseas use market forces to reduce medical device costs compared to Australia's PL. This reform would foster a more competitive environment in healthcare, potentially lower private health insurance premiums, and improve the overall efficiency of Australia's healthcare system.

(v) Leveraging the economic opportunities of data and digital technology

a. Unlocking the benefits of data sharing for competition

Governments should review barriers to the productive use and sharing of data. The ACCC's Digital Platform Services inquiry observes that the exchange or acquisition of data may intensify competition both between data firms, and between the business customers that use data firm products, by providing customers with greater choice between products that are more relevant to their needs.²³ Further, removing barriers to data sharing can boost innovation and ensure that data is allocated to its most productive uses.

To facilitate effective data sharing and unlock its benefits for competition, governments will need to provide businesses and citizens with the confidence that data will be used responsibly. Governments could do this through the development of responsive regulatory models, such as the 'Five Safes' protocol, which is used effectively by the Australian Bureau of Statistics and other government agencies. This protocol requires that data is anonymised and only accessible by those who have received training and have been approved access to the data. An effective regulatory framework will enhance competition by promoting new waves of technological disruption.²⁴

²¹ Mandala Partners (2024) *Out-of-pocket costs report*.

²² Mandala Partners (2023) *Australia's surgical surcharge*.

²³ Australian Competition and Consumer Commission (2024) *Digital platform services inquiry: Interim report 8*.

²⁴ See Triggs (2024) *The benefits of selling your data* as published in the Canberra Times.