Competition Policy Review

Submission from the South Australian Government

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SOUTH AUSTRALIA

Government of South Australia

Contents

1. Introduction

The South Australian Government is committed to improving competition across the economy and welcomes the opportunity to contribute to the national review of competition policy. Ensuring the delivery of the key enablers that underpin competitiveness and productivity of our economy are key features of our industry transformation and growth strategies.

All levels of government have an important role in competition policy. The South Australian Government has introduced a number of changes and a range of reforms to increase competition in both the public and private sectors. Key examples include:

- South Australian Government Competition Policy procedures including competitive neutrality guidelines and legislation review guidelines.[1].
- Competition policy statement for State and Local government[2].
- Better Regulation Handbook[3] to guide regulatory impact assessments when proposing to introduce, review or amend regulation.
- Development of Cost Recovery Guidelines for government agencies is underway.
- The establishment of an independent economic regulator (Essential Services Commission of South Australia (ESCOSA)) under the *Essential Services Commission Act 2002* whose objective is the *protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services.*
- An Energy and Water Ombudsman to ensure that complaints and disputes between consumers of electricity, gas and water services and providers are appropriately investigated;
- The establishment in 2010 of the Office of the Small Business Commissioner to provide services to resolve disputes with as minimal stress as possible to small business operators;
- Changing to a demand driven system for vocational education and training, where TAFE South Australian competes alongside private providers;
- First stage of the development of a multi-provider social housing system (Better Places, Stronger Communities program) to transfer 1,000 public housing dwellings to community housing organisations;
- The Water Industry (third party access) Amendment Bill 2013 to provide a negotiate/arbitrate framework for businesses to seek access to services provided by natural monopoly water infrastructure.

The South Australian Government notes that the review is predicated on the assumption that the benefits of removing restrictions on competition have exceeded the costs in the past and therefore the process should continue as well as be broadened into human services. An evidence base to validate these assumptions and underpin the draft recommendations would add value to the draft report and would help to promote public understanding and acceptance of competition policy.

[1] http://www.dpc.sa.gov.au/national-competition-policy

[2] Can be made available on request

[3] www.dpc.sa.gov.au/sites/default/files/pubimages/documents/BetterRegHandbook.pdf

Discussions about competition policy must also be mindful of other reviews and policy discussions about the respective roles of the Commonwealth and the States and Territories currently on the national reform agenda, including the White Paper on the Reform of the Federation. If the White Paper of the Federation's aim is to produce greater delineation of roles and responsibilities, then appropriate respect needs to be afforded to that level of government with responsibility for determining policy in those areas. In some instances the draft recommendations appear to disregard the existence and aims of the White Paper on the Reform of the Federation process.

In response to the Review panel's draft report the South Australian Government offers the following discussion for consideration by the Review panel. Many of the draft recommendations are individually addressed but in summary the South Australian Government's key points are:

- Measures by Commonwealth and state governments to enhance competition have generally been effective.
- The benefits of further measures to enhance competition must be considered against the costs of those measures, including possible adverse impacts on welfare, access and equity, and who bears those costs.
- The external oversight role proposed would be inconsistent with the aims and objectives of the White Paper on the Reform of the Federation process.
- The successful implementation of competition policy in the human services sector must take into consideration the diversity of essential service provision to the community.
- The mixed delivery of human services by the various levels of government and non-government sector requires consideration of the flow-on impacts of reforms on the system as a whole.
- There are limitations in the extent to which consumers are willing and able to exercise choice in the market for human services which will require careful consideration and planning to overcome.
- The diverse needs of the State's transport system can be delivered without the adoption of road tolls.
- South Australia has made significant progress in reducing the regulatory burden on business.

2. Competition Policy

2.1 Recommendation 1 – Competition Principles

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers. The following principles should guide Commonwealth, state and territory and local governments in implementing competition policy:

- *legislative frameworks and government policies binding the public or private sectors should not restrict competition;*
- *governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;*
- *the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;*
- *governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities;*
- *government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;*
- *a right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest; and*
- *independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.*

Applying these principles should be subject to a 'public interest' test, so that:

- *the principle should apply unless the costs outweigh the benefits; and*
- *any legislation or government policy restricting competition must demonstrate that:*
    - *it is in the public interest; and*
    - *the objectives of the legislation or government policy can only be achieved by restricting competition.*

The intent of draft recommendation 1 is largely to broaden the National Competition Policy agenda to include all government services and promote the role of choice. Support for and wording of the individual principles outlined in Recommendation 1 will be contingent on the support for many of the other Recommendations made in the draft report.

As listed in the introduction South Australian Government has undertaken and continues to implement reforms and changes that increase and enhance competition across both the public and private sectors. However, in South Australia much of the 'low hanging fruit' has been picked. Future competition enhancing changes and reforms, particularly in the human services area, are very likely to be subtle, complex to implement and assess, and potentially controversial.

The South Australian Government agrees that governments should generally avoid policy and legislation that restricts competition, however such an outcome may sometimes be justified if the benefits of the restriction to the community as a whole outweigh the costs, and the social objectives of such a policy or legislation may only be achieved by restricting competition. As such the South Australian Government strongly supports the consistent, transparent and thorough application of the public interest test as a central component of competition policy in Australia. For example, in areas such as tobacco, alcohol and other

public health policy, it is important to ensure that a focus on competition policy does not undermine governments' capacity to respond to emerging risks. This includes circumstances where the level of risk is significant but difficult to quantify and a precautionary or proactive approach may be required to ensure public safety.

To avoid creating a competition policy 'industry' the public interest test should also include sufficient attention given to the costs of collecting information and developing, monitoring, enforcing and updating proposed policy responses. As noted by the Productivity Commission[4], some past reforms were procedurally costly to implement and the adjustment burden considerable when compared to the potential benefits. This has particularly been an issue at the regional level and for smaller State and Territory Governments in dealing with more minor items on the legislation review program.

2.2 Recommendation 2 – Human services

Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.

The guiding principles should include:

- *user choice should be placed at the heart of service delivery;*
- *funding, regulation and service delivery should be separate;*
- *a diversity of providers should be encouraged, while not crowding out community and voluntary services; and*
- *innovation in service provision should be stimulated, while ensuring access to high-quality human services.*

Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.

The draft report provides a range of views and perspectives on how competition policy principles could be extended to the human services sector. This is a complex sector however, composed of distinct sub-sectors with diverse institutional, regulatory, legal, funding and service delivery mechanisms. Successful implementation of competition policy reforms would need to consider all these differences and be adapted where necessary.

As the draft report rightly notes, changes in competition policy need to also consider the flow-on impacts across sectors. For example, whilst responsibilities for different parts of the health system as well as aged and disability services are split between different layers of government in Australia, they should be viewed as a whole service system where policy changes in one area by one level of government consider potential impacts to service demand in other areas managed by other levels of government.

The draft report recognises that "*equity of access, universal service provision and minimum quality*"[5] are important considerations in the provision of human services. While competitive practices should be encouraged when commissioning services within a competitive market, South Australian Government is concerned that regarding human services as a competitive market may conflict with these social objectives of access and equity.

For example, public education has been created in response to a market failure. If the market was left to operate without government intervention, the market price for education

[4] 2005, *Review of National Competition Policy Arrangements*, Report No 33
[5] Page 26 of the Competition Policy Draft Report

would be beyond the reach of many to afford. Similarly, the provision of Australian public health services is based on the Medicare principles of universal access to medical services, pharmaceuticals and public hospital services.

In South Australia, there is already considerable partnership between the public and private sectors for the provision of human services. For example, the South Australian Government has arrangements with the non-government sector for the provision of a range of services including hospital avoidance, early discharge support, transition care, help in the home and mental health services.

It is important to recognise that competition can only exist if the market offers viable alternatives. For example in regional South Australia the lack of population often results in there being no, or only very limited, supply options. While greater scope exists for the implementation of competition reforms in the higher volume areas of human service delivery, care must be made to ensure continuity in services in rural and remote areas and where service delivery may not offer appropriate financial returns to providers relative to the cost of service delivery.

As noted by the Productivity Commission's submission to the Review, the problems presented by the application of competition in human services are not a good reason to preclude the application of competition in these markets, but "*careful analysis, extensive consultation, and possibly controlled policy experimentation, should all be pursued*"[6].

South Australian Government recognises that co-design of human services is an emerging policy direction in human services delivery, and as such considers there to be value in including this in the recommended guiding principles. Co-design refers to the involvement of consumers of services, as well as other partners such as service providers and non-government organisations (NGOs), in the design of human services. The South Australian Government suggests that an additional new proposed guiding principle be added:

- *A co-design approach to planning what services are needed and how they are delivered should be encouraged.*

South Australian Government is committed to exploring innovative and efficient new models of delivering social programs to promote and encourage economic efficiency. One new funding model currently being tested to deliver preventative and early intervention programs in health is Social Impact Investments[7] – where private investors provide upfront funding and receive a reward only if the program succeeds in achieving predetermined outcome measures. These types of investments can encourage more efficient use of taxpayer dollars and provide incentives to service providers to deliver preventative and early interventions as efficiently as possible.

[6] Page 42 of the Productivity Commission submission to the Competition Policy Review.
[7] http://www.socialimpact.org.au/

APPLICATION OF USER CHOICE IN HUMAN SERVICES

The ability of consumers to make good choices about the service they receive is adversely impacted by a number of factors including:

- the level of knowledge;
- the lack of availability of quality indicators about services to be consumed;
- the time-critical nature of some human services eg emergency care;
- the particular vulnerability of some consumers (eg those with disabilities or being treated for addiction); and
- the complexity of the service required.

Facilitating user choice requires new approaches that increase consumer's knowledge and enhance their ability to make choices, whilst at the same time recognising there are some limitations to this. For example the South Australian Government has developed a website[8] for people with disability and their families to search, contact and review service provider information, with a view to improving information about services available in South Australia.

There are also other significant limitations to consumer choice, for example: time-critical emergency care, vulnerable patients (such as those with cognitive impairment or being treated for addiction) and highly complex cases. If consumers are to be given more choice in the services they consume, significant effort would be required on the part of governments, providers, regulators (and clients) to ensure adequate education processes and information are made available. The South Australian Government agrees with the draft report that appropriate alternative options must be provided for those who are unable to make informed choices or do not wish to exercise their discretion.

The South Australian Government has consistently supported application of the user choice principles in disability services. Prior to the Australian Government's announcement of the NDIS, the South Australian Government had already commenced a transition towards individualised funding for clients, including self-management, in order to allow people with disability to have choice and control over their own support packages. Over the past thirty years, there has been significant growth in the number, diversity and size of providers in the NGO sector providing disability and aged care services in South Australia. In the disability sector, this has meant that the proportion of disability services provided by the NGO sector has increased to now more than half the market share.

However, there are still some areas where the South Australian market for services is significantly underdeveloped and there is a limited choice of providers. Strategic development of the market may be required to facilitate user choice. South Australian Government is currently conducting a market analysis of all service areas in disability and aged care to determine an appropriate strategy for the future.

In the area of social housing, a key policy issue related to increasing user choice is the possibility of future Commonwealth funding for public rental tenants via the Commonwealth Rent Assistance payment. That is, rather than paying a grant to State Governments to subsidise public housing services, tenants would receive the payment directly. Currently this

[8] www.mysupportadvisor.com.au

is a direction put forward in a number of Commonwealth reviews and it is anticipated to be considered through the Review of the Federation process.

South Australian Government supports a multi-provider social housing system; progress on this is underway, including a transfer target of 5,000 public housing dwellings to community housing organisations. A major project (Better Places, Stronger Communities) is underway to achieve the first stage transfer of approximately 1,000 dwellings.

For the education sector the South Australian Government is concerned that increased mobility in student enrolment as a result of increased parent choice (subsidised by governments) will lead to residualisation, where the most disadvantaged students become increasingly concentrated in government schools. The Review of Funding for Schooling[9] noted that the concentration of disadvantaged students resulted in poor educational outcomes.

The Australian school education system is currently characterised by a high level of non-government providers. This does not equate to improved educational outcomes when compared to countries where there is less competition or choice such as Finland which achieves high education results with a totally state funded school system. This is further supported by the 2013 Grattan Institute report on the 'The myth of markets in school education' which concluded that increasing competition was not a viable way of increasing the performance of school systems.

SEPARATING FUNDING, REGULATION AND SERVICE DELIVERY

The South Australian Government conceptually supports innovation in the roles of funding, regulation and service delivery in human services, although notes that absolute separation of these roles may not always be the best outcome and a range of models ought to be considered. The ability of government to implement such a policy can be limited by some existing structural arrangements, including industrial relations arrangements and size of jurisdiction.

For example, disability services in South Australia have been administered, funded and provided through the same entity since 2006, following the abolition of the Intellectual Disability Services Council (IDSC) and Julia Farr Services (JFS) boards and the subsequent integration of responsibility for government service delivery into the South Australian Government. With the move to the National Disability Insurance Scheme (NDIS), the function of funder and regulator will move to the National Disability Insurance Agency. The South Australian Government is currently undertaking work to assess government's service model into the future, determining in what form and under what conditions the government will continue to provide disability and aged care services.

In the area of housing services, one of the supporting features of a multi-provider system is the creation of a separate regulatory body. A national regulatory system for community housing providers has been developed to align regulatory practice across all jurisdictions and assist in growing the community housing sector. The South Australian Government has committed to this, with the commencement of the *Community Housing Providers (National Law) (South Australia) Act 2013* in April 2014 and the creation of the Office for Housing Regulation.

[9] Gonski, 2011, *Funding Review for Schooling*

Separating funding, regulation and service provision to encourage a diversity of providers may, for relatively small government organisations, generate additional implementation and oversight costs that significantly outweigh the benefits to 'consumers' of regulatory, research and service provision services.

2.3 Recommendation 3 – Road transport

> *Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety.*
>
> *To avoid imposing higher overall charges on road users, there should be a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Commonwealth grants to the States and Territories.*

Consistent with previous COAG agreements the draft report notes that charging for road use is currently indirect – through fuel excise and vehicle registration charges – and suggests that these should be replaced with direct, cost-reflective prices in a revenue-neutral way. In principle, the recommendation is supported, as the existing fuel excise and fixed access charges are unsustainable, lack transparency and create inequalities and distortions in investment across the road network. However there are a number of implementation issues that need to be resolved.

If direct pricing is to work nationally, a consistency in the standard of road network is needed to make the pricing consistent and efficient. Currently, the road network standard fluctuates across Australia, and in many cases within major road transport routes. Therefore, cost-reflective pricing may fluctuate significantly across these routes, unless all segments of those routes are brought up to a consistent standard. Applying a fixed cost across a main road transport route based on the average will result in cross subsidisation across users, based on the distance travelled by users along that route. Consideration of initial pilot programs, aimed at improving poor standard segments of road, may be worth considering, so that consistent standards are reached across the entire lengths of major routes.

The draft report's view is that cost-reflective pricing in roads considers location, time and congestion. Mass should also be a part of that equation, as mass is a major determinant of road wear (and maintenance costs) as well as bridge strength requirements.

The in-principle efficiency gains from road pricing have been widely investigated, and are generally well understood by governments. The draft report points to those arguments and proposes continuing to reform road pricing towards a more efficient pricing system where the costs related to actual use are better reflected in pricing.

The focus over the last five years has been on reforming heavy vehicle pricing and altering the funding mechanisms for freight system investment. Through representation on various national bodies all jurisdictions are continuing to contribute to the reform initiatives.

Recent cost benefit analysis undertaken as part of the Heavy Vehicle Charging and Investment (HVCI) phase of reform confirm the majority of benefits are associated with supply side reforms, that is those that ensure a continuous and sufficient flow of funds back to road providers from charge revenue.

Any move towards a reformed pricing system will require a consistent approach and model across Australia, and will require trials to validate the system. The South Australian

Government notes that there is no analysis presented of the likely implementation issues and impacts of changing from the current system to cost-reflective pricing and suggests that great care would need to be taken to ensure that specific sectors, such as primary industries which rely extensively on road transport, are not disadvantaged if the draft recommendation is implemented.

South Australian Government has developed an Integrated Transport and Land Use Plan[10] (ITLUP) to guide private, federal, state and local government investment into the transport system for the next 30 years, and play a key role in ensuring land-use planning, strategic infrastructure planning and transport investment are fully integrated.

It is suggested that the Panel recognise the role of integrating transport and land use planning as part of its consideration of road pricing as a means to achieve the desired outcomes. The South Australian Government does not support the use of road tolls, and the diverse needs of the State's transport system can be delivered without the adoption of such measures.

South Australian Government is also continuing to pursue alternative mechanisms to capture private sector funding contributions to road improvements and maintenance, including through formal deed arrangements where funding contributions are provided by direct beneficiaries of improved infrastructure.

2.4 Recommendation 6 - Taxis

> *States and Territories should remove regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest.*
>
> *If restrictions on numbers of taxi licences are to be retained, the number to be issued should be determined by independent regulators focused on the interests of consumers.*

Regulation of taxis does not only manage the number of taxis. It also includes vehicle standards, driver training, service standards (including disability access), and driver behaviour standards, health, and criminal history. These are the areas of regulation that overlap with public safety. The *Passenger Transport Act 1994* and *Passenger Transport Regulations 2009* are predominantly concerned with passenger safety and welfare (including protection from exploitative fare practices).

These regulations do not prohibit technology (i.e. smart phone applications or "apps") companies from providing services but requires them to become accredited where they are not otherwise included in an existing accreditation of a transport operator (as an approved booking office) or centralised booking service for taxis. The South Australian Government is currently in discussion with independent app providers with a view to facilitating their accreditation or approval as a booking office to accredited operators.

Only metropolitan taxis have a restriction on entry through a licensing system. All other passenger vehicle categories have no limitations, except those of minimum vehicle quality. South Australia is committed to releasing taxi licences on an annual basis through the forward budget estimates process. Taxis are licensed to ply for hire from rank and street hail. Other transport services are for scheduled or specified routes (i.e. general passenger services/Adelaide Metro) or pre-bookings only. It should be noted that the introduction of

[10] http://transportplan.sa.gov.au/

bookings apps for hire car (i.e. chauffeured) vehicles will reduce the distinction between taxis and hire cars in terms of responsiveness to requests for hire as South Australia does not place time or distance limits on pre-bookings.

It is acknowledged that the taxi licensing requirement creates a barrier to entry to this segment of the industry. Enabling effective management of passenger safety, vehicle standards and operator integrity would be important policy issues before deregulation of licensing taxis could be considered.

A key concern for the taxi licensing system is to ensure there are adequate numbers (and service conditions through licensing) for wheelchair accessible taxis. Removal of license number controls on taxis is likely to result in proportionally fewer wheelchair accessible taxis as general taxis would be easier to acquire (no licence cost, cheaper non-wheelchair accessible vehicles) and are much more attractive for drivers (eg less customer service intensive). The Government might need to consider increased expenditure to assist wheelchair accessible taxis in this case. The South Australian model of taxi services has resulted in wheelchair accessible taxis having generally equivalent response times to general taxis; a requirement of the federal *Disability Discrimination Act 1992*.

2.5 Recommendation 7 – Intellectual property review

> *The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission.*
>
> *The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.*
>
> *The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.*
>
> *Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions. Such an analysis should be undertaken and published before negotiations are concluded.*

The South Australian Government acknowledges that IP law is extremely complex, and is becoming more so, due to the need to adapt the laws to suit technological change. It is the view of the draft report that an overarching review of IP be undertaken by an independent body, such as the Productivity Commission. In view of the legal complexity, it is South Australian Government's view that any Productivity Commission team would need to be augmented by appropriate legal support in order to conduct such a review.

In its response to the Australian Government's Agricultural Competitiveness Issues Paper, the South Australian Government suggested that consideration be given to, among other things, a review of unused IP rights owned by publicly funded research and development organisations, and how they might be shared with industry, in order to derive commercial benefit.

2.6 Recommendation 10 – Planning and zoning

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

The principles should include:

- *a focus on the long-term interests of consumers generally (beyond purely local concerns);*
- *ensuring arrangements do not explicitly or implicitly favour incumbent operators;*
- *internal review processes that can be triggered by new entrants to a local market; and*
- *reducing the cost, complexity and time taken to challenge existing regulations.*

The recommendation of the draft report in respect to Planning & Zoning is supported.

The externalities of the built environment need to be managed for the public good, and urban planning is the means of achieving this through zoning and other planning instruments. The built environment impacts of unfettered development and competition could also negatively impact on broader productivity through unmanaged externalities such as traffic congestion and public health decline.

The certainty and stability this brings to public and private investment enables high level outcomes that serve citizens long term interests in ensuring investment is well placed to meet citizens spatial needs.

Efficient government investment in infrastructure such as public transport, health, education, broader public services and the enhancement of public spaces is best supported through this approach.

Ensuring business needs are regularly able to be considered, and then appropriately translated into the planning zoning systems across the country particularly at the strategic and policy levels of the systems, will reduce impediments to competition and ensure timely investments are able to be made.

The South Australian Government notes that comments in the draft report about planning and zoning focus narrowly on issues related to competition in the urban retail sector; in particular, the extent to which planning might unintentionally restrict competition amongst supermarkets. Remarkably, the draft report says nothing about the impact of planning and zoning on competition in other sectors, including rural/agricultural settings.

Consideration of fit for purpose land use planning regimes may better assist primary industries and regional development.

An independent expert panel is currently undertaking a review[11] of how planning is viewed and conducted in South Australia, with the final report to South Australian Government expected in December 2014.

[11] http://www.thinkdesigndeliver.sa.gov.au/

2.7 Recommendation 11 – Regulation Review

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- *they are in the public interest; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition laws (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

South Australia does not agree that there is a need for a whole sale nationally managed review of all regulations. South Australia has made significant progress in reducing the regulatory burden on business. For example, the South Australian Government has successfully implemented two rounds of red tape reduction which generated ongoing cost savings to business of $321 million per annum. South Australia supports the use of the public benefit test which is already a requirement in South Australia for regulatory review (see Better Regulation Handbook[12]).

The South Australian Government has recently established the Simpler Regulation Unit to review government regulatory activities which impose significant costs or delays on business, including laws and regulations as well as administrative procedures and guidelines. Regulatory activities across all three spheres of government will be considered with the aim of reducing any unnecessary overlap or duplication of effort.

The South Australian Government considers that the oversight of this process by an external body (draft recommendation 39) would be inconsistent with the aims and objectives of the White Paper on the Reform of the Federation process.

[12] www.dpc.sa.gov.au/sites/default/files/pubimages/documents/BetterRegHandbook.pdf

2.8 Recommendation 13 – Competitive neutrality policy

All Australian governments should review their competitive neutrality policies. Specific matters that should be considered include: guidelines on the application of competitive neutrality during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).

The South Australian Government regularly reviews its implementation of competitive neutrality including:

- the South Australian Competitive Neutrality guidelines in 2010; and
- the list of significant business activities (note that the thresholds have not been reviewed or indexed so that 'less significant' entities are now captured that would have been excluded in 1995).

The South Australian Government does not agree that there is a need for an independent body to oversee the review of Competitive Neutrality policies. This can be accomplished through self-assessment, as is currently the case, and public reporting.

2.9 Recommendation 14 – Competitive neutrality complaints

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum:

- *assigning responsibility for investigation of complaints to a body independent of government;*
- *a requirement for the government to respond publicly to the findings of complaint investigations; and*
- *annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Draft Recommendation 39) on the number of complaints received and investigations undertaken.*

It is the view of the South Australian Government that there is no need for reporting to an independent oversight body. The South Australian Government currently has a mature, transparent and independent competitive neutrality complaints process to manage all complaints received.

The Competitive Neutrality Complaints Secretariat within the Department of the Premier and Cabinet, in consultation with the Crown Solicitors Office, makes an initial determination in relation to all complaints received. If it is determined that the complaint is not trivial or vexatious, the Secretariat refers the complaint to the relevant government agency for initial consideration and possible resolution between the parties. If the complaint cannot be resolved, it is referred to the Premier (with responsibility for the *Government Business Enterprises (Competition) Act 1996*) for consideration, who may appoint an independent Competition Commissioner to investigate the complaint. The Competition Commissioner prepares a written draft report to allow relevant parties and the Premier to provide comment.

The final report is made public via the Government Gazette, on the Department of the Premier and Cabinet website[13] and laid before both Houses of Parliament.

2.10 Recommendation 15 – Competitive neutrality reporting

> *To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.*

The Productivity Commission's recommendation that competitive neutrality policy requires self-reporting by Government Enterprises in annual reports duplicates current reporting arrangements and adds to the administrative burden of States. The reporting that is currently undertaken through the Heads of Treasuries matrix should be sufficient.

2.11 Recommendation 16 – Electricity, gas and water

> *State and territory governments should finalise the energy reform agenda, including through:*
>
> - *application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;*
> - *deregulation of both electricity and gas retail prices; and*
> - *the transfer of responsibility for reliability standards to a national framework.*
>
> *The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical integration.*
>
> *All governments should re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:*
>
> - *economic regulation of the sector; and*
> - *harmonisation of state and territory regulations where appropriate.*
>
> *Where water regulation is made national, the body responsible for its implementation should be the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).*

The national water reform agenda encapsulated in the 2004 Intergovernmental Agreement on a National Water Initiative (NWI) and in COAG reforms have continued to drive water market reform nationally. Of specific relevance to South Australia, these reforms have informed the Commonwealth *Water Act 2007* (and the *Water Amendment Act 2008*) that requires the sustainable management of the Murray-Darling Basin.

The South Australian Government has undertaken significant water reform consistent with the NWI. The South Australian Government has implemented NWI pricing principles, which require cost reflective pricing. ESCOSA is currently undertaking a pricing inquiry[14] and is to report to the South Australian Treasurer on 31 December 2014. The inquiry stems from the South Australian Government's Water for Good plan, which identified pricing reform as a key element in ensuring long-term water security and economic efficiency for South Australia.

The South Australian Government has no objection to a national approach if appropriate arrangements are made to enable State based legislation for pricing and access arrangements to operate effectively.

[13] http://www.dpc.sa.gov.au/national-competition-policy

[14] http://www.escosa.sa.gov.au/water-overview/retail-pricing/inquiries.aspx

The Millennium drought stimulated changes to policies and operations of system storage rights in the Murray-Darling Basin. South Australia gained the ability to defer delivery of water in one year in order to store water for use in subsequent years in upstream storages. As a result South Australian Government has been able to develop policies that allow water users to carry water over from one year to the next, providing them with greater flexibility to manage their water between water years in response to climate and market influences.

However, there are a number of other important Murray-Darling Basin Agreement, commitments made by the jurisdictions that need to be delivered to support productivity and competitiveness, particularly in the agricultural sector, in the medium to long term. In particular, removing unnecessary barriers to water trade will deliver economic efficiencies by allowing the market to facilitate the distribution of allocations and entitlements across the system.

It is not current South Australian Government policy to privatise dams and water reticulation networks (page 119). However, the regulatory framework, including the *Water Industry Act 2012*, could deal with this effectively should the current policy change.

The Government is also in the process of finalising legislation to allow for third party access to water infrastructure.

South Australian Government has implemented the key requirements in the energy reform agenda.

3. Competition Law

3.1 Recommendation 17 – Competition law concepts

The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.

The South Australian Government agrees with the recommendation to retain existing competition law concepts.

3.2 Recommendation 18 – Competition law simplification

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions.

The Panel recommends that there be public consultation on achieving simplification.

Some of the provisions that should be removed include:

- *Subsection 45(1) concerning contracts made before 1977;*
- *Sections 45B and 45C concerning covenants; and*
- *Sections 46A and 46B concerning misuse of market power in a trans-Tasman market.*

This task should be undertaken in conjunction with implementation of the other recommendations of this Review.

The South Australian Government agrees that the competition law provision of the *Competition and Consumer Act 2010* (CCA) should be simplified.

3.3 Recommendation 19 – Application of the law to government activities

The CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

The South Australian Government does not agree that the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and States and Territories.

South Australia has a State Procurement Board[15] that acts to encourage competition in state procurement for regular requirements of state government, including the health and education systems. Procurement for infrastructure projects is undertaken by the Department of Planning, Transport and Infrastructure which oversees a competitive tender process for building and construction and maintenance services.

3.4 Recommendation 20 – Definition of markets

The current definition of 'market' in the CCA should be retained but the current definition of 'competition' should be re-worded to ensure that competition in Australian markets includes competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied by persons located outside of Australia to persons located within Australia.

The South Australian Government agrees that the current definition of market in the CCA should be retained and supports the proposed changes to the definition of competition to

[15] http://www.spb.sa.gov.au/content/policies-guides

include competition from goods or services being imported or capable of being imported into Australia.

3.5 Recommendation 38 – National access regime

The declaration criteria in Part IIIA should be targeted to ensure that third-party access only be mandated where it is in the public interest. To that end:

- *criterion (a) should require that access on reasonable terms and conditions through declaration promote a material increase in competition in a dependent market;*
- *criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and*
- *criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.*

The Competition Principles Agreement should be updated to reflect the revised declaration criteria.

The Australian Competition Tribunal should be empowered to undertake merits review of access decisions while maintaining suitable statutory time limits for the review process.

The Panel invites further comment on:

- ***the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; and***
- ***whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.***

The National Access Regime (the Regime) in Part IIIA of the CCA provides a legal framework by which third parties can seek and obtain access to facilities in order to compete, or compete more effectively, in upstream and downstream markets.

Rail and ports are critical infrastructure for the primary industries in South Australia and their dependent rural and regional communities, with so much of the State's output exported either as commodities or finished products.

While the interstate rail track network is the subject of an access undertaking given by the operator of the rail track, Australian Rail Track Corporation, to the Australian Competition and Consumer Commission (ACCC) under Part IIIA, South Australia's Eyre Peninsula and Murray Mallee rail networks are subject to a State Government access regime that has been certified as effective.

A mandated Code of Conduct for Grain Export Port Terminal Operators (the Code) commenced on 30 September 2014. The Code rightfully deals with regional monopolies, allaying concerns of primary producers and traders about misuse of market power and unconscionable conduct by the grain export port terminal operators where competition does not exist (as determined by the ACCC).

However, recent decisions to exempt some Western Australian ports from this code may cause unintended effects on South Australian grain growers.

More generally, South Australian Government notes that much of the potential for growth and development in South Australia's regions centres around the primary industries, resources, manufacturing and renewable energy sectors. It is necessary for significant

further investment in rail, ports, energy and water infrastructure to occur in order to maximise the potential of the regions.

It is important that access regimes are light handed and strike the right balance between providing incentives for investment in infrastructure and providing third party access on reasonable terms. The South Australian Government is of the view that the scope of Part IIIA should not be extended unless it can be demonstrated that the benefits of regulated third party access outweigh the costs.

4. Institutions and Governance

4.1 Recommendation 39 – Establishment of the Australian Council for Competition Policy

The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy.

The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.

Recommendation 40 – Role of the Australian Council for Competition Policy

The Australian Council for Competition Policy should have a broad role encompassing:

- *advocate and educator 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 and regulatory issues, including proposed privatisations; and*
- *undertaking research into competition policy developments in Australia and overseas.*

Recommendation 41 – Market studies power

The proposed Australian Council for Competition Policy should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation or to the ACCC for investigation of potential breaches of the CCA.

The Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the PC model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.

Recommendation 42 – Market studies requests

All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy to undertake a competition study of a particular market or competition issue.

All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy.

The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.

Recommendation 43 – Annual competition analysis

The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.

The South Australian Government does not agree that there is a need to establish an Australian Council for Competition Policy (ACCP). The South Australian Government considers that the oversight role proposed by these recommendations would be inconsistent with the aims and objectives of the White Paper on the Reform of the Federation process.

That said, the South Australian Government does not agree that the Productivity Commission would not be able to undertake roles proposed for the ACCP in recommendation 40. The Productivity Commission has undertaken work on competition in the past and is viewed by States and Territories as an independent research body. It is usual practice for the Commonwealth Treasurer to consult with States and Territories on the terms of reference for Productivity Commission inquiries. The Productivity Commission has mandatory information gathering powers and would be able to undertake competition studies of markets in Australia.

The South Australian Government notes that the OECD identified that Australia has already gone quite far in undertaking competition policy reform. The South Australian Government is not convinced that there is a need for a work program on competition policy reform to be developed.

4.2 Recommendation 44 – Competition payments

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, the Panel favours competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort would be assessed by the Australian Council for Competition Policy

The South Australian Government agrees that there is merit in the Commonwealth Government making competition payments to the States and Territories for genuine productivity enhancing reforms. However, a baseline, or 'line in the sand' needs to be drawn around the competition policy reforms that are in train and only new or 'additive' reforms should be considered for competition payments.

The South Australian Government is not convinced about the need for competition payments '*to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform'*. There is the possibility that slow reforming states would benefit from competition payments at the expense of states that have been early adopters of reforms. In effect competition payments could act as a deterrent to innovation and deter some jurisdictions from undertaking reforms ahead of others.

Competition policy reform in Australia is considered to be 'mature', so the issues around competition policy reform are not the same as those that faced Australia in the 1990s. A cost-benefit analysis of further competition policy reform therefore needs to be conducted and only evidence-based reforms, when benefits outweigh costs, entered into.

Based on States previous experience with competition payments, relatively minor transgressions can result in major fiscal issues for States. The payment system could also be open to political interference.

4.4 Recommendation 45 – ACCC functions

Competition and consumer functions should be retained within the single agency of the ACCC.

The South Australian Government supports the recommendation to retain competition and consumer functions within the single agency of the ACCC.

4.5 Recommendation 46 – Access and pricing regulator functions

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national access and pricing regulator:

- *the powers given to the NCC and the ACCC under the National Access Regime;*
- *the powers given to the NCC under the National Gas Law;*
- *the functions undertaken by the Australian Energy Regulator under the National Electricity Law and the National Gas Law;*
- *the telecommunications access and pricing functions of the ACCC;*
- *price regulation and related advisory roles under the Water Act 2007 (Cth).*

Consumer protection and competition functions should remain with the ACCC.

The access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.

South Australian Government supports a single national access and pricing regulator for Commonwealth Government functions. However, South Australian Government does not support a national access and pricing regulator unless appropriate arrangements are made that would enable State-based legislation for pricing and access arrangements to operate effectively, particularly in the water area.

South Australia's rail and ports access regimes have both been certified as effective regimes under Part IIIA of the Competition and Consumer Act.

The issue of whether State based access regimes should be retained or replaced by regulation under the national access regime was assessed and debated at length during implementation of the COAG Competition and Infrastructure Reform Agreement (CIRA) (signed in February 2006). The COAG Reform Council (CRC) also reviewed this issue with respect to South Australia's intra-state rail and concluded that such a regulatory change did not offer a net benefit. The CRC's 2011 assessment of the CIRA reforms to implement a simpler and consistent approach to access regulation of interstate rail track was that all milestones had been achieved.

South Australia considers that the CRC conclusions, with respect to South Australia, remain relevant and the case for transfer to the national access regime has not been made by the Review Panel.

South Australian Water is subject to independent regulation by the Essential Services Commission of South Australia (ESCOSA) in a manner consistent with the National Water Initiative and its associated pricing principles. The first determination of South Australian Water's allowable revenue by ESCOSA commenced on 1 July 2013 and is effective until 30

June 2016. ESCOSA has commenced the second determination of South Australian Water's allowable revenue which will commence on 1 July 2016 and be operative until 30 June 2020.

The South Australian Government tabled a Parliamentary Bill for public consultation in 2013 on access to water infrastructure that would establish a state based access regime. This included a provision to displace Commonwealth legislation where there is inconsistency with state based legislation. This provision has been the subject of discussion between representatives of the South Australian Government and the Commonwealth Government to ensure there is no duplication of regulatory effort. A satisfactory resolution has not yet been achieved. The South Australian Government understands that the proposed state based legislation meets the requirements for certification by the National Competition Council.

4.6 Recommendation 47 – ACCC governance

The Panel believes that incorporating a wider range of business, consumer and academic viewpoints would improve the governance of the ACCC.

The Panel seeks views on the best means of achieving this outcome, including but not limited to, the following options:

- ***replacing the current Commission with a Board comprising executive members, and non-executive members with business, consumer and academic expertise (with either an executive or non-executive Chair of the Board); or***
- ***adding an Advisory Board, chaired by the Chair of the Commission, which would provide advice, including on matters of strategy, to the ACCC but would have no decision-making powers.***

The credibility of the ACCC could also be strengthened with additional accountability to the Parliament through regular appearance before a broadly-based Parliamentary Committee.

The South Australian Government is not convinced that the current ACCC governance arrangements are problematic. The ACCC is an acceptable performer and it would be potentially counterproductive to add additional layers of bureaucracy at additional cost to taxpayers, particularly when the need for change has not been adequately established.

5. Retail Markets

5.1 Recommendation 52 - Pharmacy

The Panel does not consider that current restrictions on ownership and location of pharmacies are necessary to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy products and services, and the ability of providers to meet consumers' preferences.

The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access and quality of advice on pharmaceuticals that do not unduly restrict competition.

Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.

The South Australian Government considers the issues relating to community pharmacy services as important matters of public policy given the critical role of pharmacy services provision within primary health care. It is essential that we have a pharmacy system which is reliable, equitable and provides universal and timely access to affordable medicines in line with the National Medicines Policy. It is particularly important that patients in regional and remote communities are not disadvantaged.

Internationally there are both models of community pharmacy practice which embrace deregulation and a competitive approach to pharmacy in line with consumer demand and models which operate within a regulated environment similar to that in Australia.

Any changes to the regulatory environment for community pharmacy would require a coordinated national effort, as the legislative basis spans Commonwealth, State and Territory legislation and the impact on the sector would be significant.

The South Australian Government supports the review panel's conclusion that some regulation of pharmacy is justified and needs to remain in place. However the nature and the extent of regulation required would need to be examined further before the South Australian Government could support the panel's conclusions that that the present restrictions on ownership and location be removed.

This could be facilitated by conducting a thorough analysis of pharmacy provision in line with the previous national competition policy review of pharmacy, the "Wilkinson Review" which was undertaken in 1999-2000.

5.2 Private Health Insurance

There are no direct recommendations in the draft report about further deregulation of private health insurance; however the draft report does indicate support for the National Commission of Audit Report's Phase One recommendation to replace the price regulation of private health insurance premiums with a price monitoring function, and to allow health funds to expand their coverage into primary care settings.

South Australian Government recognises that increased price competition in relation to the setting of private health insurance premiums could yield some cost benefits to consumers through the deregulation of price setting. Similarly, extending the coverage of private health insurance to primary care settings could allow insurers to diversify their product offerings and take a more holistic approach to providing products that meet the broader health needs of members, thereby increasing competition and diversity in the health insurance market.

The Medibank Private submission to the Review provides an example of its pilot program currently underway in the primary care market in Queensland. Initiatives such as this have the potential to reduce the cost burden of acuity on both the public and private hospital systems by intervening more effectively in the primary healthcare market. Consideration of models where the management of chronic disease is funded in a holistic sense, rather than episodic treatments has some merit.

However, in the case of the highly concentrated private health insurance market (noted in a number of submissions[16] to the Review), considerable care should be exercised in any decision toward further deregulation without clear safeguards in place to ensure that the principles of universal health care are upheld.

There is potential for greater private health insurer involvement in the provision of primary care to lead to the creation of a two-tier healthcare system where people who can afford private health insurance receive preferential treatment options, thereby eroding the notion of universal access.

In addition, the extension of premiums to cover gap payments in the primary care setting could also reduce the number of general practitioners providing bulk-billing services, leading to adverse access issues for those with less financial means to access primary care. Similarly, relaxing the community rating system (allowing health funds to vary premiums to account for lifestyle factors as recommended in Phase One of the National Commission of Audit Report) will tend to disadvantage lower socio-economic groups.

[16] For example, those made by the Australian Dental Association Victorian Branch, the Australian Dental Association Incorporated, the Australian Private Hospitals Association, Australian Physiotherapy Association, and Optometry Australia.