



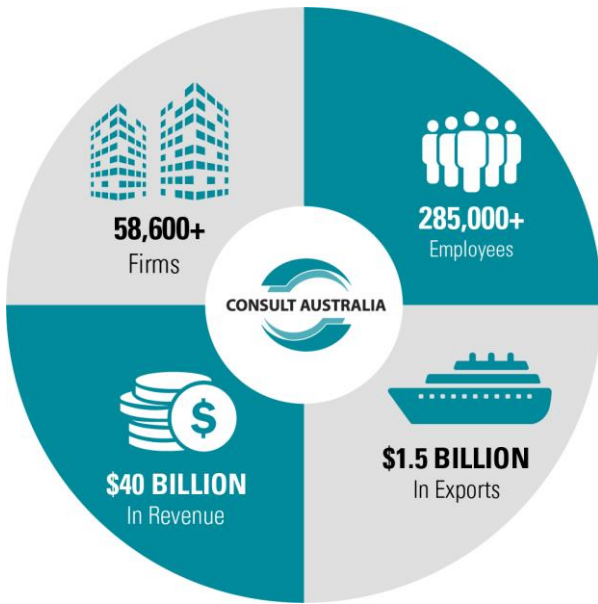
September 2024 Revitalising National Competition Policy

SUBMISSION TO TREASURY

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About us

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia’s top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:



A full membership list is available on our [website](#).

Executive Summary

Consult Australia welcomes the opportunity to contribute to the Treasury's Revitalising National Competition Policy consultation.

Our industry is competitive, comprising close to 60,000 businesses across Australia, including some of Australia's top 500 companies and many small businesses (97%). All levels of government rely on the deep technical advice provided by Consult Australia member businesses from a broad suite of disciplines including engineering, design, architecture, quantity surveying, community engagement, environmental services and sustainability, project management, strategy, planning, urban design, and landscape architecture.

The National Competition Policy is important to our industry as it can unlock greater productivity, promote innovation and choice, and restore balance to the contractual relationships across procurement supply chains. We have reviewed the National Competition Policy Principles and National Competition Policy Reform Agenda and are supportive of the opportunities presented.

Consult Australia's recommendations include not only reforms to the National Competition Policy but also other reforms that are needed to address competition issues in the market to create a thriving business environment. Our recommendations sit under the following five themes:

- regulatory complexity and impost
- regulatory inconsistency
- market behaviours impacting competition
- innovation and industry involvement
- digital by default.

Our recommendations aim to provide a streamlined and effective regulatory system and support approach to market behaviours that both enables and encourages participation in the market by the widest variety of leading businesses.

Consult Australia notes that the key challenge for the federal government's reform agenda will likely be the buy-in from all government agencies at both the federal and state levels. For example, many of our recommendations need action by all or most state governments. This barrier is not insurmountable and will be worth the effort to increase competition and boost productivity for both government and industry.

We look forward to continuing to work with the government on the National Competition Review.

Summary of Consult Australia's recommendations

Regulatory complexity and impost	The National Competition Policy should require all governments to reduce the complexity of regulation across different regulatory instruments and avoid duplication and overlap in regulatory and compliance processes.
	The National Competition Policy should require all governments to apply more rigour to regulatory market analysis.
	The National Competition Policy should include an explicit requirement on all governments to consider small business impacts, market conditions and competition impacts when developing regulatory policy.
Regulatory inconsistency	The National Competition Policy should extend the legislation review principle to require competition to be promoted, where it is in the public interest.
	All governments should foster occupational mobility through consistent and automatic mutual registration, should amend the 'home state' definition in relevant legislation.
Market behaviours impacting competition	The federal government should amend the Australian Consumer Law to ensure the misleading and deceptive conduct provisions protect consumers and small businesses and cannot be misused otherwise.
	The federal government should maintain the explicit exemption for the 'supply of services of a professional nature by a qualified architect or engineer' from the fit-for-purpose consumer guarantee in the Australian Consumer Law.
	All state/territory governments except QLD should amend civil liability legislation to explicitly prohibit contracting out of proportionate liability in professional services contracts.
	National Competition Policy should disallow the practice of fee capping by clients and government agencies which overrides market forces.
Innovation and industry involvement	All governments should change the procurement practice of labelling bids as 'non-confirming' to allow innovation to be considered.
	All procuring agencies should engage industry early in the pre-design phase to explore innovation as part of project scoping.
	The National Competition Policy should provide clear direction to all governments to promote and encourage innovation.
	The National Competition Policy should require all governments to undertake targeted reviews to assess if legislation, government policies or processes are negatively impacting competition in a particular market or creating barriers to entry of new participants and technologies.
Digital by default	All governments should collaborate with industry on actions to enable a digital by default environment.
	All governments should move away from the 'digital by exception' mindset to clearly specify digital requirements in procurement processes.
	The National Competition Policy should include a data sharing principle.

Recommendations for Reform

Consult Australia supports the objective of the reform agenda to remove barriers or impediments to competition that do not provide a net public benefit or are unnecessary to achieve the desired public policy outcome.

Of the reform themes proposed for the National Competition Reform Agenda, four stand out as particularly relevant to our industry:

- Promoting a more dynamic business environment
- Harnessing the benefits of competition in the net zero transformation
- Lowering barriers to labour mobility
- Leveraging the economic opportunities of data and digital technology.

Our recommendations for reform are relevant to these themes. We have proposed solutions to unlock greater productivity, promote innovation and choice, and restore balance to the contractual relationships across procurement supply chains. We have dived into the detail, providing specific reform actions, from amendments to the Australian Consumer Law (ACL) to behavioural changes needed by government and other market players. Our proposals draw on thought leadership including our:

- [Uplifting Productivity Report](#)
- [Confidence and Continuity Survey Findings](#)
- [Digital by Default Green Paper](#) (our follow up White Paper is expected to be released in late 2024/early 2025)
- [Model Client Policy](#) (originally released in 2018 and [re-released in collaboration](#) with the Australian Constructors Association in 2022)
- [A Net Zero Future](#) – noting that this work is continuing via the collaborative effort of industry and government through the NetZero Infrastructure Alliance.

Consult Australia holds that these recommendations support the delivery of improved competition outcomes for government, industry and communities. We have also included case studies for context and to inform how our recommendation would revitalise competition principles.

Regulatory complexity and impose

Our recommendations:

- The National Competition Policy should require all governments to reduce the complexity of regulation across different regulatory instruments and avoid duplication/overlap in regulatory and compliance processes.
- The National Competition Policy should require all governments to apply more rigour to regulatory market analysis.
- The National Competition Policy to include an explicit requirement on all governments to consider small business impacts, market conditions and competition impacts when developing regulatory policy.

These recommendations go to:

- promoting a more dynamic business environment
- lowering barriers to labour mobility.

As raised in the Treasury's consultation paper, effective legislation is an important factor in encouraging participation in the low carbon economy, therefore these recommendations could also be relevant to harnessing the benefits of competition in the net zero transition.

Complexity and duplication/overlap

The call from industry for less complex and less duplicative regulation is not new.

Consult Australia has seen several state governments develop unnecessarily complex regulatory systems in the rush to regulate. To demonstrate action, a government might draft and pass a broad-based act through parliament without detail and follow up with detailed regulations and codes of practice. This leads to an appearance of regulatory policy making 'on the run'.

It has always been the case that regulations are more detailed than acts, as they provide the details on how to administer the act. However, we are increasingly seeing even less detail in the acts with regulatory requirements being split over the act and regulations (instead of being set out in the act and detailed administration information in the regulations). There is also often a lack of detail in the consultation policy documents released to the industry for comment. Over time, acts are becoming too high level and the important details are left to be developed outside of the parliamentary system.

This complex structuring of regulatory requirements through acts, regulations and government documents imposes a burden on business, including an administrative burden. Splitting obligations across different regulatory instruments could create a convoluted approach, making it harder for professionals and the businesses that employ them to understand and comply. This can impact the markets a business is willing/able to participate in, especially smaller businesses without dedicated internal legal and compliance teams.

To improve market participation all governments should reduce the complexity of regulation across different regulatory instruments and aim to include all regulatory requirements in a single instrument, making it easy for professionals and businesses to understand and comply. Reducing the layers of regulation should have a positive impact on compliance costs by making it easier for businesses to understand and comply.

Administrative cost burdens can also be minimised by avoiding duplication and overlap in regulatory and compliance processes. For example, when procuring, government clients often request and validate insurance documentation at the prequalification stage, then again at tender and again at the award stage. Consult Australia understands that assessing the validity of supplier information is an important compliance measure for government procurement. However, duplicative processes result in unnecessary costs and a 'by exception' or 'as required' information update process could be used instead.

Case study:

The NSW Government has a complicated building compliance regime including numerous acts, regulations and codes. For example, a professional engineer providing consulting design services on a class 2 building will need to ensure they are suitably registered to undertake relevant work under the Design and Building Practitioners Act and meet all the relevant obligations contained in that Act, the Design and Building Practitioners Regulation and the Code of Practice for Professional Engineers. In addition, the NSW government has proposed a new Practice Standard for Professional Engineers which is expected

Consulting businesses that provide designer and/or engineering services on buildings around the country have re-assessed whether to provide services in NSW noting the complexity of the regulatory regime.

Consult Australia is aware of leading consulting businesses avoiding or reducing the number of building projects in NSW because of the burden of the regulations – despite the projects being within their competency and having qualified employees.

Impact analysis

Consult Australia has two recommendations that go to impact analysis.

Consult Australia proposes that more rigour could be applied to regulatory impact analysis by state and territory governments to reduce complexity. For example, at the Federal government level the Office of Impact Analysis provides a transparent review process which includes oversight from outside the agency proposing the regulation and brings a level of consistency across the whole of government. Consult Australia would support a similar oversight approach in states and territories. Complementing this would be increased training of policy officers and advisors within government on 'better regulation' policies and impact analysis.

The inclusion of industry perspectives, an understanding of market conditions and a consideration of competition impacts is essential to inform the design of regulatory and compliance processes. These can have a significant impact on small and nascent businesses and can sometimes be overlooked. Therefore, we propose that an explicit requirement is included to consider small business impacts, market conditions and competition impacts when developing regulatory policy.

Regulatory inconsistency

Our recommendations:

- The National Competition Policy should extend the legislation review principle to require competition to be promoted, where it is in the public interest.
- All governments should foster occupational mobility through consistent and automatic mutual registration by amending the 'home state' definition in relevant legislation.

These recommendations go to:

- promoting a more dynamic business environment
- lowering barriers to labour mobility.

Consult Australia agrees with the proposal in the consultation paper to extend the legislation review principle to also require competition to be promoted, where it is in the public interest. Augmenting this principle will assist the government in providing balanced and consistent regulation.

Our industry is navigating the complexity of balancing systemic skills shortages over the long term with increasing uncertainty in the short term on the forward program and continuity of work, as evident in the results of our [2024 Confidence and Continuity report](#). For our member businesses, lack of continuity of work makes it challenging to hold resources and/or invest in capability. Where businesses work across jurisdictions, workforces are managed nationally, and members look across sectors for opportunities to support using existing teams. Significant occupational mobility is needed to enable businesses to deliver a vast range of projects in different parts of the country for different clients, whether it be the Department of Defence, state/territory governments or local councils. It is not just large consultancy businesses that operate cross-jurisdictionally, over 90% of Consult Australia's small business members also work across multiple jurisdictions.

Inconsistencies in registration schemes and failure to realise automatic mutual registration create a challenge in managing workforces and impact competition in the built and natural environment. For businesses in our industry to maintain registration of their staff, ready for deployment on

projects in various locations, there are significant registration costs. Consult Australia continues to advocate for consistency and automatic mutual registration to allow businesses to provide engineering services across different state and territory jurisdictions with reduced burdens and barriers.

The legislation review principle of the National Competition Policy currently focuses on ensuring regulation does not restrict competition. The inconsistencies in registration schemes are an example of where regulation has potentially restricted competition. From Consult Australia's perspective, competition will continue to be hampered while there are 'multiple fees, multiple registration' arrangements. We recommend that the federal government amend the 'home state' definition in the Commonwealth Act and/or state/territory governments modify the definition in the state legislation to recognise a practitioner's first registration as their 'home state' (for registration purposes).

The implementation of the *Mutual Recognition Act 1992* (Cth) has not delivered true occupational mobility because of the flaws in the definition of 'home state'. The 'home state' definition recognises the first registration if the practitioner has their principal place of residence or work in that first jurisdiction. The legislation fails to consider professional registered engineers who live in a jurisdiction that is different to their registration jurisdiction. The legislation fails to recognise the nature of services provided by a consulting engineer across jurisdictions. For example, we will have many engineers living and working in Victoria who were registered in Queensland before the Victorian scheme started. Using the 'home state' definition these practitioners did not benefit from automatic mutual registration because their 'home state' is Victoria.

The proposed recommendations will result in change that promotes competition, improves occupational mobility and leads to more consistent future regulation.

Market behaviours impacting competition

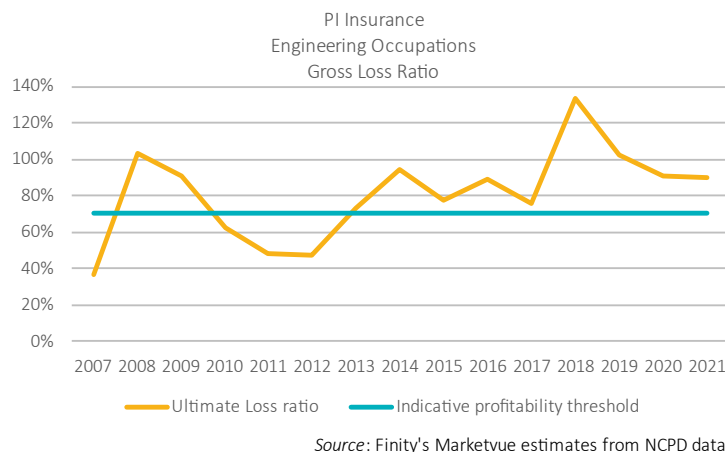
Our recommendations:

- The federal government should amend the Australian Consumer Law to ensure the misleading and deceptive conduct provisions protect consumers and small businesses and cannot be misused otherwise.
- The federal government should maintain the explicit exemption for the 'supply of services of a professional nature by a qualified architect or engineer' from the fit-for-purpose consumer guarantee in the Australian Consumer Law.
- All state/territory governments, except QLD should amend civil liability legislation to explicitly prohibit contracting out of proportionate liability in professional services contracts.
- The National Competition Policy should disallow the practice of fee capping by clients and government agencies which overrides market forces.

These recommendations go to:

- promoting a more dynamic business environment.

Australia's construction industry has a reputation of adversarial, problematic and uncollaborative contracting, primarily flowing from inappropriate risk allocation. The impact of the level of disputation is illustrated through the high gross loss ratios for professional indemnity (PI) insurance (especially in engineering) in the figure below. Insurers need the gross loss ratio to be below the teal line which is the indicative profitability threshold. Engineering occupations have been above that line since around 2013.



A market with a high likelihood of claims and corresponding high insurance costs does not foster participation and competition. Behaviours contributing to the market conditions include:

- misuse of the Australian Consumer Law's misleading or deceptive conduct provisions
- clients requiring providers of professional services to contract out of proportionate liability
- inappropriate use of fit for purpose clauses in professional services contracts, which is inconsistent with the exclusion in the ACL
- fee capping by clients and government agencies.

The statutory reform recommendations to address these behaviours formed part of Consult Australia's [submission to the Commonwealth inquiry into procurement practices for government funded infrastructure](#) in July 2021. Positive action is yet to be undertaken.

Misleading and deceptive conduct claims

Over the past five years Consult Australia has seen an increase in the rate of sophisticated contracting parties misusing the ACL's misleading or deceptive conduct provisions in business-to-business situations to potentially avoid contractually agreed liability caps and to strong-arm consultants into settling claims. This practice discourages businesses from competing in the market.

Consult Australia wants to ensure that misleading or deceptive conduct claims are preserved to protect consumers and small businesses as opposed to being used in contractual situations where sufficient legal protection is provided under the contract and/or common law. Federal government should therefore amend the ACL to this end to create a fairer market.

Contracting out of proportionate liability

The original policy intent of proportionate liability in the civil liability reforms of 2001 was to bring stability back to the professional indemnity insurance market. This is being undermined by clients (including government clients) requiring professional service providers to contract out of proportionate liability in contracts. Consult Australia seeks an amendment to all state and territory civil liability laws (except Queensland) to explicitly prohibit contracting out of proportionate liability in professional services contracts. We need the Federal Government to push for this national consistency to manage contract risk exposure and level the playing field across jurisdictions.

Fitness for purpose

The ACL includes a general fit for purpose consumer guarantee of products and services. This consumer guarantee is expressly excluded from applying to the *'supply of services of a*

professional nature by a qualified architect or engineer (see section 61). This exemption dates back to the 1986 Trade Practices Act and was retained after the 2017 review of the ACL. Consult Australia holds that the exemption remains vital.

This exemption makes sense when you consider that creating a unique design for the first time is very different from making, testing, and selling a commercial product. An architect or engineer works with a client to develop the client's idea into a design, with various data inputs from third parties. The client then entrusts constructors and subcontractors to achieve the final product for the client. The architect or engineer cannot guarantee that the final product will be fit for the client's purpose, because they do not have control of the constructors. It is also particularly difficult to identify the client's 'purpose' at the early stages of the project, which is when the design professionals are first engaged, and often the client's 'purpose' evolves throughout the project.

When negotiating contracts, some clients will seek a fit for purpose guarantee from design and engineering professionals. This guarantee might be limited to the provision of design services rather than the resulting building or facility. This can still be problematic because it is almost impossible to define the purpose of a professional service with the same certainty as the purpose of a finished build.

Consult Australia advocates against fit for purpose obligations in professional services contracts and supports the explicit exemption in the ACL. Generally, PI insurance policies do not cover assumed liabilities or contractual warranties (a fit for purpose guarantee is such a liability/warranty).

Too often fit for purpose obligations are thought of by governments, clients or regulators as a solution to issues such as poor construction, ineffective regulation or lack of building defects insurance. However, fit for purpose obligations on designers, advisors and engineers only exacerbate current market pressures in the PI market without necessarily addressing the core issues.

Any changes to the current ACL exemption would be detrimental to the professional services industry and negatively impact competition. Consult Australia requests the explicit fit for purpose exemption is maintained for the *'supply of services of a professional nature by a qualified architect or engineer'* (under section 61, ACL).

Fee capping

Under the National Competition Policy price oversight instruments are used by the government where there is a natural monopoly or near monopoly market conditions. Consult Australia members operate in a competitive commercial market and yet have experienced state and local government attempting to control the fees charged by businesses. This fee capping attempts to control the pricing in the market.

It is worth noting that historically Consult Australia provided published 'fee scales' which were used as a guide for members on the market rate for their services. Consult Australia no longer provides that service because in March 2001 the association was informed by the Australian Competition and Consumer Commission that publication and issue of fee scales by associations was not advisable as they could be deemed anti-competitive and in contravention of the Federal Trade Practices Act.

Given it is anti-competitive for an association to publish fee guides, it is incongruous that government procuring agencies would be permitted to do this and then require all bids to comply with the fee caps/scales. Consult Australia recommends that National Competition Policy clearly states that government will not seek to cap rates where there is a competitive commercial market.

Case study:

The NSW Treasury's [Infrastructure Advisory Standard Commercial Framework](#) includes capped daily resource rates. Treasury recommends government agencies follow the framework to 'support better outcomes for buyers and suppliers'.

Local Buy in Qld requires suppliers to submit a pricing schedule to set the maximum rates that can be charged.

Innovation and industry involvement

Our recommendations:

- All governments should change the procurement practice of labelling bids as 'non-confirming' to allow innovation to be considered.
- All governments should engage industry early in the pre-design phase to explore innovation as part of project scoping.
- The National Competition Policy should provide clear direction to government to promote and encourage innovation.
- The National Competition Policy should require all governments to undertake targeted reviews to assess if legislation, government policies or processes are negatively impacting competition in a particular market or creating barriers to entry of new participants and technologies.

These recommendations go to:

- promoting a more dynamic business environment
- harnessing the benefits of competition in the net zero transformation
- leveraging the economic opportunities of data and digital technology.

Government procurement practices that hinder innovation and the long-term competitiveness of markets include the:

- practice of labelling bids as 'non-confirming bids'
- late engagement of industry on project design and scope.

In Consult Australia's [submission on Procurement practices of government agencies in NSW and its impact on the social development of the people of NSW](#) we advised that members were dissuaded from providing innovation on NSW projects when bidding because they are concerned any deviation will be considered a 'nonconforming bid'. To lead the way on innovative projects, we encouraged NSW government to invest more time in early involvement, including:

- conduct early industry briefings
- move away from the 'non-confirming bid' mindset that dissuades bidders from delivering innovation
- recognise the commercial nature of the market and use that to drive innovation

These recommendations are supported by [The MacLeamy Curve](#), which illustrates the benefits of an integrated design process with early involvement of design professionals. This includes industry briefings, tender processes, scope of projects, and contract negotiations with a focus on fair and balanced contract terms and appropriate risk allocation.

With the current 'non confirming bid' mindset evident in government procurement, any deviation by bidders is left unconsidered, limiting innovation. More early involvement of the supply chain in the pre-design phase and collaboration would enable a detailed understanding of desired project outcomes between client and supplier and can facilitate innovation.

Collaboration is a key aspect of Consult Australia's [Model Client Policy](#), which advocates for government to be an 'active client' and set the tone from the top. Consult Australia recommends the National Competition Policy provides clear direction for government to promote and encourage innovation. We agree with the proposal in the consultation paper to undertake targeted reviews to assess if legislation, government policies or processes are negatively impacting competition in a particular market or creating barriers to entry of new technologies.

Digital by default

Our recommendations:

- All governments should collaborate with industry on actions to enable a digital by default environment.
- All governments should move away from the 'digital by exception' mindset to clearly specify digital requirements in procurement processes.
- The National Competition Policy should include a data sharing principle.

These recommendations go to:

- promoting a more dynamic business environment
- harnessing the benefits of competition in the net zero transformation
- leveraging the economic opportunities of data and digital technology

Consult Australia is an advocate for digital by default. With Australian governments investing billions in infrastructure, there is a once-in-a-generation opportunity to accelerate our industry's digital transformation. Consult Australia's [Digital by Default – Green paper](#) called for a nationally coordinated approach to leverage existing best practice to accelerate digital transformation. Collaborative leadership by government and industry, along with certain and clarity on digital expectations is required.

Government, as regulators, owners, funders and beneficiaries of public infrastructure, has a crucial role to play in enabling a dynamic and inclusive digital economy and a 'digital by default' approach. This means moving away from the current 'digital by exception' mindset, and embracing new technologies and digital practices from design, through procurement, construction, handover and maintenance to improve outcomes and boost productivity. A recent example that showcases the importance of a coordinated approach to build national scale for global competitiveness is [Canada's Construction Sector Digitalisation and Productivity Challenge Program](#).

The National Competition Policy needs to provide the right policy settings to enable effective collaboration between government and industry to realise the benefits of digital and data. Consult Australia supports the inclusion of a data sharing principle that enables government data to be shared more readily.

Consult Australia is keen to collaborate with government in creating an enabling environment that provides the required consistency and certainty for businesses and government to invest. Consult Australia is currently finalising its *Digital by Default – White Paper* and looks forward to engaging with government on its recommendations.

Contact

We would welcome any opportunity to further discuss the issues raised in this submission.



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Thanks to our Industry Champions

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