

National
Competition
Council



Memorandum of Understanding

in relation to provision of corporate and
professional services

between

the Australian Competition and Consumer Commission
Commonwealth Government
ABN: 94 420 483 623

and

the National Competition Council
Commonwealth Government
ABN: 56 552 760 098

Part A. Background

Parties to the MOU

1. The Parties to this Memorandum of Understanding (MOU) are the National Competition Council ('NCC') and the Australian Competition and Consumer Commission ('ACCC'). In this MOU, the term 'Party' or 'Parties' will mean either or both of the ACCC or the NCC as the context allows.
2. The NCC is a Commonwealth statutory agency established by section 29A of the *Competition and Consumer Act 2010*. Its role is to make recommendations to relevant ministers in relation to applications for declaration of services and also the certification of state or territory access regimes. The NCC has a similar role under the National Gas Law, whereby it makes recommendations on the coverage of natural gas pipeline systems.
3. The ACCC is an independent Commonwealth statutory authority established under the *Competition and Consumer Act 2010*, responsible for enforcing consumer protection and fair trading laws and for promoting competition. This role includes regulation of national infrastructure services.

Purpose and Principles

4. The NCC wishes to ensure it has ongoing access to capable corporate and professional services to assist it in making recommendations and decisions, and undertaking its other functions, under the *Competition and Consumer Act (CCA)* and the *National Gas Law (NGL)*.
5. Rather than directly engaging staff and other resources (including premises, IT, payroll and accounting services, and stationery and supplies) to provide corporate and professional services, the NCC has entered into an agreement with the ACCC to provide it with corporate and professional services including secretariat services.
6. The NCC is an independent entity. However, rather than directly engaging staff and other resources it draws on ACCC resources as required. The NCC will retain responsibility for its recommendations, decisions and other functions under the *CCA* and *NGL*. Services provided to the NCC by ACCC officers will be provided in accordance with NCC policies and procedures (or, where relevant, ACCC policies that have been adopted by the NCC) and under the direction of the NCC President and Councillors.
7. The ACCC and NCC do not intend this MOU to create any legally enforceable rights or impose any legally binding obligations on either Party.

Part B. Operational Provisions

Corporate and professional services

8. An indicative list of corporate and professional services (including secretariat services) required by the NCC and to be supplied by the ACCC is set out in Appendix 1.
9. The ACCC will maintain the capacity to provide the corporate and professional services required by the NCC. The NCC will retain the ability to directly engage (and pay for) independent expert and legal advice where necessary.
10. The NCC will reimburse the ACCC for travel expenses incurred by the ACCC in the course of providing corporate and professional services to the NCC.

11. The ACCC will ensure that appropriate staff and other related resources are available to provide corporate and professional services to the NCC so that the NCC is able to meet statutory and other agreed deadlines and are of a quality acceptable to the NCC.

Ongoing NCC compliance responsibilities

12. The NCC President is the Accountable Authority for the NCC and is responsible for the NCC's compliance with and discharge of obligations and responsibilities under relevant legislation, regulations and policy.

Designation of an Executive Director

13. The NCC and ACCC agree that an appropriately qualified officer of the ACCC will be designated as Executive Director of the NCC and will act as the principal link with the NCC President and Councillors and have day to day responsibility for directing the provision of services.
14. The NCC and ACCC agree that no person will be designated as Executive Director of the NCC without the agreement of the NCC President and that the NCC President will have a substantive input to the assessment of the performance of the designated Executive Director in his or her role as Executive Director of the NCC.
15. The NCC and ACCC agree that the designated Executive Director will give priority to the duties of that position unless the ACCC considers it would have a detrimental impact on the operations of the ACCC. In such circumstances, the NCC and ACCC will discuss alternative arrangements, including designating an alternative ACCC officer to undertake the duties of Executive Director.
16. The NCC Executive Director is responsible for advising the NCC President on NCC compliance and providing assurance on these matters with assistance from ACCC corporate specialists. In undertaking this role, the NCC Executive Director reports to the NCC President.
17. It is the NCC President's responsibility to oversee delivery of the NCC Executive Director role. The ACCC does not, despite providing employee-related services to the NCC, oversee the delivery of the NCC Executive Director role.
18. The NCC Executive Director will consult with the General Manager of the ACCC's Executive Office and the ACCC CEO before utilising the corporate or other employee resources of the ACCC, other than as expected on a day-to-day basis.
19. Where a matter may involve a potential conflict of interest, the NCC Executive Director will:
 - a seek agreement from the relevant ACCC General Manager/Deputy General Counsel; and
 - b consult with the ACCC General Manager of the ACCC's Executive Office and the ACCC CEO
 before engaging ACCC corporate or other employee resources.
20. If performing any of the NCC Executive Director duties may involve a conflict of interest, it is to be managed in accordance with the ACCC-NCC Protocol for managing any conflicts of interest in providing services to the NCC ('COI Protocol').

Designation of an Executive Officer

21. The NCC and ACCC agree that an appropriately qualified officer of the ACCC will be designated as Executive Officer of the NCC, reporting to the NCC Executive Director and have responsibility for managing and/or coordinating inputs to the NCC's processes, operations and projects. The NCC and ACCC agree that no person will be designated as Executive Officer of the NCC without the agreement of the NCC President and that the NCC President will have a substantive input to the assessment of the performance of the designated Executive Officer in his or her role as Executive Officer of the NCC.
22. If performing any of the NCC Executive Officer duties may involve a conflict of interest, it is to be managed in accordance with the ACCC-NCC Protocol for managing any conflicts of interest in providing services to the NCC ('COI Protocol').

Confidential Information

23. The NCC and ACCC agree that officers involved in provision of corporate and professional services may also be engaged in other duties for the ACCC. The NCC and ACCC have entered into the ACCC-NCC Protocol for handling confidential information ('Confidential Information Protocol') that provides appropriate protection to confidential information provided to either Party.
24. In complying with the Confidential Informational Protocol the NCC and ACCC agree that confidential information obtained or held by either Party will not be disclosed to the other except as provided for or authorised by law.

Conflicts of Interest

25. The ACCC agrees that in assigning officers to provide corporate and professional services, regard will be given to the need for transparency in decision making and avoidance of any appearance of a conflict of interest. Wherever possible staff engaged in the regulation of a service will not be assigned to assist the NCC in considering an application for certification, declaration, and revocation of declaration or coverage of that service.
26. The ACCC and NCC have entered into the Conflict of Interest Protocol. All ACCC staff assisting the NCC must be aware of and comply with this protocol.

Governance and Information Management

Development of Additional Protocols

27. The ACCC and NCC commit to cooperate to develop appropriate additional protocols where appropriate to undertake work in connection to this MOU, with a view to ensuring they are able to work effectively together.

Expected service level and Payment for services

28. In return for corporate and professional services the NCC will pay the ACCC \$925,000 per annum, quarterly in advance.
29. The payment for services may be reviewed annually having regard to the appropriations of funds by Parliament to the ACCC and the NCC, and any required "efficiency dividends".
30. Payment under clause 28 will only cease upon the expiry of 6 months notice from the NCC to the ACCC.

31. Where a Party considers that payment for services in clause 28 is not or will not be, sufficient to deliver service requirements, the Executive Director, the NCC President and the ACCC Chief Executive Officer (CEO), will meet to determine what, if any, payment adjustment is required pursuant to clause 29. Any agreed payment adjustment will be agreed upon by the NCC President and the ACCC CEO in writing.
32. In determining any payment required under clause 28, regard shall be had to the period this agreement has been in operation, the total number of applications over that period, any other work the NCC has been tasked with, the nature of applications received and the anticipated level of work required.

Media releases and other public statements

33. The Parties agree that, subject to any legal obligations restricting information-sharing, where a Party is considering a media release or other public statement which relates to a professional or corporate service provided under this MOU, they will:
 - Consult with the other Party; and
 - Will not release any public statement unless both Parties have agreed to the content of the statement beforehand.

Dispute resolution

34. Where any dispute arises in relation to this MOU, the NCC President and the ACCC CEO will meet to consider and determine the matter. Where agreement cannot be reached the parties will refer the dispute to the Secretary to the Treasury (or his/her nominee) for conciliation.

Part C. Management of the MOU

Commencement, review and termination

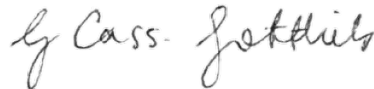
35. This MOU first commenced on 1 July 2014 and was varied following the Agora Review conducted in July 2016, and then varied again in 2023. It will continue until terminated on notice by the NCC or ACCC. On the date of commencement of any newly varied version, any previous MOUs shall cease to have effect.
36. This MOU will be reviewed on or before 31 December 2024 (2024 Review) and every two years thereafter.
37. The 2024 Review will be supported by the provision of a report assessing the terms and operation of this MOU, including but not limited to:
 - a. The allocation of responsibility for supporting the NCC's compliance with its obligations and responsibilities and
 - b. the extent to which the payments under the MOU reflect the services required by the NCC and the capacity of the ACCC to provide those services.
38. Either Party seeking to terminate this MOU under clause 20 will give 6 months notice in writing.
39. This MOU may be amended or terminated in writing at any time, including where a change in Government policy or legislation so requires.

History of review

1 July 2014	The date this MOU first commenced.
1 January 2017	Following the Agora Review conducted in July 2016, the parties agreed that the NCC would pay the ACCC \$850,000 per annum for corporate and professional services (an increase from \$700,000 from the first agreement dated 1 July 2014). This fee increase was implemented from 1 January 2017. The other key changes agreed were: shortening of the notice period for termination of agreement (from 12 months to 6 months); and designation of an additional ACCC staff member (NCC Executive Officer) to assist with the duties of the NCC Executive Director.
Late 2018	Informal reviews were undertaken, with the Parties agreeing to make no changes to the MOU.
June 2021	Informal reviews were undertaken, with the Parties agreeing via an exchange of letters to make no changes to the MOU.
August 2023	A review was undertaken and amendments made that clarified the services and roles, the parties agreed to an increase in the annual fee from \$850,000 to \$925,000.



Julie-Anne Schafer
President
NCC
Date: 6 October 2023



Gina Cass-Gottlieb
Chair
ACCC
Date: 22 September 2023

Appendix 1: Corporate and professional services

This appendix provides an indicative list of corporate and professional services required by the NCC and to be supplied by the ACCC. Each relates to the provision of advice and support in relation to NCC recommendations, decisions and reports.

Applications

1. Receive applications under Part IIIA and the NGL (usually there will be pre-application discussions with intending applicants). This encompasses applications for:
 - declaration of a service (and revocation of declaration)
 - certification of state/territory access regimes
 - ineligibility for declaration (and revocation of an ineligibility determination)
 - coverage of pipelines (and revocation of coverage)
 - form of regulation of covered pipelines (light regulation determinations are made by the NCC)
 - 15 year pipeline no-coverage determinations
 - Classification and reclassification of pipelines Advise the NCC on validity of applications
2. Arrange public notice of applications and publication of these on the NCC website
3. Advise service provider and other interested parties of applications
4. Advise decision- making Minister on applications
5. Advise the NCC on novel issues arising in applications and how these should be considered in accordance with the law, discuss approach to such issues and associated risks with the NCC as appropriate
6. Seek submissions on applications, publish these on the NCC website
7. Deal with applications for confidentiality in accordance with NCC policy
8. Investigate and research issues arising in applications, especially those relating to satisfaction of the relevant declaration or other decision criteria
9. Respond to inquiries in relation to possible applications and third party access to infrastructure generally.

Recommendations

10. Prepare a draft recommendation for consideration by the NCC, amend this as required following discussion with the NCC
11. Publish and distribute draft recommendation (incl on website), seek further submissions in response to draft recommendation
12. Finalise recommendation in conjunction with the NCC, provide to decision making Minister
13. Publish Minister's decision and NCC recommendation

Other legal assistance and research

14. Participate, and brief counsel and solicitors to participate, in reviews or appeals of decisions and other litigation in accordance with NCC policy and practice (It is the NCC's intention that it would directly engage (and pay for) independent experts, solicitors and counsel engaged in any review, appeal or similar proceedings.
15. Any other legal advice the NCC may require, including in-house legal services and procurement of external legal services
16. Prepare and update guidelines and similar policy statements for approval by the NCC
17. Undertake research and analysis to support the NCC's response to any requests for research or advice under ss29B (1) or (2) of the CCA
18. Prepare draft submissions and reports as directed by the NCC Liaise with Commonwealth and State/Territory officials as required

Administration, Finance, IT and Information Management

19. Coordinate travel arrangements for NCC President and Councillors (The NCC will remain responsible for the costs of Councillor travel and accommodation)
20. Generally assist the NCC in meeting its statutory obligations, including in relation to freedom of information and privacy legislation
21. Provision of IT services to NCC, including professional and timely IT security and IT support services which are compliant with Commonwealth Government requirements
22. Administration and maintenance of the NCC website (including any IT support services needed to maintain the website)
23. Organise scheduled NCC meetings and other meetings/teleconferences as required

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24. Prepare speaking notes and conference presentations for the NCC President and Councillors
25. Prepare and distribute NCC media releases (NCC media releases will generally be issued in the name of the NCC President and provide general strategic communications advice. Day to day media inquiries will be handled by the Executive Director and escalated to the President as required).
26. Maintain the NCC's financial records and provide professional and timely finance services to the NCC
27. Maintain and provide professional and timely payroll services to the NCC, including in relation to NCC Councillor remuneration
28. Liaise with the NCC's auditors in relation to the NCC's financial statements
29. Maintain NCC records in accordance with the Archives Act 1983 and other information management obligations
30. Provide assistance and advice to ensure the NCC complies with the Privacy (Australian Government Agencies - Governance) APP Code 2017, including appointing Privacy Champion and Privacy Officer, developing privacy management plan, undertaking annual review of plan and privacy processes/procedures.

Government liaison and reporting

31. Prepare the NCC's Annual Report, including reporting required under s 290(2) of the Competition and Consumer Act 2010.
32. Prepare responses to parliamentary questions
33. Prepare briefing material for the NCC President's attendance at Senate Estimates and other similar inquiries
34. Liaise with Treasury and other government agencies in relation to the NCC's budget and financial management
35. Liaise with Treasury in relation to appointments to the NCC as needed
36. Coordinate the NCC's provision of information to and dealings with Treasury, Department of Finance, Comcare, Comcover, the Australian Public Service Commission, the Office of Legal Services Coordination, and other government agencies as required