



Revitalising National Competition Policy: Administering competitive neutrality complaints

Productivity Commission submission

Submission to The Treasury's consultation process on
Revitalising National Competition Policy

The Productivity Commission acknowledges the Traditional Owners of Country throughout Australia and their continuing connection to land, waters and community. We pay our respects to their Cultures, Country and Elders past and present.

The Productivity Commission

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Contents

Introduction	4
Competitive neutrality policy and the role of the PC	4
Improving the administration of competitive neutrality complaint investigations	5
Areas for updating Competitive Neutrality policy and guidelines	8
References	10

Introduction

The Treasury's consultation paper, *Revitalising National Competition Policy* 'seeks feedback on the three potential elements identified for revitalising [National Competition Policy] for the modern economy' (The Treasury 2024, p. 6). The paper seeks views on, among other things, whether changes could be made to improve the operation of the competitive neutrality principles (The Treasury 2024, p. 15).

Since its establishment in 1998, the Productivity Commission (PC) has investigated complaints about Australian Government businesses' compliance with competitive neutrality policy. This submission draws on the PC's experience to suggest ways of improving the policy principles, clarifying the operation of the policy by jurisdictions, and enhancing the administration of the complaints mechanism. The PC would be happy to discuss the matters raised in this submission further as the Competition Review progresses.

Competitive neutrality policy and the role of the PC

Competitive neutrality policy seeks to ensure that significant government businesses¹ do not have advantages (or disadvantages) relative to their competitors, simply by virtue of their public ownership. This is designed to remove resource allocation distortions arising out of the government ownership of businesses to improve competition and efficient market outcomes (Australian Government 1996, p. 4). The Australian Government's Competitive Neutrality Policy Statement provided for the PC to set up and operate the complaints mechanism (Australian Government 1996, p. 6).

Under the *Productivity Commission Act 1998* (Cth) (PC Act), the PC receives and investigates complaints about the competitive neutrality arrangements of Australian Government businesses and reports to the Treasurer on its investigations.² The PC can also conduct an inquiry in relation to a competitive neutrality complaint under Part 3 of the PC Act if the Treasurer refers such an inquiry to the PC.³

The PC performs its competitive neutrality functions through the Australian Government Competitive Neutrality Complaints Office (AGCNCO), which operates as a separate unit within the PC. Traditionally, a Commissioner and a small number of staff form the AGCNCO as a part of their roles in the PC.

Between 1998 and 2024, the AGCNCO has provided 18 reports to government on previous investigations, on matters including Australian Hearing, the Sydney and Camden airports, Defence Housing Australia, NBN Co and Australia Post. The office has also released several research reports on competitive neutrality policy.

The AGCNCO also provides guidance on the applicability of competitive neutrality to government agencies implementing their obligations, as well as advice on the operation of the policy to state and territory government agencies, individuals and private organisations.

¹ Hereafter, simply 'government businesses'.

² Paragraph 6(1)(c) of the PC Act.

³ This is not explicitly mentioned in Part 3 of the PC Act but is referred to as a part of the PC's powers to request information when conducting an inquiry (see subparagraph 48(1)(a)(ii) of the PC Act).

Improving the administration of competitive neutrality complaint investigations

Transparent implementation of the findings of the AGCNCO (and competitive neutrality policy more broadly)

The role of the AGCNCO concludes at the point advice to government is provided on the matters raised in a complaint (unless an inquiry into the complaint is subsequently referred under Part 3 of the PC Act). The PC publishes investigation reports to provide public transparency on the outcomes of a complaint. The PC Act does not explicitly enable or require the PC to publish these reports, with the current arrangements requiring an understanding between the PC and government that publishing these reports is appropriate. A stronger guarantee of transparency could be provided by legislatively requiring the PC to publish the reports of the AGCNCO at the conclusion of a complaint investigation.

There is also no role for the AGCNCO to review implementation of its findings, no transparency over whether a government business responds to AGCNCO findings, and there is no penalty for a government business that does not implement an investigation's findings. Indeed, the policy statement explicitly states that under the policy:

Commonwealth business organisations will not be subject to penalties for non-compliance with the competitive neutrality principles. (Australian Government 1996, p. 22)

Concerns have been raised about the lack of penalties for failing to implement adverse findings from competitive neutrality investigations, for example:

Experience in application of the policy highlights a variety of problems, in particular the lack of penalty for failure of a government-related entity to respond to a finding that its conduct is not competitively neutral. (Healey and Smith 2018, p. 232)

Similarly, the Harper review observed that:

The absence of any requirement to respond to documented breaches of competitive neutrality policy is clearly undermining its efficacy. (Harper et al. 2015, p. 267)

The PC has highlighted the need for improved reporting. In its submission to the Harper Review, the PC recommended:

... that competitive neutrality policy requires self-reporting in annual reports by government businesses of the steps taken to comply with the policy... [as that would] ... aid in the assessment of compliance and also provide some transparency to private sector competitors that the business is operating in line with government policy (PC 2014, p. 34).

Government businesses are required to note that they are subject to the policy in annual reports to Parliament (Australian Government 1996, p. 22). These requirements may not extend to how they have considered and implemented competitive neutrality in their activities, and how they have implemented the findings of complaints investigations. In the absence of stronger requirements, the implementation of competitive neutrality policy relies primarily on good will.

Good will alone may not promote a transparent and timely response. For example, the AGCNCO is not aware of any response to its report concerning NBN Co (2022), which was released on 29 November 2022. This report identified, among other things, a \$300 million competitive advantages for NBN Co in relation to

debt neutrality (AGCNCO 2022, p. 1). This advantage reduces competition among builders and operators of fibre telecommunications networks and potentially raises costs to consumers.

Other, more transparent, options for implementing competitive neutrality exist. For example, the New South Wales Government is required to provide written responses to the Independent Pricing and Regulatory Tribunal's (IPART) competitive neutrality investigation reports⁴. This response must be provided within eight weeks of IPART's report⁵. The response must advise whether IPART's recommendations are being adopted and, if not, the reasons why they are not being adopted⁶. IPART is required to publish the response.⁷

The review should consider:

- increased reporting by government businesses on how they have complied with competitive neutrality policy and responded to the findings of the AGCNCO
- an increased role for the monitoring of compliance with competitive neutrality requirements after a complaint investigation
- a requirement on the PC to publish AGCNCO reports and on government (through the government business, responsible portfolio department or responsible Minister) to respond to these reports.

Information gathering powers

The investigation of recent complaints has brought into focus a weakness in the competitive neutrality complaint mechanism – how to ensure government entities provide information essential to the successful resolution of a competitive neutrality complaint investigation.

The AGCNCO does not have the power to compel information provision from parties that may have information relevant to its investigations, unlike the powers available to the PC when conducting an inquiry.

The PC Act does, however, prohibit hindering and disrupting the PC in the performance of its functions, with section 46 imposing a criminal penalty for such conduct.

This may appear to be of some use to the AGCNCO to help it compel Australian Government bodies to provide a submission to our complaint investigations. In practice, however, that provision is one the AGCNCO is unlikely to invoke for several reasons:

- hindering and obstructing is likely to be a high legal bar – mere delay or deprioritising responding to the AGCNCO's investigation may not be enough to meet this threshold
- the penalties are severe for a government business manager or APS officer who does not provide information in a timely manner – and there is a lack of gradation in the available enforcement tools in the PC Act
- taking criminal action may 'taint the well' of good will among Government agencies that the AGCNCO (and the PC) rely on to supply the information and analysis necessary to successfully prosecute our investigations and inquiries

⁴ Section 24GE of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

⁵ Paragraph 24GE(1) of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

⁶ Paragraph 24GE(2) of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

⁷ Paragraph 24GE(4) of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

- taking criminal action also introduces the risk of potentially lengthy delays as legal proceedings move through the courts and may be subject to appeals.

The AGCNCO's experience with how impractical information gathering powers can constrain an investigation shows changes are needed in how it encourages parties to provide it with information and analytical insights. The AGCNCO notes that other investigative bodies have recognised this threat to the successful conduct of their investigations. For example, in New South Wales, IPART has powers to require information from the complainant and the relevant government business during a competitive neutrality investigation⁸.

The review should consider appropriate statutory powers for the competitive neutrality complaints office to gather information pertinent to a complaint investigation.

Multiple governments as owners of a business subject to CN

Each jurisdiction in Australia has its own competitive neutrality policy and complaints mechanism. This has the potential to create problems where a competitive neutrality complaint is brought against a government business where more than one government is an owner of the business.

If, hypothetically, a complaint was brought against a jointly-owned business, which competitive neutrality policy requirements would that complaint be assessed against? And which complaint mechanism would be used to assess that complaint? Taking things to the extreme, could it be possible that one government complaint office accepted the complaint while another would reject it, and that one complaint office might deliver recommendations that another government or affected party disputed. How might this play out in implementing the findings of each investigation?

Examples of jointly-owned businesses include the Australian Road Research Board (ARRB) and National Rail – both of which have been the subject of a competitive neutrality complaint investigation. At the time of that investigation, the ARRB was a public company whose 10 Members were representatives from each of the Australian, State and Territory Governments and the Australian Local Government Association, while National Rail was owned by the Australian, New South Wales and Victorian governments. The administration of these complaints required considerable efforts to resolve how the complaint should be dealt with, which could be avoided if protocols are developed to identify how a lead complaints office will be decided – enabling complaints offices to spend more time engaging on the substance of a complaint.

The review should consider what protocols are needed to determine which policy and complaint process would be invoked in the case of a complaint concerning a government business with multiple government owners.

⁸ Sections 24GH and 24GI of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

Addressing competitive advantages under state legislation

The current competitive neutrality complaint against Australia Post by members of the Conference of Asia Pacific Express Carriers (Australia) Limited (CAPEC) has demonstrated how a government business might enjoy competitive advantages under the legislation and policies of other governments, because of its government ownership. For example, CAPEC claims that Australia Post has competitive advantages under state road rules (CAPEC 2022, p. 21).

The Australian Government's competitive neutrality policy statement is silent on how to tackle a cross-jurisdictional source of regulatory advantage. A national approach to this issue would ensure breaches of competitive neutrality (and resource misallocation) are addressed. This could include establishing formal procedures for a competitive neutrality complaint agency in one jurisdiction to notify the complaint agency of another jurisdiction whose legislation is providing the competitive advantage and to establish any protocols to deal with this situation.

The review should consider a national approach to CN and any necessary procedures and protocols to support that. Such procedures and protocols could be within a broader agreement by governments to commit to reviewing and amending legislation that provides regulatory advantages to government businesses in other jurisdictions.

Areas for updating Competitive Neutrality policy and guidelines

Clarifications to the operation of competitive neutrality policy

Several elements of the competitive neutrality policy have proven difficult for managers of government businesses to apply in practice. While the AGCNCO provides advice on the operation of the policy to support the goals of competitive neutrality policy, greater clarity would assist the effective implementation of the policy. This clarity could be provided in the National Competition Principles or in jurisdictional policy statements. Some areas that would benefit from greater clarity are:

- What constitutes 'government' in significant government business activities?
 - How should bodies that are partly government owned, and publicly-funded universities, be treated under the policy?
- What constitutes a 'business' for the purpose of competitive neutrality?
 - The Australian Government policy statement requires the managers of an activity to have a degree of independence in relation to the production of the good or service and the price at which it is provided (Australian Government 1996, p. 7). It is unclear in practice, what 'degree' of independence is sufficient to require a business to comply with competitive neutrality policy.

- The absence of specific references to potentially material competitive disadvantages and how they might best be addressed (for example, community service obligations).
 - Competitive neutrality policy and guidelines are explicit in pointing to the goal of no net competitive advantages for government businesses simply by virtue of government ownership. However, while those documents explicitly refer to major areas of potential advantages, those documents do not specify what material disadvantages might face government businesses.
 - The policy could be clarified to enable netting off advantages and disadvantages (subject to moral hazard concerns set out below) or for the government to directly fund any competitive disadvantages (such as community service obligations).
- Potential moral hazard arising from offsets to determine net competitive advantage.
 - Competitive neutrality policy focuses on net competitive advantages. Implicitly, this provides the potential for a government business to offset the value of any competitive advantages of government ownership with the cost of any competitive disadvantages of government ownership.
 - However, this approach runs the risk of introducing a disincentive for government businesses to pursue efficiencies that would reduce the cost of those competitive disadvantages of government. If a government business has a *net* competitive advantage, then any investment or action that reduces the cost of the competitive disadvantages would simply result in a higher net competitive advantage, and a higher competitive neutrality payment, with no benefit flowing to the government business. This concern suggests that, in some cases, a different approach to achieving no net competitive advantage might be warranted (for example, directly addressing advantages and disadvantages separately).

The review should consider clarifying a number of definitional aspects of the operation of competitive neutrality policy, to improve the effectiveness of the policy and the outcomes it achieves, including:

- scope of entities covered under 'government'
- what constitutes business activity
- consideration of material disadvantages
- treatment of potential moral hazards.

Updates to competitive neutrality policy

There are areas where competitive neutrality policy has become outdated in the 30 years since the National Competition Policy was agreed. These are areas where practices have moved on in ways not foreseen at the time, where the policy has been shown to not operate effectively, or where rigidities in the policy's formulation have become less relevant over time. Consideration should be given to:

- Removing the requirement to make dividend payments.
 - The Australian Government policy statement requires significant government businesses to 'pay commercial dividends ... to the Budget' (Australian Government 1996, p. 17). This requirement is not needed, as a government business that is otherwise complying with competitive neutrality (no competitive advantages from government ownership and earning a commercial rate of return) would also be required to earn a commercial rate of return on any retained profits – so these do not represent access to cheap capital.

- The need for a broader umbrella to counter all forms of lower cost financing, along with caveats to the application of debt neutrality adjustment payments.
 - Debt neutrality aims to address a government business’s cost of access to finance where this cost is lower than their competitors because of its government ownership. The policy is silent on modern forms of financing, such as structured financing, leases, and special purpose vehicles, which may also be priced favourably based on an implicit government guarantee.
 - Debt neutrality considerations may also fail to consider the degree of autonomy a government business may have in determining their capital management policies and practices. Debt neutrality payments may require adjustment where a government business has limited autonomy in debt decisions.
- The need to reformulate the commerciality test in competitive neutrality policy.
 - This was discussed in the AGCNCO’s NBN Co report. Finding 6.2 stated:

There is merit in re-specifying the commerciality test in competitive neutrality policy. The existing requirement in competitive neutrality policy that a government business should earn a commercial rate of return over a reasonable period does not take account of the fact that government policy constraints and unanticipated shocks to costs or demand may make it impossible for even a fully commercially oriented business to ever make an ex post commercial rate of return on its assets. (AGCNCO 2022, p. 93)
- The contemporary relevance of financial thresholds in the *Competitive Neutrality Guidelines for Managers* (Treasury and DoFA 2004).
 - These guidelines contain some dollar thresholds which are not indexed. These thresholds have reduced over the last 20 years in real terms and may now be capturing a greater range of activity than was originally intended. The guidelines supporting the policy should be updated.

The review should consider updating aspects of competitive neutrality policy and guidance that have become dated or redundant, to improve the effectiveness of the policy and the outcomes it achieves.

Overall, the PC considers that competitive neutrality policy has served Australians well, with the 1996 Competitive Neutrality Policy Statement continuing to be fit for purpose. Our experience, through the AGCNCO, has shown some areas where improvements can be made. The PC hopes that this review can be instrumental in improving the effectiveness of the policy, including the operation of the complaints mechanism.

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