



The public interest test for competitive neutrality

6 February 2023

This information paper is written to explain and help you provide feedback on our draft recommendations concerning the application of the public interest test for competitive neutrality. It outlines what the public interest test involves, why it matters and our draft recommendations to improve it. It also provides information on how you can get involved and provide your feedback. It can be read alone or with the material listed at the end of this paper.^a

1 What is the public interest test?

The Competition Principles Agreement requires government businesses to apply competitive neutrality principles to significant government business activities, but only to the extent that the benefits of applying competitive neutrality principles outweigh the costs (the 'public interest' test).³ This means that competitive neutrality policies may not apply to activities that, for example, implement government social welfare policies where the total costs of applying competitive neutrality principles exceed the benefits.

The Competition Principles Agreement also sets out specified matters which, where relevant, must be considered in assessing the public interest (such as community service obligations and certain government policies).² The main choices faced by jurisdictions around the application of the public interest test are when it should be applied and what should be considered as part of the test. There are also procedural questions of how often to apply the test to a business activity and whether the application of the test should be published or consulted on.



Competitive neutrality principles only apply where the benefits of doing so outweigh the costs

^a Section 5 of this paper provides more information on what competitive neutrality is and why we are reviewing NSW's competitive neutrality policies.

2 Improving the public interest test

2.1 Clarifying when the test should be undertaken

We recommend that the public interest test be undertaken where a government business considers that it would not be in the public interest to charge a competitively neutral price (that is, the cost of the good or service, as adjusted for any advantages or disadvantages of government ownership, such as taxes and regulations) or to remove a non-cost advantage (such as preferential access to data).

Currently, an entity does not have to go through the process of estimating a competitively neutral price (including identifying and removing or adjusting for non-cost advantages) if they can establish that the costs of applying competitive neutrality principles outweigh the benefits.³ Applying the public interest test after a competitively neutral price is estimated and non-cost advantages have been identified is preferred. This is because it exposes the cost of the subsidy and the impacts of applying it and allows the public interest test to be informed by a full set of costs and benefits.

For example, a local government printing business that is subject to the competitive neutrality policies but wishes to subsidise its services must calculate the competitively neutral price regardless. After establishing the competitively neutral price it can assess the costs and benefits of not charging this price.

We recommend the public interest test be re-applied whenever there are major changes in the market and at minimum, once every 5 years, to ensure it does not become outdated.

2.2 Greater guidance on how to apply the test

There is limited guidance in the competitive neutrality policies on how a government entity should undertake a public interest test. We propose to recommend that the revised competitive neutrality policy provides a clear, easy-to-apply framework for undertaking the public interest test. The proposed steps are set out in Figure 2.1 along with an example of the application of the steps.

The example in question concerns a council that is considering supplying a green bin service. Another local business offers green bin services alongside other gardening and waste removal services, but the cost is not affordable for some residents. Even if it was affordable, the demand for the services outstrips the supply by the local business. As a result, dead tree branches and other green litter are accumulating in the area, posing a fire hazard. The council has calculated the competitively neutral price (\$20 per collection) and concluded that it will result in a price that is still unaffordable for residents so is considering a subsidised price (\$10 per collection).

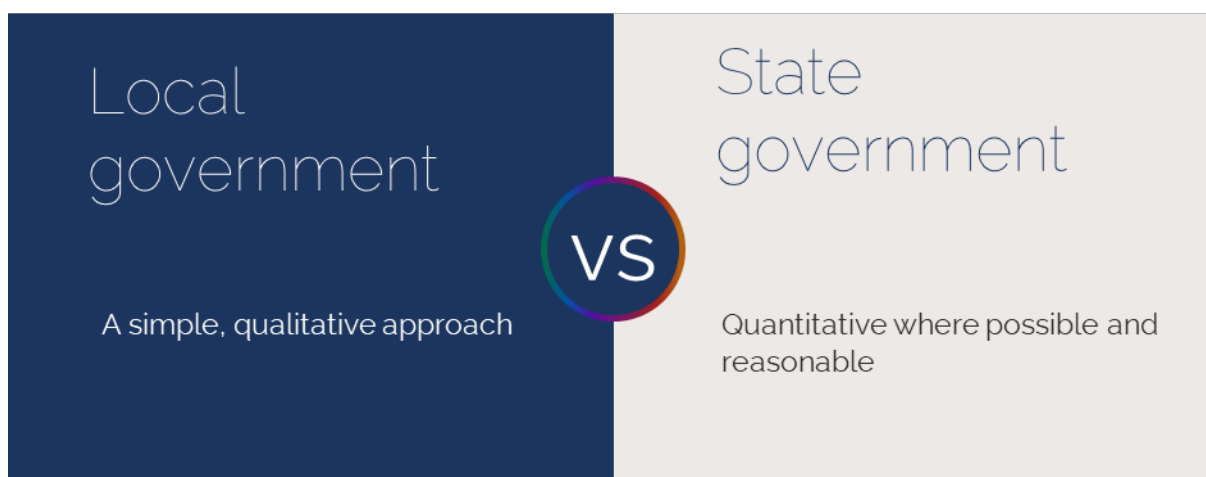
Figure 2.1 Proposed public interest test: steps and brief example

01	<p>Define what is being proposed</p> <p>Subsidised green bin service to encourage residents to dispose of their green litter and avoid fire hazards, which pose risks to the whole community.</p>
02	<p>Assess benefits of proposed option</p> <p>An affordable service would increase accessibility, encourage more residents to use the service and would reduce fire risk.</p>
03	<p>Assess costs of proposed option</p> <p>The subsidised service may reduce demand for the private business' services, but this is likely to be limited as there is sufficient demand for both the council and private business services.</p>
04	<p>Do the benefits outweigh the costs?</p> <p>The Council has concluded that the benefits of reduced fire risk outweigh the impact on the private business' services and the cost of the subsidy.</p>
05	<p>Are there less costly means of achieving the objective?</p> <p>An alternative is a rebate for residents who cannot afford the private businesses services, however, this would be costly to administer.</p>

Note: this is a summarised example of the application of the public interest test. While local governments would only be required to take a simple, qualitative approach to the public interest test, more information would likely need to be considered in determining costs and benefits.

We are proposing different methods for local and state government entities (see Figure 2.2). A simple, qualitative approach for local government will reduce the regulatory burden on councils seeking to subsidise business activities. Currently councils can subsidise the price of goods or services for any reason once they have identified the competitively neutral price for their goods and services.⁴ For state government, the public interest assessment should be quantitative where possible and reasonable. This is consistent with the obligation in the current competitive neutrality policies.⁵

Figure 2.2 Different approaches for local and state government



The competitive neutrality policy should also outline circumstances where applying competitive neutrality is unlikely to be in the public interest. For example, we consider that a government business charging to recover the cost of dividends, taxes or other costs avoided by not-for-profits or charities (as relevant) is unlikely to be in the public interest where:

- most competitors are not-for-profits or charities (so they also benefit from not paying dividends, taxes etc), and
- there is a role for government in the market (i.e. a gap in the market that a government business activity should fill for a reasonable period of time).

2.3 Publishing and consulting on the tests

We heard in our consultation that competing businesses are interested in greater transparency concerning competitive neutrality. We consider that there is a strong case for transparency around public interest assessments, given the subjective nature of the assessments. We therefore recommend the publication of public interest assessments for the period that it is relied on, subject to the removal of confidential or commercially sensitive information.

To assist government businesses with applying the public interest test, we propose to develop a template identifying information for inclusion and information that might be considered commercial in confidence (noting this will always need to be subject to a case-by-case assessment by the government business).

Consultation on the public interest test is also likely to be useful and should be encouraged. We do not, however, recommend making consultation mandatory as this would impose a considerable burden on government entities where they need to undertake several assessments.

3 Further information

See our [review page](#) for further information and resources about competitive neutrality, including:

- terms of reference for the review
- Issues Paper
- Draft Report
- other information papers.

4 We want to hear from you

We want to hear about your experiences with the NSW competitive neutrality policies and processes, and your views on our draft recommendations. Hearing the views of a wide group of stakeholders is very important to us.

We have provided a short list of questions for you to respond to below. You can respond to these questions and/or the broader list of questions in the Draft Report, which provides further information on the issues raised here. We are interested in any feedback you can provide. You don't need to answer every question or stick to the questions asked.



Do you agree with our proposed approach to the public interest test?

- In practice, how will this approach differ from current practice?
- What tools, templates and guidance would assist the undertaking of the test?
- What information should be published about a public interest test?

Have your say

Your input is critical to our review process.

[Submit feedback »](#)

You can get involved by making a submission, submitting feedback or attending a public hearing.

[Contact the review team »](#)

[Attend the public hearing »](#)

We are accepting written submissions on our Draft Report until 24 February 2023 and are holding a public hearing on 13 February 2023. You can express your interest in attending our public hearing on our website. If you have any questions regarding the review, are interested in meeting with us or would like to speak to the review team, please contact [Ineke Ogilvy](#).

5 Background

We are reviewing NSW's competitive neutrality policies and processes. Our review is identifying issues and concerns with current competitive neutrality policies and analysing opportunities to improve them. We have considered how the policies compare to best practice and recommend potential improvements in our Draft Report.

Competitive neutrality policies and processes aim to ensure that government businesses do not have a competitive advantage over other businesses because of their government ownership

Government businesses might compete across a range of industries, including in manufacturing, laundry services, construction (including roads), waste disposal, gyms and fitness, tourism services, printing, childcare and aged care.

¹ *Competition Principles Agreement 1995* (Cth) cl 3(6).

² *Competition Principles Agreement* (Cth), cl 1(3).

³ Department of Local Government, *Pricing & Costing for Council Businesses*, July 1997, p 3; NSW Treasury, *NSW Policy Statement on the Application of Competitive Neutrality (TPP 02-1)*, January 2002, p 14.

⁴ NSW Government, *Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 14.

⁵ NSW Treasury, *NSW Government Guide to Cost-Benefit Analysis (TPP 17-03)*, March 2022.