

# Competitive neutrality complaints processes in NSW

28 June 2022

We are reviewing NSW's competitive neutrality policies and processes. Our review will identify issues and concerns with current competitive neutrality policies and analyse opportunities to expand their scope. We will consider how the policies compare to best practice and recommend potential improvements.

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. Some of the businesses across Australia over which competitive neutrality concerns have been raised include aquatic centres, nuclear medicine and land valuation and plumbing services.

This short information paper is written to help you understand and provide feedback on the competitive neutrality complaints processes in NSW. It explains the current competitive neutrality complaints handling processes in NSW for both state and local government. 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.

## 1 What is competitive neutrality?

Competitive neutrality policies aim to ensure that government businesses do not have a competitive advantage over other businesses simply because they are owned by the government. In doing so, these policies promote competition, innovation and efficiency in the marketplace, which encourages cost-reflective prices, better quality goods and services and greater choice for customers.

Competitive neutrality policies require government businesses to assess their advantages and disadvantages from being government-owned and offset any net competitive advantage. One way that government businesses are currently required to do this is by pricing their goods and services to reflect all costs that an equivalent private business would have to pay in the same market.

Some advantages of government ownership that a government business may benefit from are:

- not having to pay the same set of taxes as other businesses
- not needing to earn a profit, and
- being able to access cheaper finance or infrastructure than other businesses.

Some disadvantages of government ownership that a government business may experience are:

- restrictions on importing capital or outputs (e.g. buying Australian only)
- restrictions on borrowing locally and overseas
- stricter employment and industrial relations obligations, and
- paying the costs of meeting community service obligations.

If you are a competitor of a government business<sup>a</sup> and you suspect that a government business is not correctly applying competitive neutrality policies, you can make a complaint. NSW's competitive neutrality policies and processes currently include separate processes for complaints against state<sup>b</sup> and local<sup>c</sup> government businesses.

## 2 How can I currently make a complaint about a local government business?

If you have a competitive neutrality complaint about a business owned by local government, you must currently raise it with the relevant council.

Each council is responsible for establishing and resourcing its own internal complaints handling process. It must include a records management system that records and tracks all complaints received and set time limits for council to respond to complaints. Each council can determine its own time limits, but the Department of Local Government's guidelines suggest that 4 weeks may be reasonable.

Each council must make clear in its complaints handling process what actions it can take when a complaint is made. This may include providing more information to you about competitive neutrality policies or reviewing its business activity to determine if it is following competitive neutrality principles. The council must also nominate a competitive neutrality complaint-handling position that is independent of its business activities.

The Office of Local Government will handle a complaint if a council fails to resolve it, or if reasonably requested to do so.

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<sup>a</sup> Including a potential competitor.

<sup>b</sup> The NSW Policy Statement on the Application of Competitive Neutrality sets out a framework for handling complaints from complainants who feel that they have been disadvantaged by a State government business that is not following competitive neutrality principles.

<sup>c</sup> The Department of Local Government's Guidelines on the Management of Competitive Neutrality Complaints 1997 sets out a separate mechanism for handling complaints about local government businesses. The Department of Local Government is now known as the Office of Local Government.

## 2.1 Successful complaints against local government businesses

If an internal investigation finds that a council has not followed competitive neutrality policies, a common remedy would be for the council to change its business practice.<sup>1</sup>

If the Office of Local Government investigates your complaint and finds that a council business has not followed competitive neutrality, it is unclear whether it is currently required to respond to the finding.<sup>2</sup> If not, this may limit the efficacy of competitive neutrality policy.

The Competition Policy Review of 2015<sup>2</sup> found that the absence of any requirement for most Australian governments to respond to documented breaches of competitive neutrality policy was undermining its efficacy.<sup>3</sup>

We are seeking your feedback on how the process for handling complaints about local government businesses is working and what improvements can be made.

## 3 How can I currently make a complaint about a state government business?

You may make a competitive neutrality complaint about a state government business<sup>4</sup> if you are an actual or potential competitor of the business. You may do so if you believe you are being disadvantaged because of a state government business' net competitive advantage from its public sector ownership.

First, you must currently directly lodge a complaint with the relevant government business. The complaint must be in writing and specify the alleged breaches of competitive neutrality.

The government business must generally respond to you in writing within 4 weeks of receiving it.

### 3.1 When are complaints independently investigated?

If you are not satisfied with the response from the state government business, you can currently ask the relevant Minister to refer the complaint to an appropriate body for investigation.

The following Ministers are responsible for referring complaints:

- The Minister for Finance may refer complaints relating to concerns about competitive neutrality in bidding for tenders by government businesses (other than local governments). These complaints may be referred to the NSW Procurement Board for investigation.

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<sup>d</sup> If an investigation was carried out by the Office of Local Government under section 430 of the *Local Government Act 1993*, the council would be required to respond to a report of an investigation into a complaint. However, no competitive neutrality investigations have been carried out under section 430. The Department of Local Government's Guidelines on the Management of Competitive Neutrality Complaints do not require the council to respond to the findings of an investigation.

<sup>e</sup> Not including a local government business (as discussed in section 2 above).

- The Minister for Customer Service and Digital Government may refer all other competitive neutrality complaints other than those about local government businesses (generally – see below exception). These complaints may be referred to IPART for investigation.

The Minister for Customer Service and Digital Government may also direct IPART to investigate a complaint relating to:

- A government business (in relation to a tender bid), where the complaint involves other alleged failures to comply with competitive neutrality principles by the government business.
- Both one or more local government businesses and one or more other government businesses (that are not local government owned) allegedly failing to comply with competitive neutrality principles. The Minister for Customer Service must consult with the Minister for Local Government before referring the complaint to IPART.<sup>4</sup>

The Minister for Customer Service and Digital Government must also be satisfied that it is appropriate for one of these complaints to be dealt with by IPART.

The relevant Minister will only refer a complaint if the:

- complaint relates to any or all the public trading activities of the government business
- competitor competes, or intends to compete, in a market with a government business and is hindered, or likely to be hindered, in doing so due to the matters of the complaint
- competitor is, or is likely to be, materially affected by the matters of the complaint
- complaint has been made by a competitor, or by a person or body who is authorised by a competitor to make a complaint on its behalf, and
- subject matter of the complaint has been raised with the government business and the complainant has reasonable grounds for not being satisfied with the response to the complaint

When IPART or the NSW Procurement Board receives a complaint referral, they must use their best endeavours to investigate and issue a report within 10 weeks. They must make the findings of their investigation and their recommendations available to the public.

### 3.2 Successful complaints against state government businesses

When IPART or the NSW Procurement Board publish an investigation report that finds the complaint was successful, the portfolio Minister must currently provide a written response to the investigating body within 8 weeks. Copies must also be provided directly to the complainant, government business, Treasurer and Premier.<sup>f</sup> The investigating body must then make the response publicly available.

The portfolio Minister does not currently have to accept the recommendations of the investigating body. Although, if they do not, the portfolio Minister's response must include the reasons why they have not accepted the recommendations.

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<sup>f</sup> The NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002, p 20, does not clearly state whether the portfolio Minister or investigating body must provide these copies.

We are seeking your feedback on how the process for handling complaints about state government businesses is working and what improvements can be made.

## 4 Only one competitive neutrality complaint has been made in NSW

We have been contacted several times by businesses with complaints about government businesses. However, we are not the correct first point of contact for complaints. There has been only one complaint investigation referred to IPART (of the then State Valuation Office in 2004). For the most populous state with the largest economy, NSW has had a disproportionately low level of complaints compared to other states and territories.<sup>5</sup>

This may mean competitive neutrality is not a significant concern. It could also suggest there is little public awareness of how and when to pursue a complaint or that the process is too difficult to navigate with little certainty as to the remedy for most businesses to pursue.

The NSW Productivity Commission's Green Paper recommended IPART consider ways of improving the complaints process, as potential complainants may not know where to start, the process can eat up business resources, and it can discourage people from even lodging a complaint.<sup>6</sup> We will do this as part of this review.

## 5 Further information

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

- review issues paper
- review of competitive neutrality in NSW information paper
- competitive neutrality & local government information paper

## 6 We want to hear from you

We want to hear about your experiences with the NSW competitive neutrality complaints process. Hearing the views of a wide group of stakeholders on how the current complaints processes are working are very important to us. We are also interested your suggestions on improvements that could be made. The areas where you may have influence in this review are:

- What government activities are captured by the competitive neutrality policies and processes
- application of the significance test
- application of the public interest test
- what obligations apply to activities that are covered

- what the complaints and investigation process should look like
- how and when we consult (over and above what is required by the terms of reference)

We have provided discussion starters below. You can respond to these and/or the broader list of questions in the issues paper. You don't need to answer every question or stick to the questions asked.

## Improving the process of making and investigating complaints



If you run a business that competes with a government business tell us:

- Have you ever tried to make a complaint about a government business?
- What was your experience?
- Did the complaint get resolved?



If you run a government owned business tell us:

- What is your experience dealing with complaints?
- What are the benefits and disadvantages of the separate complaints handling processes for different levels and types of government business activities

We are accepting written submissions on our information papers and issues paper until 15 August 2022. You can express your interest in attending upcoming workshops on our website. Later in the year, we will also hold a public hearing to hear more from stakeholders. 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 one of the staff members listed at the beginning of the issues paper.

### 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 a staff member »](#)

<sup>1</sup> The Department of Local Government's Guidelines on the Management of Competitive Neutrality Complaints 1997, p6.

<sup>2</sup> Harper, I, McCluskey, S and O'Bryan, M, Competition Policy Review Final Report, March 2015

<sup>3</sup> Harper, I, McCluskey, S and O'Bryan, M, Competition Policy Review Final Report, March 2015, p267

<sup>4</sup> *Independent Pricing and Regulatory Tribunal Act 1992*, section 24G(3) and (5).

<sup>5</sup> Healey DJ, 2015, 'Competitive Neutrality: Addressing Government Advantage in Australian Markets' p18, in State-Initiated Restraints of Competition, Edward Elgar Publishing, pp. 3 - 39, <http://www.elgaronline.com/view/9781784714970.xml>

<sup>6</sup> NSW Productivity Commission, 2020, *Productivity Commission Green Paper Continuing the productivity conversation*, p115