



IPART Independent
Pricing and Regulatory
Tribunal | NSW

Competitive neutrality in NSW

Issues Paper

June 2022

Tribunal Members

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Invitation for submissions

IPART invites comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

Submissions are due by Monday, 15 August 2022

We prefer to receive them electronically via our [online submission form](#).

You can also send comments by mail to:

Competitive neutrality review
Independent Pricing and Regulatory Tribunal
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If you require assistance to make a submission (for example, if you would like to make a verbal submission) please contact one of the staff members listed above.

Late submissions may not be accepted at the discretion of the Tribunal. Our normal practice is to make submissions publicly available on our [website](#) as soon as possible after the closing date for submissions. If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed above.

We may decide not to publish a submission, for example, if we consider it contains offensive or potentially defamatory information. We generally do not publish sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please let us know when you make the submission. However, it could be disclosed under the *Government Information (Public Access) Act 2009* (NSW) or the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's [submission policy](#) is available on our website.

The Independent Pricing and Regulatory Tribunal (IPART)

Further information on IPART can be obtained from [IPART's website](#).

Acknowledgment of Country

IPART acknowledges the Traditional Custodians of the lands where we work and live. We pay respect to Elders, past, present and emerging.

We recognise the unique cultural and spiritual relationship and celebrate the contributions of First Nations peoples.

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1 Introduction

Across its nine operational clusters, the NSW Government delivers a diverse range of products and services to the citizens of NSW, using its workforce of over 400,000 employees¹. Similarly the 128 local councils in NSW employ over 48,000 staff and deliver a combined \$12 billion of infrastructure facilities and services to their local communities.²

These products and services are delivered using a variety of models including partnering with, procuring or in direct competition with the non-government (private and not-for-profit) sectors.

Government business activities can have a range of advantages that are not available to other businesses. These include not having to earn a profit or pay taxes, access to cheaper funds and hidden subsidies. Competitive neutrality policies and processes are aimed at preventing government businesses from using these advantages to out-compete other businesses.

We are reviewing NSW's competitive neutrality policies and processes. This issues paper is the first stage in the review, which will be finalised in February 2023.

Competitive neutrality policies currently require governments to account for the full cost of providing goods and services and make the value of any taxpayer subsidies explicit. Without them, Government businesses may price their goods and services too low, which locks other businesses out and ultimately leads to higher costs and poorer services.

By helping develop effective competition, competitive neutrality gives all businesses incentives to innovate, improve their products and become more efficient. It also gives non-government businesses, particularly small businesses, confidence that they will not be unfairly disadvantaged due to a government owned competitor operating in the same market.

In NSW, current competitive neutrality policies and processes:

- apply to significant state and local government businesses where there is a public interest in applying them
- set out costing and pricing principles for Government businesses to follow when setting prices for their products
- provide a framework for handling complaints from competitors^a who feel that they have been disadvantaged by a Government business that is not following the competitive neutrality principles.

Our review will identify issues and concerns with current competitive neutrality policies and analyse opportunities to expand their scope to other Government activities. We will consider how the policies compare to best practice and recommend potential improvements.

This review delivers on the commitment made by the NSW Government to review its competitive neutrality framework in response to the recommendations of a review of Australia's competition policy undertaken in 2015.

^a Including potential competitors

1.1 What we are reviewing and why

Competitive neutrality policy has applied to NSW's state and local government business activities since the late 1990s. The NSW Government last reviewed competitive neutrality policies around 20 years ago. Since this time, the NSW economy has changed significantly.

For example, Government business ownership has become more strategic and focused. The types of activities Governments use to deliver on their policy objectives has broadened, along with greater private sector and not-for-profit involvement in delivering essential services to the community either instead of, or alongside, government.

Our review will consider whether NSW competitive neutrality policies and processes remain fit for purpose and make recommendations for improving the design of the policies and processes that reflect the maturity of government businesses today.

We will seek to understand the views and experiences of private and not-for-profit competitors, as well as government agencies, to assess what is working well and what could be improved. We will also consider the costs and benefits of expanding the scope of government activities to which competitive neutrality principles apply. Our review will address the following questions:

- are the scope and coverage of the policy appropriate?
- are complaint mechanisms, oversight, accountability, transparency and administration arrangements effective?
- are the current NSW competitive neutrality policies best practice?
- what improvements can be made to the policies and their implementation?
- what are the costs and benefits of expanding the scope of the policies to a broader range of government activities?

1.2 Overview of this issues paper

This issues paper provides context for the review, including why competitive neutrality is important, and discusses the current policies and processes. The key topics covered by the issues paper are summarised below.

Getting competitive neutrality right will benefit the people of NSW

Effective competitive neutrality policies are important because they create opportunities for lower prices, better quality and greater choice for customers, by supporting competition, innovation and efficiency.

They do this by encouraging government owned businesses to structure their businesses and prices in a way that provides a level playing field between government and non-government businesses. This ensures that government operated businesses do not use the advantages that come from government ownership to compete unfairly with private businesses. It also means that governments should consider the disadvantages of government ownership and work to remove or transparently acknowledge them.

This should result in an economy that encourages the efficient use of resources, and that allows productive and innovative businesses to thrive.

The key features of the current policies and processes

Competitive neutrality principles

Depending on the nature of the government business activity and its operations, NSW's competitive neutrality principles may include:

- **Commercialisation** – either through corporatisation or establishing self-contained organisational units for the trading activity. These entities apply the commercial policy framework that requires:
 - commercially based performance targets, dividends and capital structures
 - regular independent performance monitoring
 - payment of taxes or tax equivalents
 - payment of debt guarantee fees
 - equivalent regulatory frameworks to private competitors.
- **Pricing goods and services transparently and in a way that reflects the costs that would be incurred by a private sector business** – by allocating costs in accordance with the pricing guidelines to ensure that prices charged at least cover the avoidable costs and are consistent with the approaches followed by private sector companies. Adjustment may be made for material disadvantages of government ownership where such policies cannot be revised to remove them.
- **Being explicit around any subsidies made for policy reasons** – government businesses are not required to charge full cost recovery but must be explicit about the quantum of subsidy being provided to fulfil policy aims.

Which government activities they apply to

Competitive neutrality principles must be applied to '*significant government business activities*' where it is in the *public interest*. This means government organisations need to review their activities to determine:

- whether they undertake any *business activities* (as defined in the relevant policy documents)
- whether any of these activities are *significant* (applying guidance about features which may render a business activity significant)
- whether the *benefits* of applying competitive neutrality principles outweigh the *costs* of doing so.

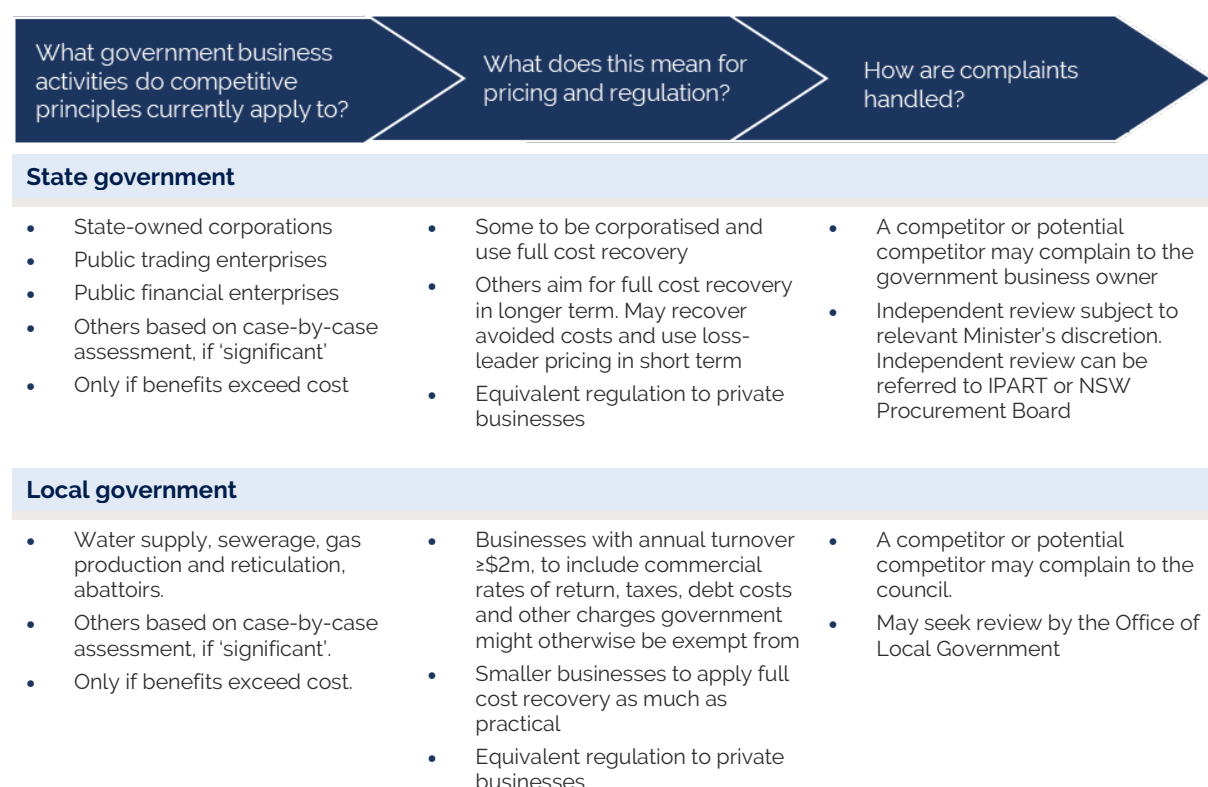
Reporting and public transparency

Some annual reporting on performance targets is required of state owned corporations and public trading enterprises.³ IPART, Office of Local Government and the NSW Procurement Board are required to provide statistical information on complaints and non-compliance in their annual reports. Some further compliance reporting had been published by the Commonwealth until 2019.

Complaints and investigations

The competitive neutrality framework in NSW establishes a two-stage complaint handling process for competitive neutrality complaints. The first stage is to lodge a complaint with the government business (or local government) that is the subject of the complaint. If the complainant is dissatisfied with the outcome, they may ask the responsible minister to refer their complaint to IPART or the NSW Procurement Board for investigation subject to the complaint meeting certain criteria. A local government related complaint can be raised with the Office of Local Government.

Figure 1.1 NSW competitive neutrality framework at a glance



Source: IPART, NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002; New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996.

We will consider experience with the NSW competitive neutrality policies and processes and how well they are working. We are also interested in identifying any gaps in the current framework and what improvements could be made.

Expanding the scope of competitive neutrality policy

Some government activities may not be captured by the application tests described above but do deliver products and services in direct competition with other providers or in a way that impacts competition. These may include:

- directly supplying social services or programs (such as public education or hospital services)
- contracting out service provision to a private operator (e.g. bus, ferry, light rail)

- taking a minority ownership stake in a business (e.g. by selling a majority stake in a previous government business)
- providing grants, concessional loans, tax advantages or equity stakes to particular private businesses to achieve policy outcomes (such as employment or innovation)
- obligations that differ between public and private businesses (e.g. licences granted under the *Sydney Water Act 1994* and the *Water Industry Competition Act 2006*).

We will consider the benefits and costs of expanding the scope of competitive neutrality policies to a broader range of activities where government and other service providers operate in the same market.

1.3 How you can get involved

We are interested in hearing from a broad range of stakeholders on their experience with the NSW competitive neutrality framework. Understanding the views of a wide group of stakeholders on how the current policies and processes are working is very important. We are also interested in identifying any gaps in the current framework and taking suggestions from stakeholders on improvements that could be made.

The table below provides a brief overview of where stakeholders may have influence in this review.

Table 1.1 What stakeholders can influence in this review

What stakeholders can influence in this review	Decisions that have already been made
<ul style="list-style-type: none"> • what government activities are captured by the competitive neutrality policies and processes • design and 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) 	<ul style="list-style-type: none"> • at least 1 public hearing and an 'issues paper' and 'draft report' made public • outcomes must be consistent with national competition policy agreements (including that there will continue to be a competitive neutrality policy in NSW) • review must cover all the items listed in the terms of reference • the review is not an investigation of compliance with competitive neutrality policies and will not investigate individual complaints • review timeframe – we are required to report in February 2023

We have provided a list of questions for stakeholders to respond to throughout this issues paper. The consolidated list is set out on the next page. These questions are aimed at starting the conversation and not designed to be an exhaustive list.

At the end of each chapter we have provided discussion starters, to help you respond to the questions and put together your submission.

The policies and processes referred to in the terms of reference are available on our [review webpage](#).

Questions on which we are seeking comment

1.	What obligations should competitive neutrality policies place on government business activities?	32
2.	What guidance do government agencies require to support them to correctly apply competitive neutrality principles to their activities?	32
3.	How should governments identify the activities that need to apply competitive neutrality principles?	46
4.	How often should government businesses re-assess their activities for competitive neutrality? What circumstances could trigger a re-assessment?	47
6.	What types of information should government businesses publish to demonstrate compliance with competitive neutrality policies and when? What types of information should not be published?	52
7.	How can the processes for lodging or investigating complaints be improved?	58
8.	What are the benefits and disadvantages of retaining a separate process for complaints about local government businesses?	58
9.	Where are the regulatory and policy gaps or overlaps with respect to the scope of competitive neutrality in NSW?	64

1.4 Structure of this paper

This issues paper is structured as follows:

- Chapter 2 provides context for the review
- Chapter 3 sets out the obligations that the competitive neutrality policies and processes impose on government businesses that are covered
- Chapter 4 outlines which Government activities are covered by the competitive neutrality policies and processes
- Chapter 5 discusses the administration and oversight arrangements that are currently in place
- Chapter 6 covers the complaints process for dealing with suspected breaches of competitive neutrality policies
- Chapter 7 considers how the scope of competitive neutrality may be changed.
- Appendix A sets out our Terms of Reference for the Review
- Appendix B provides a brief comparison with the Commonwealth regime and those in place in other states
- Appendix C provides a brief comparison of competitive neutrality policies in NSW and competitive neutrality rules in several other countries
- Appendix D provides a comparison of complaints handling processes across Australian jurisdictions
- Appendix E provides a glossary of terms used in this paper.

2 Context

While the stated objectives and benefits of competitive neutrality policies are often expressed differently, these policies acknowledge the advantages that government businesses sometimes have over non-government businesses operating in the same markets. They aim to ensure that government businesses do not have a competitive advantage over other businesses because of their government ownership. This supports competition and confidence which in turn creates an environment that supports lower prices, greater innovation and more productive businesses.

NSW's competitive neutrality policies and processes were last reviewed 20 years ago.^b Over this time, NSW's economy has changed significantly. The review we are undertaking is aimed at assessing whether the current policies and processes are still working as intended and delivers on the commitment made by the NSW Government to review its competitive neutrality framework in response to the recommendations of a review of Australia's competition policy undertaken in 2015 (commonly referred to as the Harper Review).

This chapter provides background information on why we need competitive neutrality policies, what NSW's competitive neutrality policies and processes look like and discuss why we have been asked to review them.

2.1 What is competitive neutrality and why do we need it

Competitive neutrality policies aim to ensure that government businesses competing with private and not-for-profit businesses do not have a competitive advantage simply because they are government owned. 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
- being able to access cheaper finance or infrastructure than other businesses
- non-cost advantages such as exemptions from regulatory constraints.

These do not include any advantage that come from the size, structure or scope of a government business's operation because these are types of advantages that other competing businesses may also have access to. Competitive neutrality does not guarantee that every business will be able to compete and make a profit.

The Competition Principles Agreement requires the NSW Government to ensure there is independent price oversight of government businesses that are monopoly, or near monopoly, suppliers of goods or services. Other regulations and licensing arrangements act to constrain market power.

^b The most recent to be updated was the NSW Government Policy Statement on the Application of Competitive Neutrality (TPP02-1), which was updated in 2002.

Government businesses can also be disadvantaged by government ownership. For instance, they may have restrictions on importing capital or outputs (e.g. buying Australian only), restrictions on borrowing locally and overseas, and stricter employment and industrial relations guidelines. They may also have to pay the costs of meeting community service obligations (CSOs).

Competitive neutrality requires government businesses to assess their advantages and disadvantages from being government owned and offset any net competitive advantages. One common way government businesses do this is by pricing goods and services to reflect all costs that a private equivalent business would have to pay in the same market. Box 2.1 provides an example of this.

Box 2.1 IPART recommends Crown Cemeteries pay rent equivalents

In 2020 we reviewed the costs and pricing of interment (burial) in NSW. To be interred in a cemetery, a person must purchase an interment right from the cemetery. Cemeteries in NSW are owned and operated by local governments, Crown land managers and private operators. Crown land managers perform most burials in Sydney and local governments perform the majority of burial services throughout the rest of NSW.

As part of our package of recommendations, we recommended Crown cemetery operators make a rent equivalent payment to the NSW Government for all new interment rights sold each year in existing Crown cemeteries.

This recommendation was to achieve competitive neutrality between existing Crown cemeteries which had been gifted land, and newly acquired Crown cemeteries and other cemetery operators which had to pay land costs. It would help make the prices paid by consumers across different cemeteries more equitable.

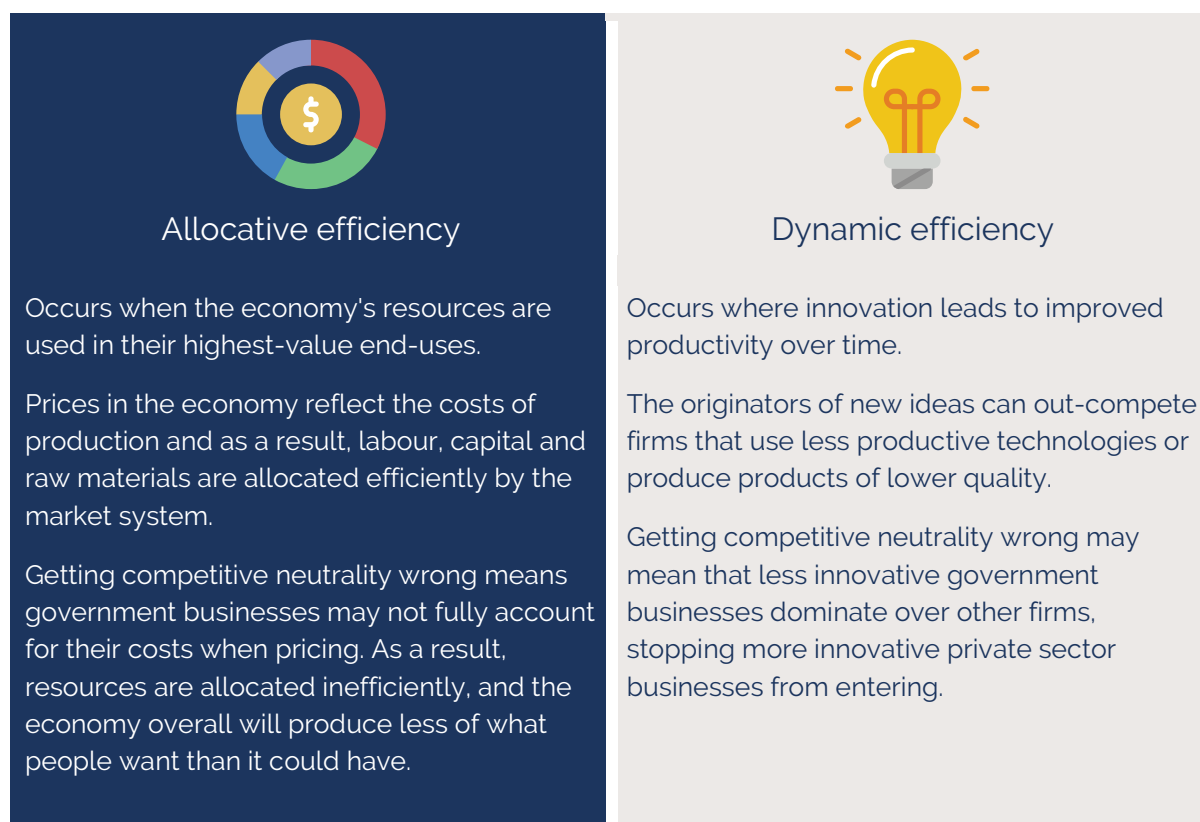
Source: IPART, *Review of the Costs and Pricing of Interment in NSW - Final Report*, November 2020, p 89.

Getting competitive neutrality right will benefit the people of NSW

Effective competitive neutrality policies are important because they create opportunities for lower prices, better quality and greater choice for customers, by supporting competition, innovation, quality and efficiency.

The stated objectives of competitive neutrality policies are expressed differently in the Competition Principles Agreement and the various NSW policy statements and guidelines, but the elimination of resource allocation distortions (allocative efficiency) is commonly cited.⁴ Effective competitive neutrality policies should also help enable a dynamic economy that meets the challenges of the future, including by allowing emerging and innovative businesses to enter markets. Figure 2.1 explains the impact of competitive neutrality on allocative and dynamic efficiency.

Figure 2.1 Competitive neutrality and efficiency



Source: IPART

Competitive neutrality is not about promoting privatisation. It aims to ensure that government business activities that compete with the private sector ensure they do so in a way that is competitively neutral. This includes accounting for both benefits and disadvantages of government ownership.

Competitive neutrality is not aimed at ensuring that individual businesses are able to succeed. Competing businesses may differ in size, assets, skills, experience and culture. These characteristics define each competitor's unique competitive advantages and disadvantages and apply equally to government and private sector businesses.

The benefits of getting competitive neutrality right are economy wide. Currently competitive neutrality is limited to government business activities, but at its broadest, competitive neutrality could touch all government activities by asking whether they help or hinder dynamic, efficient businesses to flourish. In this way, competitive neutrality policies are important to achieving a prosperous economy in NSW that meets the demands of the future.

2.2 NSW's current competitive neutrality policies and processes

In 1995, the Australian Commonwealth, State and Territory Governments signed the Competition Policy Agreements, which are a set of intergovernmental agreements that form Australia's [National Competition Policy](#). The 3 initial agreements developed in 1995 are the [Competition Principles Agreement](#), the [Conduct Code Agreement](#) and the [Agreement to Implement the National Competition Policy and Related Reforms](#). In 2006 a fourth intergovernmental agreement was developed called the Competition and infrastructure reform agreement.⁵

Clause 3 of the Competition Principles Agreement sets out broad competitive neutrality principles and gives each government discretion on how to implement them (as long as their actions are consistent with it). This allows room for different interpretation and implementation of the national competitive neutrality principles and resulted in varying competitive neutrality regimes among the states and territories. [Appendix B](#) shows how different competitive neutrality regimes compare across Australia.

The NSW Government issued its Policy Statement on the Application of Competitive Neutrality in 1996 and updated it in 2002.⁶ It outlines NSW's competitive neutrality initiatives, general pricing guidelines,^c the complaints mechanism, and the competitive disadvantages that can arise from Government ownership. In June 1996, the NSW Government also issued a Policy Statement on the Application of National Competition Policy to Local Government.

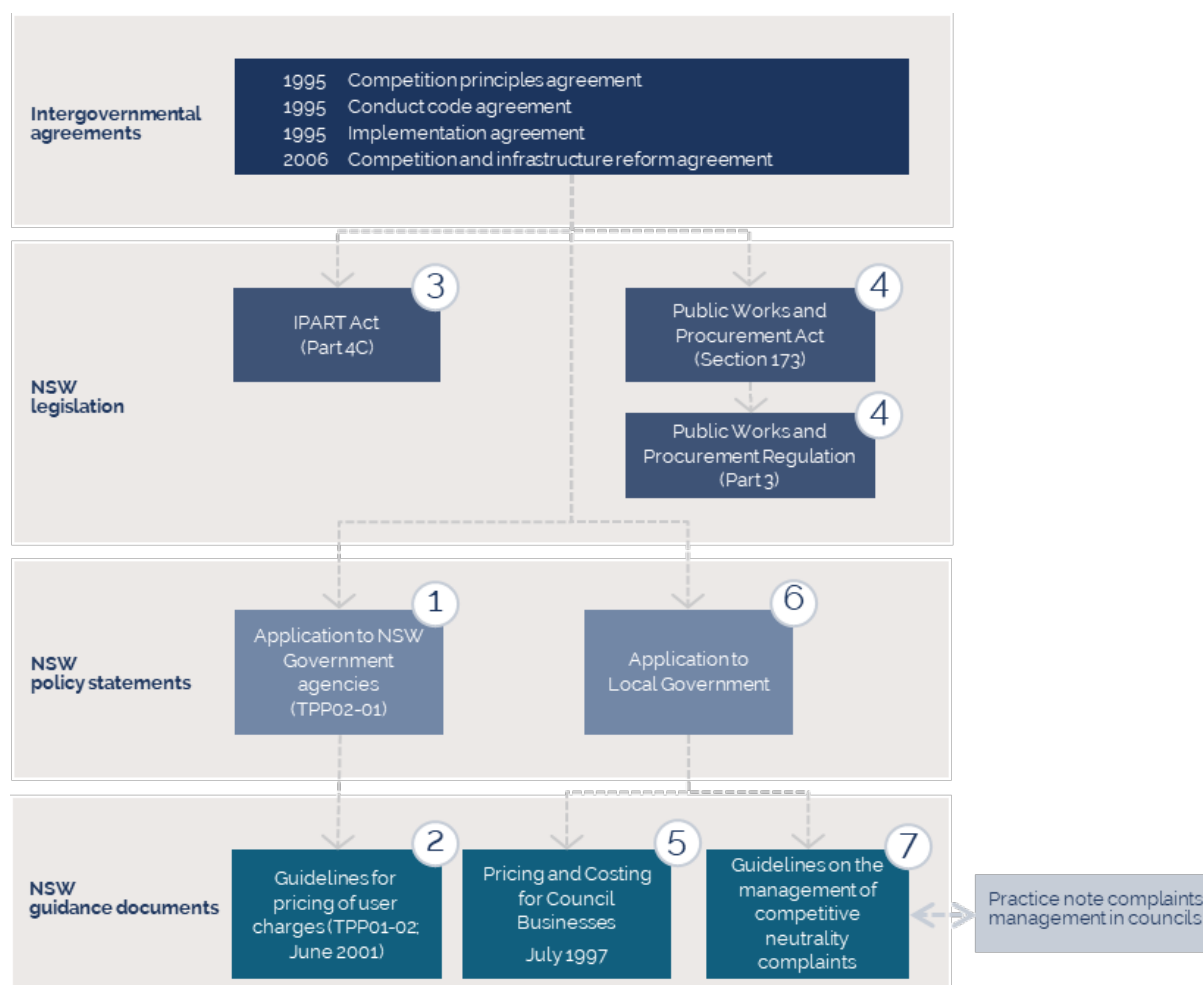
The set of policy documents that comprise the NSW competitive neutrality framework we are asked to review include:

1. [NSW Government Policy Statement on the Application of Competitive Neutrality](#) (TPP 02-1), January 2002.
2. [Guidelines for Pricing of User Charges](#) (TPP 01-02), 2001
3. [Part 4C of the Independent Pricing and Regulatory Tribunal Act 1992](#) (IPART Act)
4. [Section 173 of the Public Works and Procurement Act 1912](#) (Public Works and Procurement Act) and [Part 3 of the Public Works and Procurement Regulation 2019](#) (Public Works and Procurement Regulation)
5. [Pricing and Costing for Council Businesses – a Guide to Competitive Neutrality](#), July 1997
6. [Policy Statement on the Application of National Competition Policy to Local Government](#)
7. [Department of Local Government - Guidelines on the Management of Competitive Neutrality Complaints](#), 1997.

These documents are available on our website. See Figure 2.2 for a summary of the NSW the competitive neutrality framework of policy and processes. Chapters 3 and 4 of this paper explain the obligations these competitive neutrality policies impose and to which government business activities they apply.

^c It provides a summary of NSW Treasury's Guidelines for Pricing of User charges (TPP01-02), June 2001.

Figure 2.2 NSW competitive neutrality documents summary



Source: IPART

Other policies that relate to competitive neutrality or its implementation, include:

- TPP 07-3: Service Costing for General Government agencies - Provides an updated approach to determine competitively neutral costs; which reiterates the general principles in TPP01-2, but with reference to more specific and practical application of those principles.
- TPP 14-03: Government guarantee fee policy for Government Businesses - Requires Government business to pay interest rates equivalent to their private counterparts
- TPG 21-04: Tax Equivalent Regimes for Government Businesses - Requires Government businesses to pay tax payments equivalent to those required by private businesses.
- TPG 21-10: Capital Structure and Financial distributions policy for Government Businesses - Requires government businesses to provide a rate of return equivalent to a private business
- Procurement policy framework - Requires a NSW Government agency supplying services to another NSW Government agency to ensure its prices and terms are consistent with competitive neutrality principles
- Procurement Board Direction 2019-04 Approved Procurement Arrangements - An agency may only purchase from government businesses that comply with competitive neutrality.

2.3 Why we are doing this review

Competitive neutrality policy has applied to NSW's state and local government business activities since the late 1990s. While Australia's competitive neutrality policies are highly regarded worldwide,⁷ most of NSW's policies have not been reviewed in over 2 decades.

NSW's competitive neutrality policies were developed at a time when government business ownership was more common than it is now. Government ownership of businesses and involvement in the economy has since evolved.

Across Australia, many large government businesses have been sold or corporatised, making them subject to the same set of costs and taxes as private businesses. Local governments have also outsourced or divested a range of business activities. Many of the services that are still provided by the Commonwealth, State and local governments are also now provided by private and not-for-profit sectors alongside them.

Box 2.2 provides an example of how competitive neutrality was achieved during the sale of a Government business by ensuring a level playing field.

Box 2.2 Ensuring a level playing field during the sale of Telstra

In 1992, the Federal Government established Telstra Corporation Limited (Telstra), a telecommunications entity which it owned entirely.^d It placed a CSO on Telstra to ensure that all people in Australia had reasonable access to standard telephone services, among other things.

In 1997, the Government began privatising Telstra, which it did in stages until this was complete in 2007.

To continue meeting its social policy objectives, the Government wanted to ensure that Telstra would continue to deliver the CSO as a private business. It also had to ensure that Telstra could do so on a level playing field with other private businesses operating in the same market, in order to satisfy competitive neutrality principles.

Other private businesses would not have had this CSO or needed to pay the costs of meeting it. The Government therefore formalised Telstra's CSO under the *Telecommunications Act 1997* (Cth) and provided funding to Telstra to cover the costs of fulfilling it.^e

^d Competitive neutrality principles did not apply to Telstra at first, since the Competition Principles Agreement was not signed until 1995 and the Federal Government did not have a competitive neutrality policy until 1996.

The competitive neutrality framework in NSW is overdue for review

Given the significant changes in government economic activities since the NSW competitive neutrality policies were introduced, this review is an important step in ensuring the policies remain relevant and fit-for-purpose. The review also provides the opportunity to review stakeholder experience with applying competitive neutrality policies and to consider whether they reflect best practice.

Competitive neutrality policies cover a broad range of industries and businesses, and they are not always well understood by the businesses they apply to or impact. The 2015 Harper Review of Australian Competition Policy found that competitive neutrality remains a matter of concern for stakeholders. Submissions to the Harper Review cited many examples of private businesses with concerns around their government owned competitors using the advantages of government ownership to penetrate markets more deeply and set artificially low prices.⁹ The Harper Review recommended all Australian Governments review their competitive neutrality policies.

In 2020, the NSW Productivity Commission found that potential competitive neutrality complainants may be prevented from making a complaint because they don't know how to, or even because the process eats up too many business resources. The NSW Productivity Commission recommended that IPART update NSW's competitive neutrality policies and processes, including by improving the complaints process and addressing stakeholder concerns about how competitive neutrality policies apply.¹⁰

In response to these changes, the NSW Government has asked us to evaluate the scope and effectiveness of NSW competitive neutrality policies and processes in ensuring a level playing field between Government business activities and their non-Government competitors^e. This review will allow us to seek views of stakeholders about how competitive neutrality policies in NSW are working and can be improved.

^e Under a terms of reference available on our [website](#).

3 What obligations do competitive neutrality policies impose?

Following its commitment to implement competitive neutrality, the NSW Government undertook a program of corporatisation and developed a range of competitive neutrality policies and guidance for government businesses in NSW to follow.

NSW competitive neutrality policies and procedures require public trading enterprises, including state owned corporations, and public financial corporations to price goods and services in a competitively neutral way (see Box 3.1). These government businesses are subject to the NSW's Treasury's Commercial Policy Framework.

For other Government owned businesses, the competitive neutrality policies and procedures focus on helping them to understand and account for the full costs of doing business and ensuring that if they choose to price below the competitively neutral price, they do this intentionally.

NSW Treasury's *Guidelines for pricing of user charges* (TPP 01-02), 2001 (the NSW pricing guideline) applies to non-corporatised state government businesses. This document sets out what these businesses should do to estimate a competitively neutral price.^a The general approach adopted by NSW Treasury in these guidelines is that competitive neutrality will be achieved where prices at least cover avoidable costs and are consistent with the approach followed by private sector competitors.¹¹

A separate policy statement (*Policy Statement on the Application of National Competition Policy to Local Government*) and pricing guideline (*Pricing and Costing for Council Businesses – a Guide to Competitive Neutrality*, July 1997) specifically addresses the application of competitive neutrality policy to local government businesses in NSW. The focus of the local government framework is internal transparency. Local government businesses may price below competitively neutral costs to achieve policy aims, but they must account for the full costs of running the business and make an explicit decision in relation to any subsidy.

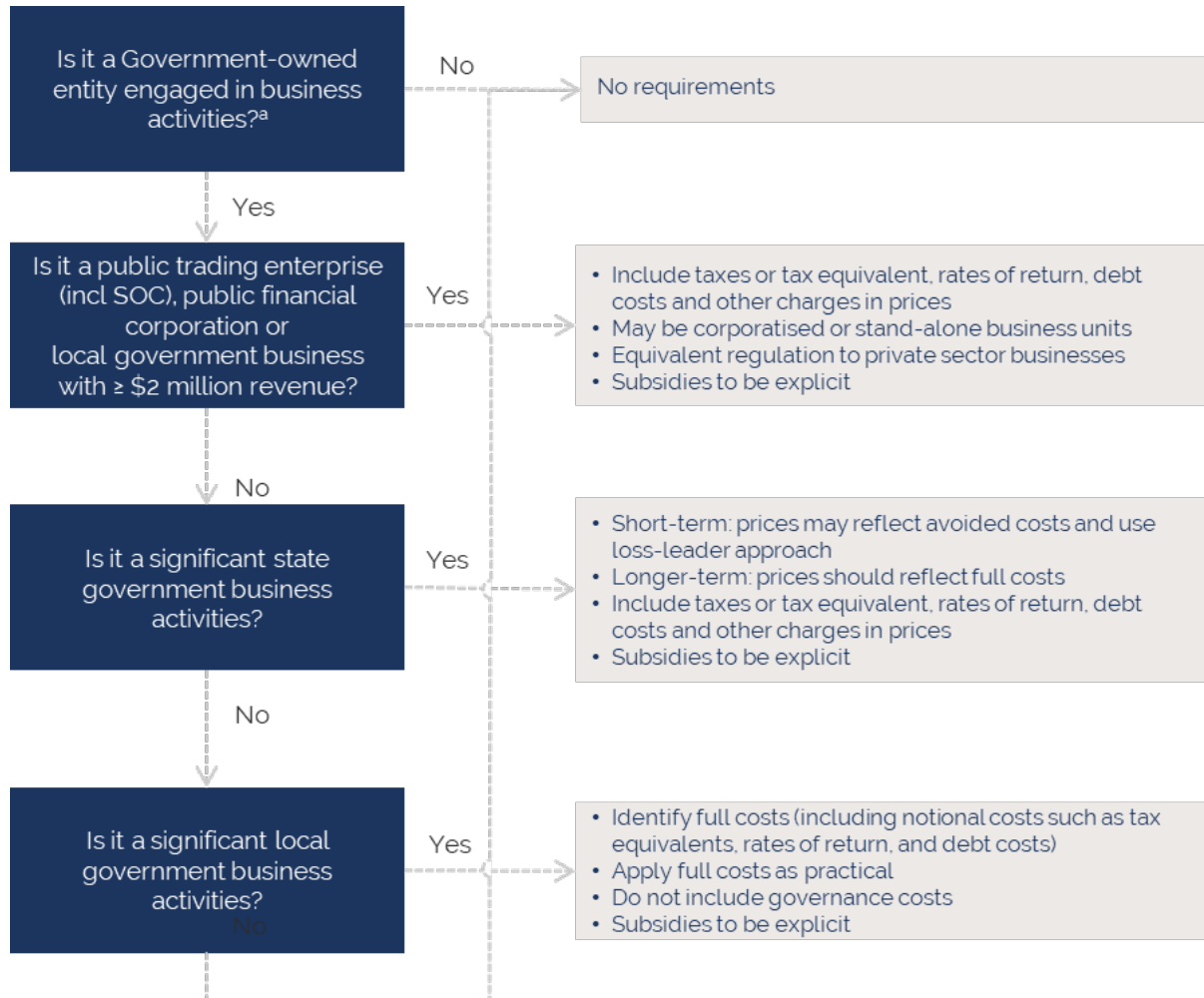
This chapter discusses the following aspects of the competitive neutrality policy statements and guidelines as they apply to state and local government businesses in NSW:

- how to estimate costs and allocate them between commercial and non-commercial parts of the business
- how to adjust for additional (notional) costs that would be faced by private sector businesses
- when and how to capture the disadvantages of government ownership
- specific obligations and guidance for local government businesses
- obligations around transparency and provision of information.

^a The guidelines do not apply to taxes, fines and regulatory fees, delivery of a good or service that is for a social program or purpose, businesses that demonstrate they're exempt from competitive neutrality principles, or local government businesses.

Figure 3.1 Competitive neutrality obligations at a glance

Government entity assesses how to apply competitive neutrality



a. See Chapter 4 for more information about whether a government owned business is in scope for competitive neutrality principles to apply.

Source: NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-2)*, June 2001; Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997; IPART.

The NSW pricing guideline notes that 'The degree of effort required to comply with these principles should take account of the significance of the activity relative to the size of the market.'¹² Where goods and services are significant, greater effort to follow the guidelines should be made. Where they are not, businesses may choose to instead price at a level similar to those of commercial providers in the market as a proxy for applying the guidelines in full.

Box 3.1 Competitive neutrality policy framework for corporatised entities

State owned corporations and public financial corporations in NSW are subject to a range of requirements that ensure their competitive neutrality obligations are met, including those set out below.

Clear performance targets for boards and management – these are used to assess performance and agreed between the government business and the NSW Government through either a Statement of Corporate Intent or a Statement of Financial Performance. These focus on capital structures, shareholder value added (which indicates whether a business is generating or eroding value) and dividends.

A financial performance monitoring regime - this process is designed to enhance accountability and set performance expectations. Government businesses report to NSW Treasury their business plans, operating budgets, cash flow statements, income and expenditure statements, balance sheets and management accounting data. They also report risk, on an exception basis.

Payments of taxes and tax equivalents – all commercial government businesses are required to make direct payments of Commonwealth and NSW State taxes or tax equivalents. Government businesses are subject to an income tax equivalent regime administered by the Australian Taxation Office. All government businesses pay the GST in the same manner as private enterprises.

Payment of debt guarantee fees - this makes up the difference between the interest paid by government businesses and what they would have paid based on their stand-alone credit rating. Government businesses with government guaranteed borrowings are required to pay a credit-rating-based fee to the NSW Government.

Regulations that mirror those applying to private businesses - many government businesses gain exemptions from certain NSW legislation and regulations as a result of their status as an entity of the Crown or statutory authority. NSW has introduced a range of legislation that has the effect of removing or reducing these differences.

Explicitly funded Social Programs - the Government may wish to use Government businesses to achieve certain social justice objectives. The Social Program Policy ensures transparent payments from the consolidated fund to NSW Government businesses to achieve certain social justice objectives and ensures social programs can be delivered without putting the commerciality of the businesses at risk.

Note: More information on Treasury's commercial policy framework is available from [Treasury's website](#).
Source: New South Wales Treasury, *Policy Statement on the Application of Competitive Neutrality* (TPP 02-01), January 2002., Chapter 2

3.1 Guidance on how to estimate costs

While it may seem straightforward for a government business to estimate its own cost of providing goods and services, there are different approaches they can use to do this. The NSW pricing guideline discusses the options, how to measure them and which is the most appropriate. The guidelines also discuss the need for costing systems to be developed where they are not already in place.

Cost estimation approaches range from incremental or avoidable cost to average or fully distributed cost, depending which costs are included:

- avoidable costs are those costs that would be avoided if the good or service was not produced (that is, they do not include a share of indirect costs, such as capital or overheads)
- fully distributed costs include both the direct costs of providing the good or service and a share of the indirect costs.

Which costing approach is appropriate depends on the circumstances of the government business. It may also change over time, as business activities become established.

The NSW pricing guideline states that in the short term, it is likely to be appropriate for pricing to be based on avoidable costs.¹³ Using avoidable costs as the basis for pricing has the following advantages:

- it ensures that the commercial activity imposes no cost on the non-commercial activities of the agency
- it encourages agencies to take opportunities to efficiently supply goods and services (e.g. by using their spare capacity)
- it provides the same flexibility private sector businesses have, to engage in loss leader activities^b
- it is similar to marginal cost pricing, which is an efficient (non-distortionary) pricing approach.

However, the NSW pricing guideline also states that over the longer term, Government businesses should endeavour to charge prices that cover the fully distributed costs of production (unless there are good public policy reasons for not doing so).

The NSW pricing guideline also discusses several types of government business and which costing approach is likely to be appropriate for each (Table 3.1). The NSW pricing guideline notes that the selection of which is the most appropriate is somewhat subjective and requires the government business to exercise judgement.

^b Engagement in such activities should be restricted to special market circumstances, and should not contravene the provisions of Part IV of the *Competition and Consumer Act 2010* (Cth) (formerly Part IV of the *Trade Practices Act 1974* (Cth)). (TPPO2-01, p 16).

Table 3.1 Suggested pricing approach for different types of Government businesses

Type of government business	Characteristics	Suggested pricing approach
Stand alone business unit (eg. public trading enterprise that is not subject to the Commercial Policy Framework)	Does not share assets or resources with other areas of an agency	<ul style="list-style-type: none"> Fully distributed costs over the medium term (allowing for some fluctuations across product lines). Flexibility in pricing individual product lines e.g. may initially price a product as a 'loss leader' in order to build up brand knowledge or market share. Avoidable cost and fully distributed cost for the business unit as a whole are the same.
Business unit of a general government sector agency	Production of a good or service requires the use of assets or other resources controlled by the non-commercial operations of the agency (such as, a shared computer system or corporate services).	<ul style="list-style-type: none"> Avoidable cost of the business unit as a whole (not individual product lines) sets a floor price. Fully distributed costs would be more appropriate where spare capacity of the non-commercial operations is being used, and there is the option to 'sell' that spare capacity.
Provision of a commercial good or service on an ad-hoc basis	Similar to a business unit but goods and services are not provided on an ongoing basis	<ul style="list-style-type: none"> Avoidable cost
Costing in-house bids under Service Competition Policy	Comparing the cost of providing services in-house with those of external service providers	<ul style="list-style-type: none"> Avoidable cost (cost usually sets the price rather than forming a floor to prices)

Source: NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-2)*, June 2001., pp15-18 and IPART

Box 3.2 Case study – costing approach for NSW's State Valuation Office

IPART considered the appropriateness of different costing approaches in its assessment of a complaint against the State Valuation Office (SVO).

IPART considered the matter of whether the State Valuation Office (SVO, a former commercial arm of the then Department of Commerce) should apply an avoidable cost or fully distributed cost approach when setting prices for its services. The Tribunal found that:

"Given the three to four year duration of mass valuation contracts, and the fact that these contracts are the SVO's major source of revenue, the Tribunal believes that the tender bids for these contracts should be priced to cover the fully distributed costs of providing the valuation services."

The Tribunal accepted the SVO's pricing methodology, which estimated full cost recovery service rates by applying a multiplicative factor to base salary rates. The multiplicative factor accounted for targeted efficiencies, recovery of business unit direct and indirect costs, a share of the Department of Commerce's costs, all relevant taxes, and an allowance for a profit margin.

Source: IPART *Investigation of Competitive Neutrality Complaints against the State Valuation Office*, 2004, p 7.

3.1.1 Cost allocation

Where government agencies undertake both commercial and non-commercial activities, there is considerable scope for error in applying the competitive neutrality obligations if a robust approach to cost allocation is not adopted. The determination of the appropriate cost allocation basis, both actual costs incurred by the agency and any notional costs, for goods or services subject to competitive neutrality is a critical issue.¹⁴

There are some examples in the NSW pricing guideline of how to cost activities, but overall the NSW's competitive neutrality policies provide limited guidance around how cost allocation should be made.¹⁵ There is also limited guidance around how to determine the scope of the commercial operation, although the pricing guidelines notes that it is not desirable for commercial operations to be defined and costed on the basis of individual product lines.

3.2 Adjustments to account for cost advantages

There are certain costs that a government business may not face due to government ownership that would be faced by private sector organisations providing similar goods or services. These costs represent the competitive advantages of government ownership. The NSW pricing guideline notes that these should be added to the costs actually incurred by the agency to determine a competitively neutral price.

These notional costs fall into two main categories:

- cost of capital (reflecting a return on the investment)
- taxes and other charges.

There may also be instances where government businesses are at a disadvantage due to government ownership. The pricing guidelines state that generally these disadvantages can, and should, be addressed administratively and should not require the notional adjustment of costs.¹⁶

Individual agencies are required to make their own assessments to determine any further categories of adjustments that may be specific to their own industry.

Competing businesses may differ in size, assets, skills, experience and culture. These are characteristics which define each competitor's unique competitive advantages and disadvantages. Competitive neutrality obligations do not require all firms or businesses to compete on an equal footing. Competitive neutrality policies do not require or encourage cost adjustments for any of these factors, which may apply equally to government or private sector companies.¹⁷

3.2.1 Return on investment (cost of capital or profit margin)

A private sector business must price its goods and services to provide a profit to its owners as well as ensuring it covers the cost of any debts. This compensates the owners of the business for the opportunity cost of investing in the business, which is equal to the return they could have earned from the next best available investment.

While government businesses may not have the same impetus to earn a profit, the government is incurring a similar opportunity cost when it undertakes commercial activities. The NSW pricing guideline requires government businesses to explicitly account for this by including the opportunity cost of capital. The opportunity cost of capital is a function of the value of the assets used by the agency to provide the goods and services and a required rate of return on those assets.

The NSW pricing guideline states that:

Generally it would be appropriate to apply a notional percentage charge to the actual fully attributed cost of the activity rather than go through the rigours of frequent weighted average cost of capital calculations. The notional charge would, however, need to be periodically reviewed, particularly where it is known that there has been a change in circumstances, such as a tax rate change.¹⁸

Where capital is a significant input in the operations of a business unit, the guidelines state that it

may be appropriate to calculate a required rate of return based on the weighted average cost of capital (WACC) in order to obtain a more accurate estimate. The WACC should be calculated in accordance with NSW Treasury's 'Guidelines for Financial Appraisal' (TPP 97-4).^{c 19}

The assessment of risk required for this calculation should be determined in conjunction with NSW Treasury, which will provide an indication of the Government's expectations.

Where capital is insignificant, a single standard rate may be used. The NSW pricing guideline suggests, but does not mandate, the use of the Commonwealth Bonds ten-year indicator rate, which is readily available.

The guideline also notes that the method used to determine the value of assets in the public sector may differ from the typical approach adopted in the private sector. Specifically, Treasury's policy is to value non-current assets at the written down replacement cost of a modern asset equivalent, which would tend to deliver a higher valuation than the typical private sector approach of using historical cost. The guidelines note that in these circumstances an adjustment may need to be made to ensure the government business is not placed at a competitive disadvantage.

^c This guideline is no longer current. It was superseded by Treasury guideline TPP 07-04.

Box 3.3 Case study – profit margin for NSW's State Valuation Office

IPART assessed the profit adjustment that should be included in its assessment of a complaint against the State Valuation Office (SVO).

The Tribunal considered assessing the SVO's rate of return by looking at its return on assets—that is, its profit (before interest) divided by its assets. However, it decided this approach was not appropriate in the circumstances because the SVO had a small asset base with a low and highly variable fixed asset value and no agreed rate of return target with Treasury. Instead, the Tribunal examined the SVO's rate of return by considering what a reasonable profit margin in excess of costs incurred would be.

The multiplicative factor in SVO's pricing model included a rate of return in the form of an allowance for 'capital maintenance' that covered future capital expenditure and a return on assets. When taking market considerations into account, the Tribunal found that the SVO allowed profit margins that were comparable with industry benchmarks in determining its prices.

The Tribunal considered the SVO's medium term profit relative to total revenue by examining the SVO's revenue and expenditure statements for four financial years. Although its operating profit was negative in some of these years, the average over the four years was positive, and comparable with that of the SVO's commonwealth equivalent, the Australian Valuation Office.

Source: IPART *Investigation of Competitive Neutrality Complaints against the State Valuation Office*, 2004, p 7.

Timing issues around cost of capital

The NSW pricing guideline notes that private sector firms exercise flexibility over the rate of return for individual product lines and, as a result, do not require government businesses to price in the required rate of return in the short term. It notes that a private sector business would require the rate of return to be at the target rate over the medium term. The NSW pricing guideline notes that 'a stand alone business unit will be deemed to be pricing in a competitively neutral way if the business unit as a whole is earning a commercial rate of return over the medium term (i.e. around five years)'.²⁰

This allows for fluctuations in market conditions for goods and services. It also provides explicit endorsement of pricing a product as a "loss leader" in the early stages of its provision in order to grow demand to reach an efficient scale, build up brand knowledge or establish market share.

There may be circumstances when there is a benefit to government service offerings being introduced on a "loss leader" basis in order to support products that impart social benefits (in effect, rationalising the costs by factoring the social benefits of supplying such goods and services) or to allow the business time to reach an efficient scale of operating.

Box 3.4 Case study – rate of return analysis for PETNET

PETNET Australia Pty Limited was a wholly owned subsidiary of the Commonwealth Government's Australian Nuclear Science and Technology Organisation (ANSTO). It manufactured a type of nuclear medicine imaging called positron emission tomography (PET) radiopharmaceuticals, also known as PET imaging or PET scan (used to diagnose and detect the severity of or treat a variety of diseases).

A competitor claimed that PETNET was not pricing to cover its costs and was not generating commercially acceptable profits. The competitor alleged that this enabled PETNET to secure a competitive tender with NSW hospitals. The Australian Government Competitive Neutrality Complaints Office (CNCO) investigated the complaint.

To comply with Commonwealth competitive neutrality provisions, government businesses need to set appropriate targets for their return on assets and demonstrate that they can meet them. The targets should exceed the long-term government bond rate (4% at the time of the investigation) and include a margin for risk (3% for low risk, 5% for medium risk, and 7% for high risk, at the time of the investigation). Rate of return in the short term is likely to vary due to a wide range of economic and industry-specific factors so the commercial rate needs to be earned over the long-term.

ANSTO claimed that over the long term, the target rate of return for PETNET was between 18%-25%, which was aligned with expected returns within the radiopharmaceutical industry. ANSTO argued that PETNET's commercial rate of return was below the 13.5% return initially expected due to errors and omissions made in the original business case.

The competitor argued that PETNET would need to gain a monopoly position within NSW (claiming 190% of the available market) to achieve a positive longer-term return.

The CNCO considered the investment of \$17.228 million in PETNET and its expected net cash flow for each year from 2011-2021 and found that it would only be able to make a rate of return of around 5.3% over 10 years. The CNCO found PETNET's likely inability to achieve a commercial rate of return on the equity invested in it was an "ex ante" breach of competitive neutrality obligations.

Source: [Australian Government Competitive Neutrality Complaints Office, PETNET Australia, Investigation No 15, 2012](#)

Note: This case study is drawn from a different Australian jurisdiction, which is not subject to the policies and processes in NSW. A different decision might have been made if examined under the NSW competitive neutrality framework

3.2.2 Taxes and other charges

The NSW pricing guideline requires government businesses to factor in taxes that may not be paid by them but would be paid by the private sector competitor. The guideline lists a set of taxes that government agencies often do not pay and that should be factored into prices. These include land tax, some state taxes and local council rates.

The NSW pricing guideline states that agencies should "examine their own particular circumstances to determine the particular taxes from which they are exempt but which may be borne by their potential private and other public sector competitors".²¹ However, it also notes that the combined notional cost of the taxes and charges may form a very small portion of the total costs (in many cases less than 1%) and be immaterial relative to other cost assumptions. If it can be demonstrated that these costs are immaterial then agencies can leave out these costs.²²

3.2.3 Offsets to account for the disadvantages of Government ownership

The Competition Principles Agreement states that government businesses 'should not enjoy any net competitive advantage simply as a result of their public sector ownership'.²³ This concept of 'net competitive advantage' implicitly recognises that as well as there being advantages from government ownership, government businesses may also face particular competitive disadvantages. The potential disadvantages of government ownership are acknowledged in NSW competitive neutrality policies.²⁴

The Hilmer Report canvassed a range of examples of competitive disadvantages that can arise from a Government business' public sector ownership including:

- restricted investment powers
- restrictions on diversifying into non-core business areas
- borrowing plans conflicting with Government Budget strategies
- restrictions on borrowing locally and overseas
- restrictions on importing capital or inputs (e.g. buying Australian only, reduced managerial autonomy)
- restrictions on export activities
- stricter employment and industrial relations obligations
- restrictions on withdrawing from particular services.

NSW Government policy is that only material competitive disadvantages should be considered when pricing goods and services.²⁵ Government businesses should not focus on estimating every cost disadvantage incurred for the purpose of deducting such costs from their cost base and prices. The preferred option for addressing the disadvantages is to make administrative changes to those practices and policies that create the disadvantage. Only where such policies cannot be revised, should agencies consider reflecting any related cost disadvantage in their cost base and prices.²⁶ The NSW pricing guideline suggests that agencies should review their own operations to determine if there are any competitive disadvantages of Government ownership and if so how these should be accommodated.²⁷

Box 3.5 Case study - competitive disadvantage for corrective services industries NSW

Corrective Services Industries, the commercial arm of Corrective Services NSW, is a government business that provides employment and training for prison inmates across NSW. It employs more than 5,500 inmates, has a turnover of around \$140 million and provides a large range of goods and services in competition with the private sector.

In 1993, Corrective Services Industries commissioned studies to assist it to determine prices for the goods and services it produced. The studies found that although Corrective Services Industries is not required to pay minimum wages for inmate labour, and, in fact, pays inmates significantly less than this for their work, this did not provide a net competitive advantage once the disadvantages associated with its operations are incorporated.

The studies concluded that 'The low inmate labour rate is largely offset by low inmate productivity (relative to the regular workforce within community facilities) and by high overhead costs (particularly those associated with the attainment of social objectives).'

Source: [Corrective Services Industries website](#) and [Corrective Services Industries, CSI and competitive neutrality, 1993](#)

Community Service Obligations and government subsidies

A government business may need to maintain services at an inefficient cost due to public interest considerations. The Competition Principles Agreement requires social welfare and equity considerations, including community service obligations (CSOs), to be taken into account when applying the public interest test.²⁸ Chapter 4 provides further information on the public interest test.

Within the competitive neutrality framework, there is scope for price subsidies to occur via community service obligations (CSOs).

CSOs are non-commercial activities that the NSW Government has asked a government business to undertake, which address a policy objective. These activities do not achieve a commercial return and would not be undertaken by comparable private sector businesses.²⁹ A CSO may involve providing the community or a targeted section of the community with social benefits at an affordable price or without charge and to an agreed standard of quality. Examples of CSOs include a requirement to provide a universal service at a fixed price, or to provide certain discounts to particular customers, such as pensioners.

There are policies in place to ensure that CSOs are clear and explicit. The NSW Treasury has a Guideline for Community Service Obligations (TPP19-02) that sets out three principles to be applied to the commissioning of CSOs by the responsible government department:

- A CSO should have a clearly defined objective and establish that the activity is not contestable – i.e., it should set out its case for why a private sector or NGO is not better placed to achieve his objective, and how a CSO is best placed to achieved the policy objective.
- A CSO should be funded by the government department responsible for the objective – through the department's budget with sufficient funds allocated to the business to cover the costs.
- A CSO should be formalised through a service level agreement – outlining the activity funding, KPIs, agreement period etc.

The CSO should undergo the same periodic reporting, monitoring and review requirements for any other government expenditure.

3.3 Guidance for local government businesses

The NSW Government's Policy statement on the application of National Competition Policy to Local Government (June 1996) (the local government policy statement) states that:³⁰

In pursuing the application of the [Competition Principles] Agreement, the Government does not believe that a prescriptive approach will achieve reform with the spirit of co-operation necessary to benefit both consumers and business. Further, the Government supports the objects of the *Local Government (NSW) Act 1993*, which devolves to local councils significant responsibility for the conduct of their own affairs. The Government is confident that NSW councils are fully able to appreciate the significant efficiency gains and reduction in service costs that can flow from the adoption of competition reforms, and will be able to responsibly apply the Agreement for the benefit of their constituents and clients.

The Government has separately established a pricing guideline that applies to local government businesses (the local government pricing guideline) and sets out how local governments are required to implement competitive neutrality principles.

The local government pricing guideline explicitly requires Councils to:³¹

- establish a complaints handling mechanism for competitive neutrality issues
- have separate internal reporting for significant business activities (see chapter 4)
 - the business must be able to be separately identified within the operations of the council and must have a separate internal accounting and reporting framework
 - apply full cost attribution including tax equivalent payments, debt guarantee fees and return on capital
- for other business activities, adopt full cost attribution where possible but can use 'rule of thumb' margin
- make subsidies to all business activities an explicit transaction
- make tax equivalent payments from the business to the business owner (that is, the council)³².

The local government pricing guideline notes the importance of:

- implementing costing systems to separately identify the costs of different activities

- including internal transactions (such as the payment of rates to the owning council)
- strategic and business planning for local council's businesses.

3.3.1 Separating businesses from other Council activities

Clause 3(4) of the Competition Principles Agreement requires a local council's significant business activities to be subject to the same corporatisation principles as those applied to significant state government business activities. The local government policy statement describes these as:³³

- adopt a corporatisation model for the business activities
- include debt guarantee fees, where the business benefits from the council's borrowing position by comparison with commercial rates
- factor into prices an appropriate return on capital invested
- make any subsidies provided to customers, and the funding of those subsidies, explicit
- operate within the same regulatory framework as other businesses
- include in their costs the same federal, state and local government taxes and charges as do private businesses.

The local government policy statement states that:

Corporatisation does not necessarily mean that the business activity must be formally or legally incorporated as a separate organisation. However, the business must be capable of being separately identified within the operations of council and have its accounting and other operations structured in such a way as to provide a distinct reporting framework for its operations to council.³⁴

3.3.2 Approach to estimating costs for council businesses

Councils are required to apply full cost attribution to significant business activities and are expected to do so for other businesses where practicable. For significant business activities, the local government pricing guideline requires the council to determine the full cost of carrying out the activity including all the elements required of state government businesses and to calculate a price for each good or service based on full cost recovery. The council may then decide to subsidise the actual price charged once this calculation has been made.³⁵

The basis of cost allocation for indirect or shared costs is at the discretion of council but must be clearly stated, consistent with accepted accounting standards and commercial practice.³⁶ Costs arising from governance functions should not be allocated to council businesses.³⁷

When comparing in-house and external tenders or bids, in-house bids should include all direct and indirect costs of the service, tax equivalent calculations, debt guarantee fees and rates of return on capital.³⁸ The guidelines also list a number of other considerations relevant to the cost of tendering services externally.³⁹

3.3.3 Calculating the rate of return for council businesses

For significant business activities, councils should aim for a rate of return comparable to the private sector. Several factors are noted as important in setting a rate of return.⁴⁰ Those factors focus on the need to view the rate of return as a measure of profitability that is viewed in conjunction with efficiency savings to be made by council businesses.

The guideline states that council businesses should achieve a long term rate of return in line with the risk profile of their business, just as their private competitors must do.⁴¹ Any exemption from this should be based on a cost-benefit analysis. However, the guideline also notes that councils should not raise prices merely to gain a rate of return as this would be seen by consumers as revenue raising. It states that rates of return must be linked to increased efficiency measures which may generate the return.

The guideline states that there is an expectation that local council owned businesses provide a dividend to their owner Councils. If councils are using ratepayers' monies to fund business activities, then ratepayers should expect to receive a rate of return on the investment of these funds. The guideline states that:

Investors would normally expect to earn a rate of return which is commensurate with the level of risk – the higher the risk, the greater the return. In a market situation the return on invested capital should be equal to or better than a return on a Commonwealth 10 year bond. This represents the minimum return investors would expect. A higher return would be expected on more risky investments.⁴²

The notional payment of dividends from a council business to its owner council must not reflect an arbitrary increase in prices to achieve a return. The local government pricing guideline states that the disclosure of notional dividends and rates of return would be part of a council's reporting and performance monitoring process.

3.3.4 Explicit subsidies for council owned businesses

While there is a general expectation that a council business would at least want to recover its avoidable costs, the local government pricing guideline acknowledges that there are some businesses where a council may not want to pass on the full charges to consumers and will set a rate lower than full cost recovery. Councils may subsidise their businesses for any purpose, but the value of those subsidies must be fully disclosed (internally) as an explicit transaction.⁴³ The guidelines require councils to identify subsidies for both significant and non-significant businesses. Non-business activities do not have to disclose subsidies.

The guideline notes that subsidies may fall into one of the following categories:

- CSO subsidies – for example, pensioner rebates, subsidised childcare places for low income families, discounted charges for charity or non-profit users of a council's business assets
- other subsidies – including a wide range of costs borne by council instead of the business activity, such as 'free' use of equipment or central services.⁴⁴

The value of these subsidies must be identified for each council business and the decision to subsidise made explicitly.

The local government pricing guideline is clear that councils need not set a price which seeks to recover the fully distributed cost, stating that "Council has full discretion to subsidise prices, in consultation with the community through the management planning process".⁴⁵

In some cases, councils provide services that they consider to be essential or fundamental for their community because the market conditions are such that these are not able to be delivered on a commercial basis. Aged care services and childcare services in rural areas are examples. The 'thin' markets in these areas mean that councils end up as providers of last resort even where they would prefer not to be involved. Councils are unable to charge competitively neutral prices as this would mean the service is unaffordable for residents. Like state government CSOs, the competitive neutrality framework can help identify the cost of providing these services and quantify the subsidy. Where subsidies are made explicit, this could enable a broader conversation between the different levels of Government as to who should be funding the subsidy.

3.3.5 Special provisions for specific council businesses

The local government pricing guidelines discuss a number of principles that are relevant to particular council owned water and sewerage businesses. For example, they refer to historical IPART work on rates of return for water and sewerage services.

The local government pricing guidelines also acknowledge that councils must apply competitive neutrality principles consistent with their obligations under the *Local Government Act 1993* (Local Government Act). This includes provisions of the Local Government Act that restrict the use of money received for certain purposes from being used for other purposes (e.g. money received from levying special rates or charges, grants or domestic water management charges).⁴⁶

3.3.6 General costing advice

A large part of the local government pricing guidelines provides general advice on costing, which is not specifically related to competitive neutrality policies but provides a necessary framework from which to begin a fully distributed costing of business activities.

3.4 Obligations around transparency of information

Comparisons of prices between privately and publicly supplied goods and services are not a good indication of whether competitive neutrality principles have been followed. There are many reasons why prices may diverge from costs, either temporarily or permanently. Some of these reasons may indicate a breach of competitive neutrality policy.^d However, some other reasons would not necessarily indicate a breach.^e

^d Such as non-payment of taxes by a government organisation, free insurance, operating on a non-profit basis, failing to earn a market rate of return on assets.

^e Such as scale economies, different business models, economies of scope through joint production of several different outputs, reduced profit expectations during the start-up phase of a new business.

This means that it is difficult for competing businesses to determine whether a government business has followed the guidelines in pricing its services. Obligations requiring the publication or provision of information in response to a complaint are therefore an important component of competitive neutrality policy.

The NSW pricing guidelines note that:

Pricing of contestable goods and services should be transparent and cost reflective...

Therefore, agencies competing in markets need to document the basis of their costing and pricing, and be prepared to respond to issues raised by complainants and to provide information to the relevant complaints review body if requested to do so.⁴⁷

Where the agency has determined that the benefits to be realised from the implementation of competitive neutrality pricing are outweighed by the costs (in other words, that it does not need to follow the guidelines for pricing of user charges) it must be able to provide information to support this decision.

The local government pricing guidelines go further, stating that the council should carry out independent, rigorous and public assessment in determining whether the application of a competitive neutrality principle will be detrimental to a business.⁴⁸

The local government pricing guidelines state that councils are required to include in their annual reports:

- a list of all business activities
- a statement of expenses incurred, revenue raised, assets acquired and assets held for significant businesses
- a statement that each of the pricing requirements (tax equivalent regime payments, rates of return and debt guarantee fees) have or have not been applied to each business
- comparison of actual performance during the year with the projected performance of category 1 businesses, including an explanation of any difference.⁴⁹

Their annual reports are also required to include a summary of complaints received regarding competitive neutrality and the results of those complaints.⁵⁰ The reporting requirements were phased in with full reporting required from 1998-1999.

We note that the above reporting requirements no longer align with requirements for councils' annual reports as currently set out in the Local Government Act, Integrated Reporting and Reporting Guidelines, and Local Government Code of Accounting Practice and Financial Reporting.

3.5 Non-cost advantages

The NSW policies and processes currently focus on cost (or price) related advantages (and disadvantages of government business activities). These may be more obvious and easier to quantify but they may not be the only considerations when attempting to design policy that levels the playing field between equivalent government and non-government businesses. Non-cost advantages may include:

Regulatory / rule making advantages – government agencies (including local governments) have the responsibility for / power to make and enforce rules. Some of these rules may be relevant to the operation of businesses under its jurisdiction. In some cases, government agencies may be exempt from regulation. Examples may include the planning approvals or rezoning areas within a local government area which may allow, prevent or restrict the operation of a business within the area or the power to allow or deny signage within an area.

Government powers – government agencies may have powers that are not available to the private sector e.g. compulsory acquisition powers to help speed up or facilitate large transport projects or other developments. When used, these powers may improve the efficiency or certainty of a government business activity.

Different regulatory frameworks or operating rules – government and non-government business activities may operate under different regulatory frameworks which may result in government businesses being able to complete processes faster, or with greater certainty.

Government access to information, customers or systems – Government agencies hold significant and varied information such as spatial, customer, citizen and asset databases because they also provide non-commercial services to citizens and customers. Shared systems between the commercial and non-commercial activities may provide easier access to information or datasets. The delivery of non-commercial services may also provide access to customers.

These advantages may not be exclusive to government businesses and may not in themselves be a breach of competitive neutrality. Careful case-by case consideration of the difference between government and non-government business activities with respect to these considerations will assist in determining whether non-price advantages add to the net competitive advantage of operating a government business.

In some cases, non-price advantages can be quantified in dollar or other terms (for example access to information which may be available to the non-government sector for a fee and / or within a processing time). In other cases, competitive neutrality principles (such as commercialisation or corporatisation may restrict the ability to access the advantage). Bundling of commercial and non-commercial products and services should be avoided, to minimise non-price advantages. A case study from a Victorian Water Utility highlights some of the concerns around non-price advantages.

Box 3.6 Case study – Non-cost advantages and plumbing services

In 2005 the state-owned water utility, South East Water Limited (SEWL), formed an alliance with two private sector contractors to optimise the delivery of its maintenance and capital works and manage the South East Water Priority Plumbing service (SEWPP) for emergency and general water and sewerage systems. An owner of a private plumbing business raised a complaint alleging that:

- SEWL defect notices promoted the use of SEWPP services over independent plumbers.
- SEWL cross-promoted SEWPP services through its website and uniforms worn by contracted employee
- SEWPP plumbing activities were exempted from processes that their competitors were required to follow, such as obtaining 'road opening permits' and a requirement to call 'dial-before-u-dig' to gain access to underground utilities asset maps.
- SEWPP had access to data and information collected by SEWL through its regulatory functions that SEWPP competitors could not access.
- SEWPP had access to Government-owned SEWL assets and expensive specialised equipment at no cost.

The complaint was investigated by the Victorian Competition and Efficiency Commission (VCEC). VCEC found that the plumbing activities of SEWPP were not exempt from processes that independent plumbing businesses are required to follow. It also found that there were no advantages with respect to information, data or assets available to SEWPP Plumbers.

However, the VCEC recommended that SEWL:

- review the formatting of its defect notices to enhance the neutrality of the information provided
- ensure that its call centre and website provided competitively neutral information to customers.

Note: This case study is drawn from a different Australian jurisdiction, which is not subject to the policies and processes in NSW. A different decision might have been made if examined under the NSW competitive neutrality framework
Source: Victorian Competition & Efficiency Commission, Competitive Neutrality Complaint Investigation, Final report, plumbing services provided by South East Water Limited, 21 December 2010 , available [online](#) at web archive of the VCEC website, last viewed on 25 June 2022

Seek Comment



1. What obligations should competitive neutrality policies place on government business activities?



2. What guidance do government agencies require to support them to correctly apply competitive neutrality principles to their activities?



Let's discuss your ideas

In this chapter we discussed the obligations and guidance material provided by the current competitive neutrality policy for relevant government activities

The key components of the competitive neutrality policy:

- Corporatisation/commercialisation of government business activities
- Transparent pricing of goods and services reflecting the costs incurred by an equivalent private sector business
- Being explicit around subsidies made for policy reasons

We asked about the competitive neutrality obligations and guidance that should be established for government businesses.

We want our different stakeholders to provide their perspectives

When preparing your submission here are some things to think about:

All stakeholders:

What are the most important elements to be included in a new policy or guidance?

What costs approaches do you think are appropriate for government businesses?

- A fully distributed approach or only avoidable costs?
- What rates of return should government businesses achieve?
- Many private businesses will apply a loss leader on a single product or for a short period of time. When is this appropriate for a government business?

Non-government business:

- Do you compete with a government business activity that doesn't apply competitively neutral pricing?
- Describe the impact this has on your business.
- What transparency should be provided around pricing?

State or Local businesses

- What challenges do you face when applying the guideline or estimating cost?
- Why do government businesses require discretion to charge below the competitively neutral price?
- How could the policies and guidance better support more government businesses to price in a competitively neutral way?

4 Which Government activities do competitive neutrality policies apply to?

Competitive neutrality principles apply to significant state and local government owned businesses where it is in the public interest to apply them. This means that there are effectively three tests for whether competitive neutrality principles apply:

- is it a Government business activity?
- is it a significant business activity?
- would the application of competitive neutrality principles be in the public interest (i.e. would the benefits outweigh the costs)?

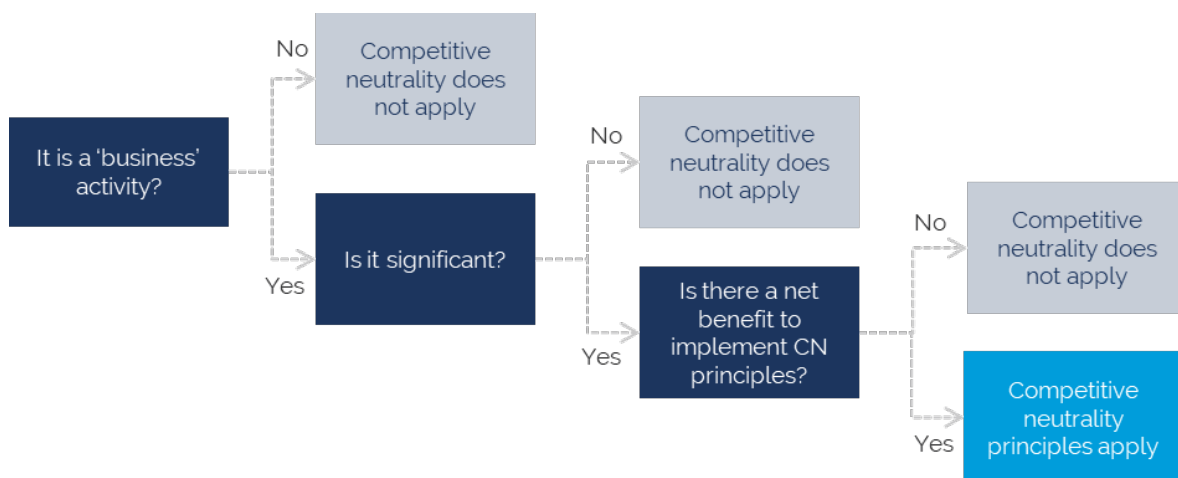
The Competition Principles Agreement provides for each jurisdiction to determine its own approach to implementation. The NSW Government discusses its approach to these tests in various policy documents, which make a distinction between state government businesses and local government businesses. There is some overlap between the way the tests are specified for state and local government businesses but there are also notable differences between the approaches.

The way the tests are specified and applied are important determinants of the scope of the competitive neutrality framework. Changes to the tests will invariably result in changes to the organisations that are subject to competitive neutrality obligations.

This chapter sets out current NSW policy for applying these tests and considers the appropriateness of the current approach. It also discusses the different ways these tests are specified and applied in other Australian jurisdictions and some of the advantages and disadvantages of these.

Figure 4.1 Competitive neutrality applicability at a glance

Government entity to assess whether competitive neutrality principles apply to any of its business activities



Note: see chapter 3 for the obligations that apply under competitive neutrality principles
 Source: IPART, NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002; New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996.

The competitive neutrality principles that apply to in-scope government business activities are outlined in Chapter 3. Consideration of whether the scope of competitive neutrality policy should be extended to cover a wider set of government activities is considered in chapter 7.⁵¹

Box 4.1 Public Trading Enterprises, State Owned Corporations and General Government Businesses

State Owned Corporations (SOCs) – are public trading enterprises that have been corporatised. Corporatisation creates an arms-length relationship with Government to ensure that boards and management operate within incentive structures that mirror, to the extent possible, those faced by the private sector.

There are 8 SOCS in NSW:

- Essential Energy
- Forestry Corporation of NSW
- Hunter Water Corporation,
- Landcom
- Port Authority of NSW
- Sydney Water Corporation
- Transport Asset Holding Entity of NSW
- WaterNSW.

Public financial corporations - are government-owned entities which provide financial services including insurance, lending and investment management.

NSW also has 2 public financial corporations- icare and TCorp. For these, the NSW Treasury plays a similar role in monitoring and managing performance as for the SOCs.

Public trading enterprises – are self-contained organisational units within the public sector that are principally engaged in trading activities that could, in principle, be provided through the marketplace without compromising the Government's social and economic objectives. Public trading enterprises raise the majority of their income from user charges. SOCs are a type of public trading enterprise.

General Government Businesses – are funded directly or indirectly (via consolidated fund) by taxes or fees or fines, through being dependent on other agencies which are directly or indirectly funded by taxes or fees or fines, or through having regulatory functions which enable them to raise taxes, fees or fines.

Source: *State Owned Corporations Act 1989*, Schedule 5. Treasury NSW, '[State Owned Corporations](#)', and '[Public Financial Corporations](#)' accessed 7 June 2022.

4.1 What is a government business activity?

Competitive neutrality principles “only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.”⁵²



Government businesses are “those parts of the public sector that are principally engaged in trading activities, including the provision of goods and services to other parts of the public sector.”⁵³

The NSW policy defines government businesses generally as organisational units which:

- have some form of public sector ownership
- are engaged in trading goods and/or services
- have a large measure of self-sufficiency and
- are subject to Executive control.⁵⁴

The extent of government control will influence whether or not the activity is part of government for the purpose of the policy. The NSW policy recognises circumstances in which a public sector business is not subject to effective control by the executive Government (e.g. universities).⁵⁵ Other examples may occur where the government holds a minority share (see Chapter 7 for a discussion of the application of competitive neutrality principles to some of these activities).

The NSW policy uses the term government business to “describe those parts of the public sector that are principally engaged in trading activities, including the provision of goods and services to other parts of the public sector.”⁵⁶ It sets out three main types of government business – public trading enterprises, State-owned corporations, and general government business. Another type of government business is public financial corporations. Each of these is described in Box 4.1.

The local government policy specifies that the provision and operation of water supply, sewerage, gas production and reticulation and abattoirs are business activities, based on the Government Statistician’s classification of these as trading enterprises.^a Other activities are determined by the circumstances.⁵⁷ Generally, a business activity will involve the supply of goods and services for a fee or charge. However, not all activities involving the supply of goods and services would necessarily be classified as business activities.⁵⁸



Local government businesses include:

- water supply, sewerage
- gas production and reticulation
- abattoirs
- and others based on circumstance, determined by council.

^a The Australian Bureau of Statistics (ABS) publishes the concepts and classifications used in Australian government financial statistics.

The local government pricing guidelines provide discretion for local councils to make their own determination as to which of their activities are classed as businesses (other than those classified by the ABS).⁵⁹ The local government policy and pricing guidelines list a range of relevant factors for consideration including whether the activity is intended to make a profit, whether council bids for external contracts or is likely to be subject to competition from other providers, whether it charges a fee for service, the economic impact, nature of the activity and how important it is for customers.⁶⁰

Although the determination of what constitutes a business may seem relatively straightforward, it may not be. There are likely to be many examples of government agencies and local councils that provide some services that would be considered business activities alongside their main (non-commercial) functions.

Examples include, public sector agencies responsible for delivering public transport that also sell transport related tourist merchandise for profit (such as Transport for London's Mind the Gap range) or local councils renting out camping sites on unused showgrounds.

In some cases, these may be distinct organisational units that meet the definition of a government business while in other cases they may not.

Questions regarding what defines an activity as a business activity also arise in other circumstances, for example, where a government entity is providing a service very cheaply or even free of charge. The fact that the government business is not aiming to make a profit, or is not charging for the good or service at all, is unlikely to be conclusive. Similarly, the non-existence of competitors is not as relevant as the scope for potential competition because the government business' pricing decisions may be keeping potential competitors out of the market.

The issue can be complex to work through, particularly if there is no clear distinction between the commercial and non-commercial operations of an entity (see Box 4.2 for a case study of how the test of intent has been applied in South Australia).

Box 4.2 Case study – bundling of business and non-business activities in South Australia

Two councils in South Australia jointly owned a corporatised entity – the Fleurieu Regional Aquatic Centre Authority (FRACA). FRACA's sole purpose was to run a regional aquatic centre with 3 swimming pools, a gym/fitness centre and a shop.

A competitive neutrality complaint was made against FRACA for bundling gym services with recreational pool access, which the complainant claimed was at non-commercial terms. The bundled membership packages were priced lower than what private sector gym operators could offer for gym-only memberships.

FRACA responded to the complaint by stating it had determined that "it is not of net public benefit to apply cost-reflective prices for Fleurieu Aquatic Centre at this point in time." Additionally, it argued that recreational pool access was a core community service obligation (CSO) activity and was not provided for a commercial objective, therefore it should not be subjected to competitive neutrality principles.

The complaint was brought to the Essential Services Commission of South Australia (ESCOSA), which found it was arguable FRACA had infringed the competitive neutrality principles.

ESCOSA did not challenge FRACA's ability to subsidise the costs of its pool services as a CSO activity and considered that if an activity is undertaken by government owned businesses for the sole purposes of a CSO then competitive neutrality principles do not apply to it.

However, in this case there were other issues which ESCOSA considered relevant. Specifically, if FRACA's pool services were (even partially) used to compete with private sector operators it should not be treated as a CSO.

FRACA had bundled a CSO activity (recreational pool access) with a significant business activity (gym services) for commercial reasons. Additionally, the price for bundled membership was below a reasonable private sector-equivalent price.

Source: South Australia Competition Commissioner, *Competitive Neutrality complaint against Fleurieu Regional Aquatic Centre Authority as the owner and operator of the Fleurieu Regional Aquatic Centre*, February 2020.

Note: This case study is drawn from a different Australian jurisdiction, which is not subject to the policies and processes in NSW. A different decision might have been made if examined under the NSW competitive neutrality framework

4.2 What makes a business activity 'significant'?

Competitive neutrality principles are applied to significant business activities, including where they are part of a broader range of functions.⁶¹ The significance test was intended to strike a balance between promoting competition and not overburdening smaller government bodies with regulatory obligations which were costly and time consuming to implement. However, there is a need to ensure that the right business activities are captured.

The Harper Review of competition policy found that across Australia, stakeholders were concerned about competitive neutrality policies, particularly where businesses compete with local government. It found there were potential obstacles to small businesses competing in a range of markets as a result of government activities even where the government business activities may not be considered 'significant' according to the relevant guidelines.⁶²

Figure 4.2 Assessing significance



Source: New South Wales Government, NSW Government Policy Statement on the Application of National Competition Policy to Local Government, June 1996, p 13-14.

4.2.1 State government business activities (other than local government)

For NSW state government business activities, the test for significance is assessed on a case by case basis by considering whether the business activity has a significant impact on a market. Relevant considerations include:

- the business' size
- the business' influence on the market
- resources commanded
- effect of poor performance.⁶³

Currently in NSW there is limited guidance on how to undertake the market assessment. There may be scope to include additional guidance to assist state government businesses to assess the likely impact of their activities on a market. For example, this could cover:

- **What is the relevant market?** Defining the type of business activity, how local or widespread the relevant market is or could be, and the size and amount of competition in the market.

- Defining the type of business activity may be straightforward in many cases. Others may be more complicated, especially if it is a relatively unique service, or there are no known competitors at the time of the assessment.
- Defining the area of the market could be more complex. The market may be contained to a particular region or be state- or nation-wide competing with other state government businesses.
- **What is the expected size of the Government business activity?** The number of goods and services offered or expected to be offered in competition with private sector providers, and other relevant factors (e.g. expected turnover). The goods and services offered may be defined as items, or 'places', (such as for camping grounds), or some other way.
 - A government agency might have multiple business activities of the same type in a similar market. Consideration needs to be given to whether these would be considered as individual business activities, or one business with multiple outlets. This is an important distinction which becomes relevant when assessing whether a business is 'significant'.
- **What is the strategic significance of the activity?** In some cases, it might be appropriate to consider whether an activity is strategically significant to growth and development in NSW. That is, if a government business is strategically significant to the NSW economy (e.g. renewables or a potentially disruptive technology), its activities may be significant even where they do not satisfy other criteria.

4.2.2 Local government businesses

For local government businesses, the NSW policy is based on a monetary threshold using annual sales turnover:

- activities of businesses with sales turnover exceeding \$2 million are deemed to be significant (category 1 businesses)⁶⁴
- activities of businesses with a lower sales turnover (category 2 businesses) should be considered on a case by case basis. They are "anticipated to have an insignificant distortionary impact on competition at either State or national level...[but] may be considered quite significant at the local level." Councils should apply full cost attribution to as many of these business activities as is practicable.⁶⁵

The local government pricing guideline requires councils to apply the broad principle and intent of competitive neutrality to category 2 businesses but provides councils with discretion as to how they do this.⁶⁶ The closer in scale a business is to a category 1 business, the stronger the argument for full application of the competitive neutrality principles. Councils need to balance the economic and social benefits in deciding how to treat category 2 business. This includes the factors listed in clause 1(3) of the Competition Principles Agreement (see Box 4.4), other community benefits of the activity and the costs to council of applying competitive neutrality principles.

While monetary thresholds based on revenue or turnover have the benefit of being much simpler to administer, they may have the unintended consequence of encouraging government businesses to price well below the competitively neutral price in order to remain underneath the significance threshold. Using alternative estimates such as the size of the asset base may reduce this incentive but has its own issues regarding measurement. Given the diversity of markets, it may also be difficult to set a threshold that would approximate a level of significance and it needs to be flexible enough to change over time. The current \$2 million threshold was set in 2002 – if it had been escalated by the change in the Consumer Price Index, it would be \$3.3 million in 2022.^b

4.2.3 Significance tests that apply in other parts of Australia

Other Australian state and territories have developed their own approaches to assessing 'significance'. These include a combination of guidance on how to assess market impact and monetary thresholds. In submissions to the Harper Review, several stakeholders including the NSW Government pointed to the need for a consistent definition of 'significant' and common understanding between jurisdictions on what is covered by competitive neutrality policies and what isn't.⁶⁷

Tasmania regards all state owned government businesses as significant (which means that it is the public interest test that is the sole determinant of whether competitive neutrality principles are applied to a government business).^c

Monetary thresholds used across Australia include:^d

- The Commonwealth, Queensland and Western Australian governments set a revenue and/or asset base threshold of \$10 million (in Queensland and Western Australia this is a guide rather than a fixed threshold).⁶⁸ South Australia sets, as a guide, thresholds of revenue of \$2 million or asset base of \$20 million.⁶⁹
- For local government, in Queensland combined water and sewerage service activities are significant if they connect at least 10,000 premises to a water service. All other business activities (subject to some exclusions) apply an annual expenditure threshold of \$9.7 million.⁷⁰ Western Australia sets an annual revenue threshold of \$200,000.⁷¹

Market impact tests are in place in Victoria, South Australia (for businesses below the monetary threshold) and Tasmania. They typically consider similar factors to those listed in the NSW test although some include more guidance as to what factors should be considered. There is also a body of regulatory decisions in these states that show how the tests have been applied as a result of complaints investigated by the relevant complaints handling bodies in each jurisdiction (e.g. see Box 4.3).

^b Using CPI Sydney March 2022/March 2002.

^c Like NSW, Tasmania has a separate test for local government businesses.

^d We note these were set at varying times going back as far as 1996 and do not contain a method to escalate the value of the thresholds.

Box 4.3 Case study – Market based significance test for penguin tours in South Australia

National Parks and Wildlife SA (NP&WSA) was operating nightly guided 'Discovering Penguins' tours from a hotel in Kingscote. A private penguin tour operator who also conducted their penguin tours in Kingscote complained to the South Australian Department of Premier and Cabinet that NP&WSA may be running its tours at a loss because it was not required to recover full capital costs and overheads. The Premier of South Australia referred the complaint to ESCOSA for investigation and report.

The private tour operator initially complained to the South Australian Department of Environment and Heritage (DEH), NP&WSA's parent department. The DEH did not consider the tours to be a business activity, rather an activity included in its broad-ranging responsibility for South Australia's wildlife. Additionally, it was not a significant activity due to its small turnover that "basically" covered the direct costs of the tour operation.

NP&WSA tour prices were lower than the private operator's. DEH estimated that NP&WSA received about 60% of the Kingscote penguin tour business. ESCOSA's onsite observation confirmed that NP&WSA's tour attracts more visitors than the private tour.

Following its investigation, ESCOSA found that such a market share of Kingscote penguin tours gave NP&WSA the ability to exert a substantial influence on the market. It concluded that NP&WSA's penguin tours should be considered as a significant business activity due to its significant market influence. Therefore, NP&WSA needed to apply competitive neutrality principles to the operations of its penguin tours.

Source: South Australia, [Competitive Neutrality complaint against National parks and Wildlife SA](#), December 2002.

4.3 The public interest test

Competitive neutrality principles only apply where there is a net public interest in applying them.

Whether or not it is in the public interest to apply competitive neutrality principles to a particular government business depends on a trade-off between the benefits of stronger competition in that market on one hand and the costs of implementing competitive neutrality principles within the government business and investigating a complaint about that business on the other.

Competition in a market for goods or services will be improved if the government business is not able to use the advantages it receives from its government ownership to win customers from a more efficient rival.

Improved competition in markets for goods and services means two things:

1. customer choice and product quality are improved, while prices remain close to efficient costs.
2. taxpayer funds are not spent subsidising the provision of services at below cost by government businesses where this is not justified as the most effective means of delivering a good or service.

But applying competitive neutrality policy to do this creates new regulatory costs, so it should only be done where these costs are justified by the outcome. The NSW policies and processes include a presumption that there is a net public benefit in applying competitive neutrality principles to significant government businesses. A cost-benefit analysis showing that this is not the case is needed before a significant government business is able to claim no net public benefit from competitive neutrality.



Competitive neutrality principles only apply if there is a net benefit to society

4.3.1 Existing guidance around how to do a cost-benefit analysis

There is limited guidance for government businesses on how to undertake a cost-benefit analysis. However, agencies can and do seek advice from NSW Treasury on how to undertake cost-benefit analysis. The guidelines note that for state government and local government businesses:

- within the NSW policy, the factors listed in the Competition Principles Agreement provide a minimum set of factors that should be included (see Box 4.4) and describe some additional factors within the policy
- the benefits of applying competitive neutrality principles are likely to flow to the broader community, be difficult to quantify and accrue in the future
- the costs of applying them are likely to be imposed on the business itself, be easier to calculate and relate to the present
- there is a presumption that the benefits outweigh the costs, unless shown otherwise
- the assessment should contain a comparison of costs and benefits on the same basis. This can be achieved by either amortising the costs over the period for which the benefits are estimated to accrue, or by converting both cost and benefit streams to current values.

Box 4.4 Clause 1(3) of the Competition Principles Agreement

Clause 1(3) of the Competition Principles Agreement is replicated below.

Without limiting the matters that may be taken into account, where this Agreement calls:

- a. for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or*
- b. for the merits or appropriateness of a particular policy or course of action to be determined; or*
- c. for an assessment of the most effective means of achieving a policy objective;*

the following matters shall, where relevant, be taken into account:

- d. government legislation and policies relating to ecologically sustainable development;*
- e. social welfare and equity considerations, including community service obligations;*
- f. government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
- g. economic and regional development, including employment and investment growth;*
- h. the interests of consumers generally or of a class of consumers;*
- i. the competitiveness of Australian businesses; and*
- j. the efficient allocation of resources.*

Source: Competition Principles Agreement, clause 1(3).

Separately to the competitive neutrality policies and processes, NSW Treasury has published a guideline to assist policy makers to undertake cost-benefit analyses.⁷² This paper is more recent than the competitive neutrality guidelines and therefore, is not referred to in them. However, it sets out the Government's expectations around how such an analysis is to be undertaken and is relevant to any government business undertaking cost-benefit analysis for the public interest test.

4.3.2 Additional guidance around how to do a cost-benefit analysis that could be included

As we noted above, the public interest test involves a trade-off between improved competition and the costs of applying competitive neutrality policy. This trade-off is best made using an economic cost-benefit analysis. The costs of applying competitive neutrality could include the cost of structural or accounting separation, costs of adjusting prices and complying with reporting requirements, as well as anticipated costs of dealing with complaints.

Determining the benefits of improved competition in a particular market is a somewhat more difficult task, although it can be done. The key point is that there are two sources of lost economic benefit when a government business misuses its government power in a market. The first is that prices depart from efficient cost. This means that prices are either too high (representing monopoly pricing) or too low (wasting productive resources). The second source of lost benefit is the fact that more taxation is required to support the government business in its loss-making enterprise.

Taxation distorts decisions by consumers to buy goods, by investors to invest in productive equipment, and workers to offer their labour. The net result is that the economy is less productive so that there is less available for consumers to purchase than there could have been.

Applying the public interest test to an individual government business raises questions regarding the identification and quantification of competition benefits. It also requires estimation of at least the factors identified above. We consider that it is likely that government businesses may not have the expertise required to undertake this estimation and may need to engage expertise or assistance in order to do so.

We will look at whether there are ways to reduce the complexity of this process and ensure it is being applied consistently, by providing more information on how the test should be applied and the key considerations it should include.

4.4 Relationship between the three tests

Applying the public interest test can be complex. It is only required to be applied by businesses that have already passed the significance test and believe that there is no net public benefit from applying competitive neutrality principles. We consider that the requirements of this step may deter a business from seeking to rely on an exemption on public interest grounds. As a result, it is important to specify a significance test that strikes the right balance between the costs of applying competitive neutrality principles and the benefits.

While this would suggest a more comprehensive approach to determining what constitutes a significant business should be preferred, a simpler approach to determining significance allows a smaller, less sophisticated business to easily identify which of their operations should apply competitive neutrality principles. For example, the monetary threshold in local government means lower administrative costs from the framework than a market-based assessment would. This may be more appropriate than market-based assessments where a local council has a range of businesses with different products that need to be considered.

As the local government significance threshold in NSW has not been updated for a long period, it is likely that there are businesses which did not initially fall under category 1 but over time have become category 1 businesses (where competitive neutrality principles must be applied in the absence of a cost-benefit analysis on public interest). Failing to update the thresholds may have added to either the costs of the competitive neutrality framework or led to inadvertent non-compliance from local councils. Which outcome is occurring is likely to depend on how often local councils are reviewing their business operations against the three tests.

Seek Comment



3. How should governments identify the activities that need to apply competitive neutrality principles?

4.5 When should the tests be applied?

The Harper review and Productivity Commission (NSW) both called for better understanding of the significance of a government business at the start-up phase which the sections above seek to address.⁷³ However, we consider there may be benefits to also periodically reviewing assessments of whether competitive neutrality should apply to a business.

As businesses and markets change overtime the application of competitive neutrality may become more (or less) relevant. For instance, a business that was deemed not significant enough to apply competitive neutrality may become more significant if a private market develops or has new potential to develop.



The net benefits of applying competitive neutrality to a business may increase or decrease over time, as markets and the economy change.

There is currently no requirement to review the application of competitive neutrality, either in the Competition Principles Agreement or the NSW policies. The Victorian Government considers that “from time-to-time, it might be appropriate to review the business status of public activities in light of changing circumstances”.⁷⁴ It identifies potential trigger points to identify a need to review the application of competitive neutrality as a maturing market, change in Government policy (e.g. to increase contestability or remove a statutory monopoly), or changes to the structure of an activity such as expansion.⁷⁵ Other jurisdictions do not appear to require re-assessment.

We consider there could be merit in including a requirement or guidance to review the application of competitive neutrality to business activities, especially where it has been deemed that competitive neutrality need not apply. This could be set as a time limit or based on guidance regarding triggers.

It is important that any time period for review is reasonable. The prospect of review and changes to an activity should not impact on decisions to provide CSOs if they present a net benefit at a particular point in time. Too frequent reviews risk impacting the business by potentially reducing the stability of the activity and longer-term planning.

Further, any identified changes in the market leading to a change in the application of competitive neutrality would need to be reasonably considered to be a structural or sustained change. One-off changes such as a private business exiting a market (where there is potential for another party to enter) may not be sufficient to warrant any change in policy.

Seek Comment



4. How often should government businesses re-assess their activities for competitive neutrality? What circumstances could trigger a re-assessment?



Let's discuss your ideas

In this chapter we described the application tests used to identify government activities that should be subject to competitive neutrality policies.

The three tests are:

- The definition of a 'government business'
- How to decide if it is significant
- How to determine if applying competitive neutrality is in the public interest

We asked questions to try and understand how these tests should work and the appropriate timing for reassessing an activity.

We want our different stakeholders to provide their perspectives

When preparing your submission here are some things to think about:

Non-government stakeholders

- Are the application tests correctly identifying relevant activities?
- If not, which test do you think is incorrectly excluding a relevant activity?

In considering how to identify government activities for competitive neutrality tell us:

- Would models from other jurisdictions (or elements of them) work in NSW?
- Prioritise issues that are important to you

NSW Government agencies

- Are application tests well understood in your agency and easy to apply?
- Which activities don't fit the definitions and what is the result of this?
- Have you encountered problems using the tests?

Local government

- Reflect on the monetary threshold used to determine significance.
- What are the limitations of monetary thresholds?
- Do councils have expertise to correctly apply the tests?
- Should local government have a different application test from state government agencies?

5 Oversight and administration arrangements

Within NSW, the competitive neutrality policies are not legally binding or established through legislation^a, but rather through a series of intergovernmental agreements, policy statements and guidance documents.

The right administration and oversight arrangements ensure government policies are implemented as intended, consistently across (the economy / areas of government) and that breaches of the policy are identified and rectified in a timely way. Appropriate oversight and administration arrangements should also allow for feedback mechanisms into the policy framework. Identifying areas of policy that do not achieve the policy objectives and could be improved in a subsequent review.

Responsibility and oversight for competitive neutrality is split between various government agencies. Responsibility for the policies sits with NSW Treasury who issue the current policies and guidance material. The Office of Local Government has also issued guidelines on pricing and costing for councils. Compliance with the policies is largely left to individual government agencies and businesses.

A complaints process (discussed further in the next chapter) is established as a function of IPART through the *Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act)⁷⁶ and a function of the NSW Procurement Board under the *Public Works and Procurement Act 1912* (Public Works and Procurement Act)⁷⁷. The Office of Local Government also has a role in dealing with complaints against local government businesses.

5.1 Policy and process oversight

Issued by NSW Treasury, the policy and guidance documents contain the objectives of competitive neutrality policy. They define the activities the policies apply to by outlining what constitutes a 'significant' government business and how to apply the public interest test. They also define the processes government agencies and businesses should take when implementing the competitive neutrality policies to its business activities.

Policy documents, like legislation and other systems should be periodically reviewed to test its continuing relevance and effectiveness. Since these documents were initially published, there has been one review.

Where policies refer to outdated legislation, definitions, documents or third parties, they become more difficult to apply and more uncertain for users and overseers alike. They also risk being forgotten or causing confusion about the obligations.

^a Except for complaints handling functions which are partially established through legislation. Independent pricing oversight of some SOCs is also established through legislation.

Ongoing review provides an opportunity to survey changes in the review period and adjust the policies to reflect changes in the economy, government activities and technological changes. It also provides an opportunity to refocus attention on the policy. The scope of a review can vary from making small updates and corrections, to broader reviews of the policy and its application,

The recommendations of this review by IPART will assist NSW Treasury to identify and prioritise updates to the competitive neutrality policies and process documents.

We will also consider what ongoing review frequency of the overall framework and review scope appropriately balances the effort of review and benefits of policy consistency with the benefit of up to date guidance material that reflect changes in the economy, government activities, technological changes.

Seek Comment



5. How often should the competitive neutrality framework in NSW be reviewed?

5.2 Reporting and access to public information

Reporting and public information is a low intervention mechanism that improves transparency of government activities. In a framework where no external body is actively responsible for monitoring compliance, provision of public information can also improve compliance with policies.

Publishing information about its decisions provides stronger incentive for government organisations to comply. It balances information asymmetry problems for competitors who suspect a breach of competitive neutrality by helping them understand the decisions of government businesses and raise complaints if they consider competitive neutrality policy has not been appropriately applied.



Publishing relevant and accessible information is a common compliance tool. It helps stakeholders (including competitors) understand decisions ask questions and raise concerns and complaints.

5.2.1 Current reporting requirements

The NSW competitive neutrality policy and process documents do establish some reporting requirements such as statements of corporate intent for State Owned Corporations^b and statements of financial performance for other government businesses (see Chapter 4).

^b These reporting requirements for state owned corporations are also established by legislation under the *State Owned Corporations Act 1989*.

These reporting requirements generally apply to those business activities applying competitive neutrality principles to its activities. That is, those that have decided through the application tests that they are significant businesses and it is in the public interest to do so.

NSW is required to report annually on implementation of competitive neutrality principles under the Competition Principles Agreement⁷⁸ and Competition and Infrastructure Regulation Agreement (2006)⁷⁹. Starting in 2008 and continuing until the 2017-18 reporting year^c, the Heads of Treasuries Competitive Neutrality Matrix report, documenting compliance with the competitive neutrality principles had been published online annually.⁸⁰

As acknowledged in the 2017-18 report⁸¹, the report restricts its assessment to government business enterprises only and do not provide assessments for other agencies that are also engaged in significant business activities. The reporting is at a very aggregated level for each business enterprise, and does not provide detailed information about individual products, services or business decisions. It does not include any reporting on local government owned business activities.

Local governments do issue schedules of rates, fees and charges as part of their operating plans required under the Local Government Act.⁸² While this is not a component of the competitive neutrality framework, these schedules may explain the pricing policy taken to determine the fees and charges applied to the council's services.^d

5.2.2 Improving transparency

In its submission to the Harper Review, the Commonwealth Productivity Commission recommended additional self-reporting in annual reports by government businesses of the steps taken to comply with competitive neutrality policy in order to aid assessment of compliance with competitive neutrality policies and provide transparency to private sector competitors.⁸³

We will consider what type and level of information about government business activities should be made publicly available. For example, should the analysis of a government business activity's significance or public interest considerations be made public? Should more detail be provided about how a government business has met its competitive neutrality obligations also be made public, and should it include the detailed basis of its pricing?

As discussed in Chapter 6, the information requirements on a complainant are high, and the lack of public information about competing government businesses may hinder a complaint from meeting the minimum requirements to be heard. Further, enhanced reporting would assist competing businesses that have a suspicion of non-compliance to quickly and easily identify whether competitive neutrality principles apply (i.e. whether the business activity does or does not meet the definition of a significance or public interest tests).

Conversely, there may be concerns about commercial confidentiality of some business information, that a competing private business would not be required to publish.

^c Published in January 2019.

^d This includes full, partial or no cost recovery categories.

The format and location of information may also be an important consideration for this review. For example, should the information be published centrally such as on a competitive neutrality register on the website of a central agency (such as treasury or nsw.gov.au) or should each government business be required to publish it on its website or in its annual report?

Seek Comment



6. What types of information should government businesses publish to demonstrate compliance with competitive neutrality policies and when? What types of information should not be published?



Let's discuss your ideas

In this chapter we discussed the administration and oversight arrangements of the competitive neutrality framework within NSW, including roles and responsibilities and reporting requirements.

We asked how frequently the policy and guidance documents should be reviewed and what information should be made available to demonstrate compliance with the policies.

We want our different stakeholders to provide their perspectives

When preparing your submission here are some things to think about:

All stakeholders

- What review frequency balances the effort of a policy review with the changes in government activity, the economy and technology?
- Should state and local government policies be merged, or made consistent? If so, who should be responsible for overseeing them?

Non-government stakeholders

- What information would you need to know to ensure that the government business is applying the competitive neutrality framework correctly?
- How and when should this information be published?
- Should the government business or activity explain why competitive neutrality does/doesn't apply to them?
- Should the costing approach, or alternatively, the full costing be published?

State or Local business

- What information should be considered commercial in confidence?
- How could releasing this information put government owned businesses at a commercial disadvantage?

6 Complaints

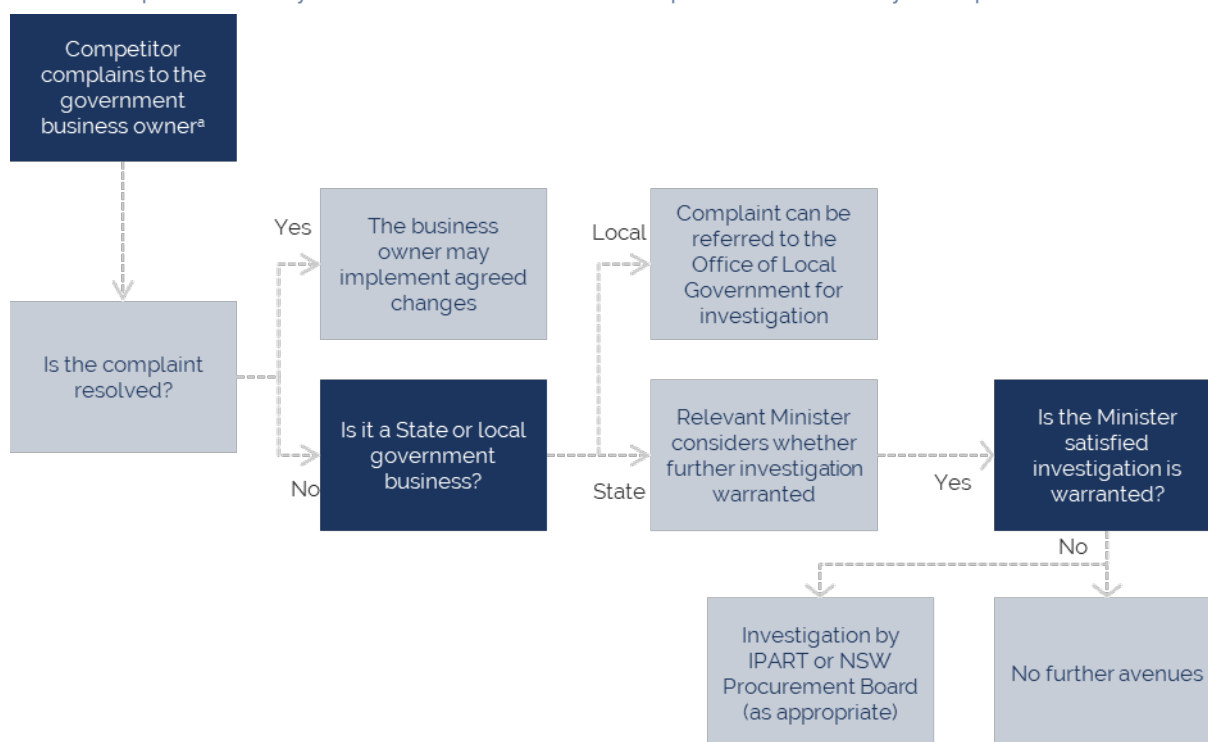
Responsibility for competitive neutrality complaints handling differs depending on the nature or ownership of the government business activity. In general, complaints should be raised with the government owned business or agency that is the subject of the complaint. If a successful outcome cannot be reached with the agency or business then an independent complaints handling function is established though NSW legislation for IPART and the NSW Procurement Board.⁸⁴ The Office of Local Government is the complaints handling body for local government businesses.⁸⁵ This chapter details the complaints handling process as well as some observations on the NSW process, and comparisons with complaints processes used in other Australian jurisdictions.

6.1 The process for making a complaint

In New South Wales, any actual or potential competitor of a Government business may make a complaint if it believes it is being disadvantaged because of a Government business' net competitive advantage from its public sector ownership. Complainants can include individuals, private firms, industry groups, or another government business.

Figure 6.1 Competitive neutrality complaints at a glance

How competitors may raise concerns about competitive neutrality compliance



a. The business owner could be a government agency or local council, the competitor may include a potential competitor.

Source New South Wales Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002, pp 17-18, IPART.

The competitive neutrality framework in NSW establishes a two-stage complaint handling process for competitive neutrality complaints. The first step in the complaint handling process is to directly lodge a complaint with the Government business that is the subject of the complaint. The complaint should be submitted in writing to the respective Government business and should specify what the alleged breaches of competitive neutrality are. The Government business must generally respond to the complaint in writing within 4 weeks of receiving the complaint. If the complainant is not satisfied with this response, they may request that the relevant Minister^a refer their complaint to be investigated further by the appropriate investigative body. The following Ministers are responsible for referring complaints:

- Minister for Finance in respect of 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.
- Minister for Customer Service and Digital Government for all other competitive neutrality complaints (other than local government businesses). 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 also involves other alleged failures to comply with competitive neutrality principles by the Government business
- a local government business, where the complaint also involves other alleged failures to comply with competitive neutrality principles by one or more other public authorities (not local governments).⁸⁶

The Minister must be satisfied that it is appropriate for the complaint to be dealt with by IPART and, in the case of a complaint about a local government business, consult with the Minister for Local Government.

Before referring a complaint to IPART or the NSW Procurement Board the relevant Minister must be satisfied of certain criteria about the complaint. These are that the:

- complaint relates to any or all the public trading activities of the Government business
- competitor competes, or intends to compete, in a particular 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
- complainant has been made by the competitor, or by a person or body who is authorised by the competitor to make a complaint on its behalf
- 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.⁸⁷

^a The policy documents refer to the relevant Minister as the Premier. Changes in Ministerial responsibilities since the policies were drafted mean that this is no longer the case.

Notably only competitors or potential competitors can make complaints, and one of the criteria is that the complaint has been raised with the government business.

Both IPART and the NSW Procurement board must use their best endeavours to investigate and report on a complaint within 10 weeks of receiving the referral.⁸⁸ IPART and the NSW Procurement Board must make the report available to the public.⁸⁹

There is a separate mechanism for handling complaints about local government businesses. The Office of Local Government is responsible for handling these complaints.⁹⁰ Complaints against local government businesses should initially be raised with the relevant council for investigation. Each council is responsible for establishing and resourcing its own internal complaints handling process. The council must nominate a competitive neutrality complaint-handling position that is independent of its business activities.

The Policy Statement on the application of competitive neutrality to local government noted a 1994 Practice Note published by the Department of Local Government titled "Complaints Management in Councils" exists as guidance to local governments. The Guidelines on management of competitive neutrality complaints issued by the Department of Local Government are intended to build on and be read with the Practice Note. It is unclear what the current status of the Practice Note is.^{b,c}

The Office of Local Government will handle complaints if a council fails to resolve a complaint, or if a complainant reasonably requests it to do so.^d

6.2 Outcome of a successful complaint

The portfolio Minister must respond to an IPART or NSW Procurement Board investigation report, in writing, within 8 weeks of the report being published. This response will also be publicly available. The Minister's response must say whether the IPART or the NSW Procurement Board's recommendations have been, or are proposed to be, adopted. If the Minister does not adopt the recommendations of IPART or the NSW Procurement Board, the Minister's response must include the reasons for not adopting the recommendations.

^b A 2013 document is available on the Office of Local Government [website](#).

^c We note some councils have recently issued up to date policies, e.g. Narrabri Council's policy was last reviewed in 2017 and republished in 2021 (available online at <https://www.narrabri.nsw.gov.au/files/uploaded/file/Your%20Council/Policy%20Register/Competitive%20Neutrality%20Complaints%20Management%20Policy.pdf>)

^d Details on the local government competitive neutrality complaints procedures are provided within the Department of Local Government's 'Guidelines on the Management of Competitive Neutrality Complaints' (November 1997) and its 'Pricing and Costing for Council Businesses – A Guide to Competitive Neutrality' (July 1997).

If the Office of Local Government investigates a 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.^e If not, this may limit the efficacy of competitive neutrality policy. The Harper Review found that the absence of any requirement for most Australian governments to respond to documented breaches of competitive neutrality policy was also undermining its efficacy.⁹¹

6.3 Improving the complaints handling process

We have been contacted several times by businesses with competitive neutrality complaints, however, there has been only one complaint investigation referred to IPART (of the then State Valuation Office in 2004). Observers have cited this figure to suggest that the NSW complaints process may not be effective noting that for the most populous state with the largest economy, NSW has had a disproportionately low level of investigations.⁹² This is in contrast with Tasmania⁹³ which has recorded 13 investigations since 2013, Victoria⁹⁴ and South Australia⁹⁵ which have each recorded at least 7 and the Commonwealth⁹⁶ which has completed at least 17 (with two ongoing at the time of publishing).^f In all jurisdictions the number of competitive neutrality complaints have been declining.⁹⁷

This may mean competitive neutrality is not a significant concern in NSW. Alternatively, it may 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.⁹⁸ We will consider this as part of this review.

The Harper review also recommended that all Australian governments increase the transparency and effectiveness of their competitive neutrality complaints processes by, at a minimum:

- assigning responsibility for investigation of complaints to a body independent of government
- requiring government to respond publicly to the findings of complaint investigations
- annual reporting by the independent complaint bodies to a proposed new Commonwealth body, the Australian Council for Competition Policy, on the number of complaints received, and investigations undertaken.⁹⁹

^e If an investigation was carried out by the Office of Local Government under section 430 of the Local Government Act, 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.

^f Unlike NSW which has a separate complaints handling body for local government, most jurisdictions have a single body. We have not identified any complaints investigated by the Office of Local government (or its predecessor) in NSW.

While the NSW state complaints mechanism already largely meets these basic recommendations, there is scope to further improve the complaints process in NSW. A comparison with other Australian jurisdictions, for example, identifies that the complaints process in NSW does have a higher threshold for complainants to satisfy than other Australian jurisdictions. For example, in NSW complainants:

- must raise complaints with the government business and wait for 4 weeks for a response and
- may not approach the investigative body, but must have their complaint referred by the responsible minister,

which are not required in other jurisdictions. See Appendix D for a comparison of complaints handling processes across other Australian jurisdictions.

We consider that where a complaints process is not well designed, relevant complaints may not be heard, either because the process is too onerous, complaints made to the wrong agency fail to be recognised and referred to the correct agency, or because the process is otherwise inaccessible. This review will consider how the current process can be improved.

The independent review of complaints is an important mechanism to enhance compliance with government policies such as competitive neutrality. A complaints process should have clear criteria that identify which complaints are relevant to competitive neutrality and provide guidance on which complaints the independent body should accept. However, the process should not be so onerous as to require complainants to self-investigate or provide information in support of the complaint that isn't already publicly available.

The criteria and process should not be designed in a way that unnecessarily obstructs a complainant's access to the process. The role of an independent complaints handling body is one which we will consider as part of this review. We will also consider whether the referral body and criteria for complaints is appropriate.

Seek Comment



7. How can the processes for lodging or investigating complaints be improved?
8. What are the benefits and disadvantages of retaining a separate process for complaints about local government businesses?



Let's discuss your ideas

In this chapter we explained the current complaints process and asked how it could be improved. We also asked who should be able to initiate a complaint, and whether a separate complaints body is required for local government businesses.

We want our different stakeholders to provide their perspectives

Some things to think about when preparing your submission:

- Who should be able to make a complaint?
- Should a complaints handling body be able to self-initiate an investigation?
- What information should be published about competitive neutrality complaints and enquiries?

Non-government businesses

- Are the criteria for making a complaint appropriate?
- Can complainants obtain the information needed to justify a complaint?
- Have you tried to make a complaint? What was the outcome?
- What are the barriers to making a complaint?
- Would you prefer a confidential complaints process?
- Do you know how to make a complaint?

State or Local government business

- How do you deal with competitive neutrality complaints?
- Why are separate state and local government complaints bodies necessary?
- Should a complaints handling body be able to self-initiate an investigation?
- What information should be published about competitive neutrality complaints and enquiries?

7 Should competitive neutrality policies apply to other government activities?

Government ownership of businesses in NSW is less common now than it was when competitive neutrality policies were introduced over 2 decades ago. However, there are other government economic activities which may still impact competition, such as:

- directly supplying social services or programs (e.g. public education or hospital services)
- contracting out service provision to a private operator (e.g. bus, ferry and light rail)
- taking a minority ownership stake in a business (e.g. by selling a majority stake in previously government owned business)
- providing grants, concessional loans, tax advantages or equity stakes to particular private businesses to achieve policy outcomes, such as greater employment innovation or industry development
- obligations that differ between public and private sector businesses (e.g. licenses granted under the *Water Industry Competition Act 2006*).

NSW competitive neutrality policies currently do not apply to these government activities. However, we have been asked to consider the benefits and costs of expanding the scope of competitive neutrality policies to a broader range of activities where government and other service providers operate in the same market.

We are exploring what a level playing field looks like today and how NSW competitive neutrality policies can achieve it. This may require competitive neutrality policies to cover other government activities, including non-business activities. For example, if government decisions, such as market design and regulation, were competitively neutral, competitive neutrality policies could allow emerging and innovative businesses to enter markets. They could provide more opportunities for non-government businesses and help enable a dynamic economy that meets the needs of our future. However, this would need to be balanced against an increased burden on government to comply with broader competitive neutrality principles, as well as any assessment that the differences are justified for risk, public interest or other grounds.

7.1 Ensuring the scope is appropriate given the objectives

By levelling the playing field, competitive neutrality policies aim to remove resource allocation distortions and promote efficient competition between public and private businesses. They do this by removing any net competitive advantages significant government businesses gain because they are government owned. Effective competitive neutrality policies also create opportunities for lower prices, better quality services and greater choice for customers. They do this by supporting competition, innovation and efficiency in marketplaces where government and non-government businesses are operating.

Competitive neutrality policies and processes are not intended to limit competitive advantages achieved through innovation or efficiency, such as economies of scale. This is where the average cost per unit of production or service delivery reduces as the company increases its output. Economies of scale are not exclusive to government businesses and may also occur in medium and larger private businesses. Achieving economies of scale is consistent with the objectives of competitive neutrality policy, which aims to achieve the most efficient allocation of resources.

If government sets the scope of competitive neutrality policies too narrow, it may miss opportunities that would deliver real benefits for consumers in terms of lower prices, better service quality and greater choice. It could also potentially create harm through ad hoc activities that sit outside the scope of competitive neutrality policies but that still have a real impact on the economic environment.

On the other hand, if government sets the scope of competitive neutrality policies too broad, it creates bureaucracy for no gain. If it sets the scope so wide as to capture every government action, then it would slow down government processes.

7.2 Interaction with other regulatory frameworks

State and local government businesses may also be subject to the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act), which prohibits certain business practices that limit or prevent competition. These include, for example, anti-competitive conduct and agreements, and misuse of market power. These prohibitions apply to corporations, and to State and local governments where they carry on a business (e.g. state owned corporations). The Australian Competition and Consumer Commission is responsible for enforcing the Competition and Consumer Act.

Current NSW competitive neutrality policies and processes are not intended to address the conduct that the Competition and Consumer Act prohibits. Where a State or local government business engages in this type of conduct, that Act would generally be a more appropriate way to deal with the conduct than through competitive neutrality policies.

We are interested to hear from stakeholders about whether there is any duplication or overlap between these two frameworks and, if so, whether that is appropriate. We would also like to understand whether there are any types of conduct or practices that may adversely impact competition between government businesses and non-government businesses that are not adequately captured under either framework (i.e. where there may be a regulatory gap).

7.3 Possible approaches to broadening the scope

While changes to the significance and public interest tests may alter the scope of competitive neutrality policies, this section is focused only on broadening the scope beyond government owned businesses to other government activities. There are a few options for doing this.

The 2015 Harper Review found that there is scope to extend competitive neutrality principles to markets where governments and other providers are supplying services, including human services. The review panel found the case for extending competitive neutrality principles is strongest when:

- there are different arrangements for government providers operating in the same market as alternative providers; and
- the differential treatment is not justified on net public benefit grounds.¹⁰⁰

Competitive neutrality policies could be expanded to government activities identified through this approach. However, one problem with this static approach is that any markets identified will likely be dynamic and change over time. This means that any list of additional activities would need to be periodically reviewed for currency,

We have engaged a consultant, The Centre for International Economics (The CIE), to advise on a shortlist of state and local government activities where the extension of competitive neutrality policies is likely to yield the most tangible and significant benefits.

Changes in scope could be targeted at government activities that have the greatest impact on competition between government and non-government businesses. If competitive neutrality policies were extended to these 'high risk' interventions (in terms of those most at risk of negatively impacting non-government businesses), this could result in more opportunities for lower prices, better quality services and greater choice for customers. This could extend competitive neutrality policies to cover government decisions that impact competition.

This could result in, for example, a new principle where if government activities significantly impact competition between government and non-government businesses, competitive neutrality applies.

7.4 How competitive neutrality might be applied to non-business activities

Traditional competitive neutrality obligations include pricing and other costing principles which are not appropriate for any newly in-scope non-business government activities, such as providing a subsidy or grant. A new set of competitive neutrality principles may better suit these non-business types of government activities.

The intention of any new principles would not be to stop the government from undertaking activities that affect competition, but to ensure that government makes decisions with any competitive impacts in mind. The goal would be to ensure government explicitly considers any impact on competition, and that this is included in the final decision to do or not to do something.

Clause 5 of the Competition Principles Agreement shows the kind of competition principle that could be applied to non-business government activities. This clause contains a guiding rule that legislation should not restrict competition unless the benefits of the restriction outweigh the costs, and its objectives can only be achieved this way.¹⁰¹ All Australian Governments were required to review and reform, where necessary, all existing legislation that restricted competition by 30 June 2002.

In line with clause 5(6) of the Competition Principles Agreement, the NSW Government is required to review legislation with potential competitive impacts systematically every 10 years, including examining the net public benefits, of retaining or removing its competitive restrictions. When the costs of those restrictions outweigh the benefits or less competition-restricting methods of achieving the Government's objectives are available, the NSW policy indicates alternative action will be taken.¹⁰²

A similar principle may be applied to government activities that fall under a broader scope of competitive neutrality policies, such as a decision to provide a tax advantage to some businesses (e.g. a payroll tax exemption for not-for-profit childcare centres). Under this principle, these activities should not restrict competition unless the benefits of doing so outweigh the costs and the government's policy objectives can only be achieved by doing so. Government could be required to review its activities with uncertain competitive standing to ensure any restrictions are justified.

For example, to provide a payroll exemption that creates an uneven playing field between businesses that must pay payroll tax (including government-owned businesses subject to competitive neutrality) and those that do not, government would first need to consider whether its policy reasons for doing so could be achieved another way.

7.5 How competitive neutrality might be applied when government has a minority stake

In the time since competitive neutrality policies were introduced in Australia, one of the ways that government business ownership has changed is by taking a minority ownership stake in a business. This has occurred for example, when government sells a majority stake in a previously entirely government-owned businesses. Box 7.1 provides a relevant case study.

Box 7.1 When Government has a minority stake in a business

In 2016 and 2017 the NSW Government sold 50.4% of its ownership in 2 of its businesses; Ausgrid and Endeavour Energy. While the government kept a 49.6% ownership stake in each of these businesses, it no longer has executive control over them.

NSW's competitive neutrality policies did not anticipate this form of government business ownership and cannot easily apply to it because the business can have a large degree of managerial independence from government. This presents a situation where it is difficult to ensure competitive neutrality in these businesses where government may have a significant, although not majority, ownership stake.

In 2000 the Council of Australian Governments (COAG) decided in that in these circumstances, a 'best endeavours' approach requires, at a minimum, that governments provide a transparent statement of competitive neutrality obligations to the business in which they have a minority stake.¹⁰³ COAG suggested governments could also have staff available to answer the business's questions, prepare information for and meet with the business regularly, request regular reports from the business and undertake joint reviews with the business of its competitive neutrality policies.¹⁰⁴

However, competitive neutrality policies in NSW have not been updated to reflect this decision. The NSW Government's current approach is to "encourage the relevant government business to comply with competitive neutrality principles."¹⁰⁵

The NSW Productivity Commission has suggested we consider how competitive neutrality principles should apply when government has a minority ownership stake in a business.¹⁰⁶ We are also required to consider this under our Terms of Reference for this review. One option is simply the 'best endeavours' approach recommended by COAG. This would allow government oversight of the business's competitive neutrality processes and is a flexible approach, making it suitable for all situations spanning from where government has a minor ownership stake to a significant ownership stake.

Another option is to apply competitive neutrality policies in full to these businesses, although this will impose a regulatory burden on other owners of the business and may discourage potential business co-owners from partnering with government.

Seek Comment




9. Where are the regulatory and policy gaps or overlaps with respect to the scope of competitive neutrality in NSW?



Let's discuss your ideas

In this chapter we discussed the potential to expand the scope of competitive neutrality policy to other government activities.



We asked questions about what other government activities (including businesses with a minority owned stake) should apply competitive neutrality principles.

We want our different stakeholders to provide their perspectives

Some things to think about when preparing your submission:

All stakeholders:

- How can government better include competitive neutrality principles in its activities?
- What is the best approach to identifying activities to be included?
- Would this require a change to the application tests?
- Which government services/activities not already captured by competitive neutrality policies have the largest impact on private or non-operators?
- Which competitive neutrality principles should apply to non-business government activities?
- How should competitive neutrality policies apply to businesses that government has a minority ownership stake in?
- Is there regulatory overlap or gaps between NSW competitive neutrality policies and national competition laws?

Appendices

A Terms of reference

B NSW compared to other states of Australia

Table B.1 NSW competitive neutrality compared to other states of Australia

	What are the key policies?	How are significant government business activities defined?	Which bodies handle complaints?
NSW	<ul style="list-style-type: none"> Policy Statement on the Application of Competitive Neutrality (2002) Guidelines for Pricing of User Charges (2001) <i>Independent Pricing and Regulatory Tribunal Act 1992</i>, Part 4C <i>Public Works and Procurement Act 1912</i>, section 173 <i>Public Works and Procurement Regulation 2019</i>, Part 3 Pricing and Costing for Council Businesses – a Guide to Competitive Neutrality (1997) Policy Statement on the Application of National Competition Policy to Local Government Guidelines on the Management of Competitive Neutrality Complaints (1997) 	<p>State government businesses are considered on a case by case basis. Relevant considerations include the business' size, influence on the market, resources commanded and the effect of poor performance.</p> <p>There is a guide of \$2 million p.a. turnover for local government.</p>	IPART, NSW Procurement Board and Office of Local Government
QLD	<ul style="list-style-type: none"> Competitive neutrality and Queensland Government Business Activities (1996) National Competition Policy and Queensland Local Government Policy Statement (1996) <i>Queensland Competition Authority Act 1997</i> (Qld), Part 4 Queensland's Competitive Neutrality Complaints Process (2001) 	<p>State government owned corporations listed on the Queensland Treasury website and State government businesses listed on the Queensland Competition Authority website are significant.</p> <p>Under the <i>Local Government Act 2009</i> (Qld) and <i>Local Government Regulation 2012</i> (Qld), a local government business activity is significant if it is conducted in competition, or potential competition, with the private sector (including off-street parking, quarries, sporting facilities, for example), and:</p> <ul style="list-style-type: none"> for combined water and sewerage service activities, they connect at least 10,000 premises to a water service for all other business activities, have an expenditure of at least \$9.7 million p.a. <p>A business activity that is a building certifying activity, a roads activity or related to the provision of library services is not significant.</p>	Queensland Competition Authority
ACT	<ul style="list-style-type: none"> Competitive neutrality in the ACT (2010) Competitive Neutrality Complaints Guideline (2015) <i>Independent Competition and Regulatory Commission Act 1997</i> (ACT) 	All government businesses, where it is in the public interest. No thresholds, such as market share or annual expenditure, apply.	Independent Competition and Regulatory Commission

	What are the key policies?	How are significant government business activities defined?	Which bodies handle complaints?
VIC	<ul style="list-style-type: none"> Competitive neutrality Policy (2012) Guidance Note - Commissioner for Better Regulation and Competitive Neutrality (2016) Various guidance notes 	Decided on a case by case basis. Relevant considerations include the size of the relevant business activity in relation to the size of the relevant market and its influence or competitive impact in the relevant market.	Office of the Commissioner for Better Regulation ^a
SA	<ul style="list-style-type: none"> Competitive neutrality Policy Statement (2002) A Guide to the Implementation of Competitive Neutrality Policy (2010) <i>Government Business Enterprises (Competition) Act 1996 (SA)</i> 	Decided on a case by case basis depending on its size and influence in the relevant market. As a guide, businesses with an annual revenue more than \$2 million or employing assets worth more than \$20 million may be significant. Other considerations include the market power of the activity (and if it can create more than nominal or trivial competitive impact in the market) and the size of the activity (and if its size relative to the size of the market as a whole is more than nominal or trivial).	Competition Commissioner; Competitive Neutrality Secretariat, Department of Premier and Cabinet
TAS	<ul style="list-style-type: none"> Various Policy Statements (~2019) <i>Economic Regulator Act 2009 (Tas)</i> 	All State government businesses. Local government businesses are assessed on a case by case basis. Relevant considerations include the relevant market, the size of the relevant market and of the local government activity compared to the whole market, and the competitive impact (including potential impact) of the activity in the market.	Office of the Tasmanian Economic Regulator
NT	<ul style="list-style-type: none"> Competitive neutrality Policy Statement (2020) 	Decided on a case by case basis. Relevant considerations include the size of the business activity in relation to the size of the relevant market, the business activity's influence on competition and if the activity earns a substantial part of its operating revenue from user charges. No significant local government businesses have been identified in the NT.	Department of Treasury and Finance
WA	<ul style="list-style-type: none"> Competitive neutrality Policy Statement (1996) 	Decided on a case by case basis. Relevant considerations are the extent of competition (or the potential for competition) between the public and private sectors; and the significance of the market in which the government business activity takes place to the Western Australian economy. A government business activity is unlikely to be significant unless its annual revenue base or turnover is more than \$10 million or it has an asset base with a value in excess of \$10 million.	Public Sector Management Sub-Committee of Cabinet

^a The Victorian Compete Neutrality Policy refers to the Victorian Competition and Efficiency Commission (VCEC) as the complaints handling body for competitive neutrality complaints. This function was transferred to the Office of the Commissioner for Better Regulation in 2015 when the VCEC was abolished.

	What are the key policies?	How are significant government business activities defined?	Which bodies handle complaints?
CTH	<ul style="list-style-type: none"> Commonwealth Competitive Neutrality Policy Statement (1996) Australian Government Competitive Neutrality Guidelines for Managers (2004) <i>Productivity Commission Act 1998</i> (Cth) 	All government business enterprises and their subsidiaries, other share-limited trading companies and all designated business units are significant businesses. Other activities with a commercial turnover of at least \$10 million per annum are assessed on a case-by-case basis.	Australian Government Competitive Neutrality Complaints Office, Commonwealth Productivity Commission

C NSW compared internationally

Table C.1 NSW competitive neutrality policies compared internationally (select countries)

	Is there an explicit competitive neutrality policy?	How has competitive neutrality been applied?
Chile	No. A competitive neutrality rule is implicitly expressed in the Chilean Constitution, Art. 19(21); which provides a right to establish a business. The State and its bodies may only engage in business activities when authorised by law and if the same laws apply to it as the private sector (subject to exceptions for justifiable reasons established by law).	The Chilean Government has applied this to state-owned enterprises. Other Government business activities are subject to competition laws which may cover aspects of competitive neutrality. ^b
European Union (EU)	No. Competitive neutrality obligations are implicitly expressed in several instruments. E.g., the Treaty on the Functioning of the EU prohibits state aid that distorts or threatens to distort competition where the costs of doing so outweigh the benefits (Art. 107). ^c	State aid is an advantage in any form conferred by national public authorities to undertakings on a selective basis. State aid rules apply to all entities engaged in economic activities, regardless of ownership, legal form and financing. The rules also apply to public and private bodies entrusted with public service obligations (similar to CSOs) and those with special or exclusive rights.
Japan	No. There is no competitive neutrality framework. The Japan Fair Trade Commission (JFTC) applies aspects of competitive neutrality in carrying out its functions. ^d	The JFTC applies the <i>Antimonopoly Act 1947</i> to all enterprises regardless of their ownership. It has been reviewing the public policy exemptions available for some business activities, through a competitive neutrality lens. ^e It also reviews drafts of laws and cabinet orders and recommendations for changes where provisions may distort competition.
New Zealand	No. There is no competitive neutrality framework. Aspects of competitive neutrality appear in the policy materials directed to state-owned enterprises and the <i>Commerce Act 1986</i> . ^f	The Treasury's 'Owner's Expectations' statement sets out expectations for Crown companies and entities, including setting financial targets that reflect the SOE's operations in a competitively neutral environment. ^g The <i>Commerce Act 1986</i> , which includes prohibitions against restrictive trade practices, applies to state-owned enterprises. ^h
NSW	Yes. There is a national competitive neutrality framework and corresponding state policies.	The regime applies to significant state and local Government businesses, where the benefits of implementing it outweigh the costs.

^b Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, p 19.

^c Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, p 14, 70-71.

^d Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, p 15.

^e Organisation for Economic Co-operation and Development Directorate for Financial and Enterprise Affairs Competition Committee, *The promotion of competitive neutrality by competition authorities – Contribution from Japan – Global Forum on Competition Session 3*, 8 December 2021, p 2: [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)20/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)20/en/pdf)

^f Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, p 15.

^g The Treasury New Zealand, Owner's Expectations, 2020: <https://www.treasury.govt.nz/publications/guide/owners-expectations>

^h *Commerce Act 1986*: <https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM87623.html>

	Is there an explicit competitive neutrality policy?	How has competitive neutrality been applied?
Slovenia	No. There is no competitive neutrality framework. Aspects of competitive neutrality appear in legislation concerning the activities of public undertakings. ⁱ	The Transparency law applies to all "public undertakings" where Government exercise directly or indirectly dominant influence by virtue of their ownership, financial participation or rules which govern it. Thresholds apply to activities with turnover above certain levels.
Spain	Yes. In addition to the EU rules and implicit national competitive neutrality obligations (e.g. the <i>Competition Act</i> , which applies equally to private and public undertakings, contains competitive neutrality elements), the Royal Decree 1373/2009 introduced explicit competitive neutrality provisions. ^j	The Royal Decree enables the Ministry of Economy and Finance to apply adjustments where Government enterprises do not comply with competitive neutrality. These include estimating the income the Treasury Department should receive as compensation for the capital invested in the public undertaking.
US	No. There is no competitive neutrality framework. But aspects of competitive neutrality appear in antitrust law and the <i>U.S. Government Corporation Control Act</i> of 1945. Compared to Australia, the US has few government-owned businesses. ^k	Businesses that are "actively supervised by the state" and follow the direction of a clearly articulated Government policy are immune from antitrust law under the state action doctrine. Companies registered under the <i>U.S. Government Corporation Control Act</i> must also report according to standardised budget, auditing, debt management and depository requirements and may need to report annually to Congress.

ⁱ Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, p 16.

^j Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, pp 17, 22, 73.

^k Organisation for Economic Co-operation and Development, *Competitive Neutrality National Practices*, 2012, p 16; Deborah Healey and Rhonda L. Smith, 'Competitive Neutrality in Australia: Opportunity for Policy Development' (2018) 25 *Competition & Consumer Law Journal* 223 [2021] *UNSWLRS* 15, p 225.

D Comparison of complaints handling processes across Australian jurisdictions

Competitive Neutrality Complaints Processes in Victoria:

In Victoria, investigations into alleged competitive neutrality breaches are conducted by the Office of the Commissioner for Better Regulation (OCBR).¹ Any competitor of a government-owned business may lodge a competitive neutrality related complaint by emailing Better Regulation Victoria. After a complaint has been lodged, OCBR conducts a preliminary assessment to decide whether it will advise the Commissioner to investigate the complaint. Key issues the OCBR considers in its assessment include:

- whether the activity could be a 'significant government business'
- there is sufficient evidence or information to suggest a possible breach of the competitive neutrality policy
- the annual turnover of the government activity is above \$500,000 (although in limited circumstance investigation of government below this threshold may be warranted)
- the complaint is from a directly affected person or business, or from an interested industry or community group
- the complainant has taken steps to resolve the concern independently, such as through discussing the concerns with the government entity.

After the complaint has been assessed, the OCBR will notify the complainant of its decision to:

- not accept the complaint and why
- accept the complaint for investigation
- accept the complaint but undertake non-investigative action to resolve the issue.

If the complaint is to be investigated, the OCBR will first seek verification from the respective government business to determine the extent to which its actions do or do not comply with competitive neutrality policy. The OCBR will then prepare a draft investigative report, which will be provided to the complainant, relevant government business, and responsible Government Department for comment on a confidential basis. After all parties have been consulted with, the OCBR will consider the responses and, where appropriate, revise the report for the Commissioner's consideration and decision.

Once the report has been finalised (including recommendations for the government business to action), it will be distributed to all parties involved and made publicly available. After the final report has been published, the OCBR will follow up with the concerned government business to ensure that steps have been taken to implement the recommendations.

¹ The Victorian CN Policy refers to the Victorian Competition and Efficiency Commission (VCEC) as the complaints handling body for competitive neutrality complaints. This function was transferred to the Office of the Commissioner for Better Regulation (OCBR) in 2015 when the VCEC was abolished. References to the VCEC should be read as the OCBR.

The OCBR is not subject to a deadline once it commences its investigation of a competitive neutrality related complaint. The Victorian Government states on its website that several factors can influence the time required for the OCBR to complete an investigation of a complaint, including:

- the type of government activity involved in the complaint
- the complexity of the complaint
- the availability of information to investigate the complaint.

Competitive Neutrality Complaint Processes in South Australia:

In South Australia, complaints about competitive neutrality related issues can be made by anyone who competes, or seeks to compete, with a government-owned business in a particular market.^m To lodge a complaint, the complainant must provide full details of the alleged competitive neutrality infringement in writing to the Competitive Neutrality Secretariat. The Secretariat will refer the complaint to the respective government business for initial investigation, report and possible resolution. If the complaint cannot be resolved between the government business and the complainant, the issue may be escalated to the Essential Services Commission of South Australia (ESCOSA) for further investigation.ⁿ

Upon receiving the complaint, ESCOSA will conduct an investigation to determine if the complaint has been substantiated and the reasons for this decision.^o If the investigation finds that competitive neutrality principles have been infringed, ESCOSA will make recommendations to ensure that the government business is compliant with competitive neutrality policy. Once ESCOSA has completed its investigation, a summary of the investigation and recommendations will be made publicly available.

Competitive Neutrality Complaint Processes in Queensland:

In Queensland, the first step in the competitive neutrality complaint process is to directly lodge a complaint with the government business that is the subject of the complaint. The complainant and the relevant government business must make a genuine attempt to resolve the complaint. If the issue cannot be resolved between the complainant and the government business, the complaint may be escalated to an investigative body.

^m *Government Business Enterprises (Competition) Act 1996* (SA), section 17.

ⁿ ESCOSA carries out this function under a standing [referral](#) from the Treasurer under section 5(f) of the *Essential Services Commission Act 2002* (SA).

^o *Government Business Enterprises (Competition) Act 1996* (SA), section 19(4).

If the complaint is made against a government business activity which is declared as a 'significant business activity' by the Treasurer and Minister for Trade and Investment, the Queensland Competition Authority (QCA) is responsible for investigating the matter.^p Complainants can submit their complaint to the QCA via the QCA's website. Some complaints are outside the scope of this framework (such as those relating to community service obligations and subsidies, and other pricing issues).^q The Premier and Treasurer may refer these complaints to the QCA for investigation and set the scope of those investigations.^r

Complaints made against government activities which are not considered to be 'significant' may be addressed by other authorities, such as the relevant portfolio Department or the Ombudsman.

The QCA is required to investigate all competitive neutrality complaints they receive, unless:

- the complainant is not, and could not be, in competition with the government business in a particular market
- the complainant has not made a genuine attempt to resolve the complaint with the government business
- the complainant has failed to comply with a notice requiring them to provide further information to the QCA
- the complaint is frivolous or vexatious.^s

The QCA's investigation process differs slightly depending on whether the complaint is made against a state or local government owned business. If the complaint is against a state-owned government business, QCA will investigate the alleged competitive neutrality breach and will provide a written report to the Treasurer setting out the results of the investigation. The report provides advice and recommendations only and the Treasurer is not obliged to accept QCA's recommendations. Once the Treasurer responds to the report, the QCA must make the report available to the public by publishing it on their website.

If the complaint is made against a local government business, QCA will investigate the alleged competitive neutrality breach and will provide a written report to the relevant local government (council) and the government business itself.^t The report will state whether QCA believes competitive neutrality principles have been infringed. If QCA decides that local government business has a competitive advantage (or disadvantage) the report will also include recommendations for the government business to action. The report contains recommendations and advice only and the local government is not obliged to accept QCA's recommendations. A copy of the report must be made available to the public for inspection at the local government's office. There is no requirement for the report to be published on the local government's website or QCA's website.

^p *Queensland Competition Authority Act 1997* (Qld), section 39.

^q *Queensland Competition Authority Act 1997* (Qld), section 38, limits the competitive neutrality complaints which may be made directly to the QCA.

^r *Queensland Competition Authority Act 1997* (Qld), sections 10(e) and 12.

^s *Queensland Competition Authority Act 1997* (Qld), sections 44 and 45.

^t *Local Government Regulation 2012*, section 52.

Competitive Neutrality Complaints Processes in Tasmania:

In Tasmania, a person may make a complaint to the Office of the Tasmanian Economic Regulator (OTTER) if the complainant believes that a government-owned business is infringing competitive neutrality principles and they are adversely affected by that supposed contravention.^u However, the complainant must first discuss the alleged breach of competitive neutrality policy with the relevant government business.

To lodge a complaint with OTTER, the complainant must submit a completed competitive neutrality complaints form (available on the OTTER website) accompanied by a filing fee of \$181.50 (inclusive of GST).^v If the complaint is deemed to be justified, the complainant will be refunded the filing fee.

OTTER has 30 days to decide whether it will investigate the complaint. During this time, OTTER may make preliminary inquiries, and require the complainant or relevant body to provide further information or verify all or part of the complaint or other information or document by statutory declaration.^w OTTER may refuse to investigate where certain criteria are met^x, resolve the complaint without investigation if it can be done so expeditiously and with the parties agreement, or commence an investigation.

Upon commencing an investigation, OTTER will provide written notice to the complainant, the relevant government business, and the responsible Portfolio Minister. The relevant government business has 30 days to provide a written response to OTTER responding to the complaint.

OTTER must complete its investigation, including an accompanying report, within 45 days of receiving the government business's response to the complaint.^y OTTER will distribute this report to the complainant, the government business, Finance Minister, and responsible Portfolio Minister.

If OTTER's investigation determines that the government business has breached competitive neutrality policy, the government business has 30 days to provide written notice of any corrective actions it intends to take as a result of the report. OTTER has 45 days to inform the Minister and responsible Portfolio Minister about any actions the government body will take as a result of the investigative report. If deemed to be necessary, the Minister may make directions to the government business to ensure that it implements OTTER's recommendations. OTTER will monitor the government business's compliance with competitive neutrality policy. Although OTTER is not required to make the full investigative report available to the public, it must provide a summary about any competitive neutrality investigations it has undertaken during the year in its annual report.

^u *Economic Regulator Act 2009* (Tas), section 48.

^v The fee is 110 fee units, which for 2021-22 is \$165. The fee unit will increase to \$1.70 for 2022-23. The value of a fee unit is calculated in accordance with section 5 of the *Fee Units Act 1997* (Tas).

^w *Economic Regulator Act 2009* (Tas), section 50.

^x See, *Economic Regulator Act 2009* (Tas), section 51, for criteria for refusal of an investigation.

^y *Economic Regulator Act 2009* (Tas), section 58.

Competitive Neutrality Complaints Process in Western Australia:

In Western Australia, if a competitor, or potential competitor, to a government-owned business believes that the government business is not complying with competitive neutrality policy it may lodge a complaint with the Public Sector Management Sub-Committee of Cabinet (PSMSC). The complainant should provide the PSMSC with sufficient evidence to justify investigating the concerned government business's pricing strategy, cost structure, and competitive behaviour (a prima facie case). The complainant must also pay an investigative fee to lodge their complaint. However, this fee will be refunded to the complainant if the complaint is determined to be justified.

On completion of its investigation into the complaint, the PSMSC will provide the complainant a copy of its findings and (subject to commercial confidentiality) material supporting its decision. If the PSMSC determines that the involved government business has complied with competitive neutrality policy, the complainant cannot appeal this decision. If the PSMSC concludes that the involved government business has breached competitive neutrality policy, it will make recommendations to the WA Government on actions that can be taken to address the issue.

The WA Government will decide on a case by case basis as to what action should be taken if a government business has not complied with competitive neutrality policy. These decisions will depend on the seriousness and nature of the non-compliance. Consideration of options available will include:

- the offending government business being required to exit from the transaction, pay any termination or exit costs, and reprice its goods or services to comply with competitive neutrality principles
- payment of an appropriate penalty or fine.

Competitive Neutrality Complaints Processes in the Northern Territory:

In the Northern Territory, the Department of Treasury and Finance (DTF) is responsible for handling complaints related to competitive neutrality. Only a 'genuinely disaffected' party may lodge a complaint with the DTF. The DTF defines a 'genuinely disaffected party' as a person, firm, or government business:

- in actual, or potential, competition with a Territory Government business
- with actual, or potential, access to infrastructure owned by a Territory Government business (e.g. through lease agreements) or
- that has suffered a direct material disadvantage due to the Territory Government business having a net competitive advantage that arises from its public sector ownership.

To lodge a complaint, the complainant must email the DTF. The complainant must provide sufficient evidence to justify investigating the concerned government business's pricing strategy, cost structure, and competitive behaviour (a prima facie case). The DTF will make a decision as to whether it will investigate a complaint within 5 business days of receiving the complaint.

If the DTF decides to investigate a complaint, it will appoint an investigation officer and a decision-making officer. Additionally, the DTF will provide notice of the investigation within 5 business days to:

- the government business subject of the complaint
- the responsible portfolio Minister
- the Treasurer
- the complainant
- any other parties considered appropriate by DTF.

During the investigative process, submissions from all relevant parties are to be provided to DTF within 15 business days of receiving the notice of investigation. As part of its submission the involved government business must provide a detailed analysis of its cost structure, pricing, policy and compliance with competitive neutrality policy and address each point made in the complaint. Following this, the submissions will be distributed to the complainant and the relevant government business who will have 5 business days to provide any further information in response to the submissions.

Once the submissions have been received, the investigation officer has 10 business days to collate the relevant information and convene a meeting with all parties to clarify any issues that have arisen from the submissions. Additional information may be provided up to 10 business days after the meeting with all parties has taken place. Following this, the investigation officer must prepare a report which summarises the investigation of the complaint within 10 business days. Upon the completion of the investigation officer's report, the decision-making officer will prepare a final report within 5 business days. The final report will discuss whether there was a breach of competitive neutrality policy and will make recommendations for the Territory Government's consideration.

Competitive Neutrality Complaints Processes in the Australian Capital Territory:

In the Australian Capital Territory, anyone can make a competitive neutrality related complaint by issuing a reference to the Independent Competition and Regulatory Commission (ICRC).^z However, the complainant must pay the reasonable costs of an investigation into the complaint as determined by the ICRC.^{aa} If the complaint is lodged by a self-funding complainant, the ICRC must determine up front whether the person or group has the capacity to fund the cost of the investigation.^{bb} The cost of an investigation can be significant, especially if the complaint is complex and the investigation is lengthy.

^z *Independent Competition and Regulatory Commission Act 1997* (ACT), sections 3A(2) and 19A.

^{aa} *Independent Competition and Regulatory Commission Act 1997* (ACT), section 19K.

^{bb} *Independent Competition and Regulatory Commission Act 1997* (ACT), section 19B(2)(c).

The ICRC acknowledges that it would be unusual for individual members of the community to have the resources to lodge a complaint on their own. To ensure that genuine complaints are not excluded from investigation, a person may approach a Minister or member of the Legislative Assembly to issue a complaint on their behalf, in pursuit of the public good. A Minister or member of the Legislative Assembly can issue a reference on behalf of a person or group and accept the responsibility for the cost of the investigation into the complaint. The ICRC may also initiate and conduct an investigation at its own cost where it is of the view that the investigation is in the public interest.

The ICRC will consider the following criteria when deciding whether to investigate a competitive neutrality related complaint:

- If there is a genuine situation where a business is being disadvantaged in a market where it competes with a government-owned business, and the government business has a net competitive advantage that arises from its public sector ownership.
- If the complaint involves a matter that is of public interest.
- If the complainant is able to fund the cost of the investigation.

If the ICRC is to conduct an investigation, it must prepare a written notice that sets out the terms of reference for the investigation. The notice must be notified through the ACT Legislation Register. A copy of the notice is also provided to the complainant.

Once the ICRC has completed its investigation, it will provide the complainant with a copy of the final report. If the complainant is not a Minister, it will also give a copy of the report to the responsible minister. A copy of the report must also be provided to the Legislative Assembly. Additionally, the ICRC will make the report available to the public by publishing it on their website.

The ICRC Act requires that a government response to the ICRC's report be provided to the Legislative Assembly within 3 months. As the report to the complainant and the Minister includes recommendations about actions the relevant government business can take to address competitive neutrality infringements uncovered by the investigation, there is no scope for appeal. The ACT Government is not obliged to implement any of the ICRC's recommendations.

Competitive Neutrality Complaints Processes for Complaints against Australian Government Businesses (Commonwealth):

Any individual or organisation (including government bodies) may lodge a competitive neutrality related complaint to the Australian Government Competitive Neutrality Complaints Office (AGCNCO), a separate unit within the Productivity Commission. Australian Government businesses may also lodge a complaint to the AGCNCO if they believe they are at a disadvantage in competing with a private business. Prior to lodging a complaint, potential complainants are encouraged to discuss their concerns with the government business involved and/or the AGCNCO. This is to determine whether the complainant's concerns are within the scope of competitive neutrality policy and may allow for the issues to be resolved without a formal investigation.

Complainants can lodge a complaint to AGCNCO by submitting a Competitive Neutrality Complaint Form via the AGCNCO website. The AGCNCO does not automatically investigate complaints. It has discretion not to investigate complaints that:

- are frivolous, vexatious or not made in good faith
- are made by someone with insufficient interest in the complaint
- do not warrant an investigation having regard to all relevant circumstances.^{cc}

Upon completion of the investigation, the AGCNCO will provide the Commonwealth Government with a written report which details the findings of its investigation and recommendations for the government business to action. AGCNCO will also make the report available to the public by publishing it on its website. The Commonwealth Government aims to respond to the report within 90 days of its receipt. While the AGCNCO may recommend changes to competitive neutrality arrangements, the Commonwealth Government is not obliged to accept this advice. If the complaint is complex, an AGCNCO investigative report may trigger a Government decision to hold a public inquiry into the matters raised.

^{cc} *Productivity Commissioner Act 1998* (Cth), section 22.

E Glossary

Application tests	These are the significance test and public interest test used to determine whether competitive neutrality policies apply to a government business activity.
Australian Council for Competition Policy	The Harper Review recommended that the Australian Council for Competition Policy be established to provide leadership and implementation of Australia's competition policy reform. This recommendation has not been adopted.
Community Service Obligations (CSOs)	These are non-commercial activities that the NSW Government has asked a government business to undertake, which address a policy objective. These activities do not achieve a commercial return and would not be undertaken by comparable private sector businesses.
Competitive neutrality framework	This is the suite of legislation, policies and processes that establish competitive neutrality within NSW
Competitive neutrality policies	<p>The following policies and processes which establish competitive neutrality within NSW and are subject to this review:</p> <ul style="list-style-type: none"> • NSW Government Policy Statement on the Application of Competitive Neutrality (TPP 02-1), 2002. • Guidelines for pricing of user charges (TPP 01-02), 2001 • Part 4C of the Independent Pricing and Regulatory Tribunal Act 1992 (IPART Act) • Section 173 of the Public Works and Procurement Act 1912 (Public Works and Procurement Act) and Part 3 of the Public Works and Procurement Regulation 2019 (Public Works and Procurement Regulation) • Pricing and Costing for Council Businesses – a Guide to Competitive Neutrality, 1997 • Policy Statement on the Application of National Competition Policy to Local Government, 1996 • Department of Local Government - Guidelines on the Management of Competitive Neutrality Complaints, 1997.
Competition Policy Agreements	The Competition Policy Agreements are a set of 3 intergovernmental agreements that form Australia's National Competition Policy. The 3 agreements are the Competition Principles Agreement , the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reforms .
Corporatisation	This creates an arms-length relationship between government and the government business activity. For example, State Owned Corporations have been incorporated as separate organisations. Their boards and management operate within incentive structures that mirror, to the extent possible, those faced by the private sector. Local government businesses activities do not necessarily have to be formally or legally incorporated as separate organisations. Corporatisation requires them to be separately identified within the operations of council and have accounting and other operations structured in a way that provides a distinct reporting framework.
Full cost attribution	This includes a range of costing methods that competitive neutrality policies require government businesses to use to set prices that at least cover the costs of carrying out the business activity.
General government businesses	These are funded directly or indirectly (via consolidated fund) by taxes or fees or fines, through being dependent on other agencies which are directly or indirectly funded by taxes or fees or fines, or through having regulatory functions which enable them to raise taxes, fees or fines.
Local government businesses	The NSW competitive neutrality framework specifies that the provision and operation of water supply, sewerage, gas production and reticulation and abattoirs are activities of local government businesses. Other activities are determined as local government businesses by the circumstances. Generally, a business activity will involve the supply of goods and services for a fee or charge. However, not all activities involving the supply of goods and services would necessarily be classified as business activities.

Local government pricing guideline	Pricing and Costing for Council Businesses – a Guide to Competitive Neutrality, 1997
Non-government businesses	Business activities that are not local, state or Commonwealth government businesses.
Local government policy	Policy Statement on the Application of National Competition Policy to Local Government, 1996
NSW policy	NSW Government Policy Statement on the Application of Competitive Neutrality (TPP02-1), 2002.
NSW pricing guideline	The NSW Treasury Guidelines for pricing of user charges, Policy & Guidelines Paper (TPP 01-02), 2001.
Public financial corporations	NSW has 2 public financial corporations- icare and TCorp. For these, the NSW Treasury plays a similar role in monitoring and managing performance as for the SOCs.
Public trading enterprises	<p>These include both SOCs and self-contained organisational units within the public sector. They are principally engaged in trading activities that could, in principle, be provided through the marketplace without compromising the government's social and economic objectives. They raise most of their income from user charges.</p> <p>Due to Australian Bureau of Statistics classification changes, they are now called public non-financial corporations.</p>
Significant local government businesses	<p>NSW competitive neutrality policies apply to these. Under current competitive neutrality policies, local government businesses are considered significant based on a monetary threshold using annual sales turnover:</p> <ul style="list-style-type: none"> • businesses with sales turnover of more than \$2 million are significant (referred to as category 1 businesses) • businesses with a lower sales turnover (category 2 businesses) are considered significant on a case by case basis. Councils should apply full cost attribution to as many of these businesses as is practicable.
Significant state government businesses	<p>NSW competitive neutrality policies apply to these. Under current competitive neutrality policies, state government businesses are considered significant on a case by case basis. Relevant considerations include the:</p> <ul style="list-style-type: none"> • business' size • business' influence on the market • resources commanded • effect of poor performance
State Owned Corporations (SOCs)	<p>These are public trading enterprises that have been corporatised. Corporatisation creates an arms-length relationship with Government to ensure that boards and management operate within incentive structures that mirror, to the extent possible, those faced by the private sector.</p> <p>There are 8 SOCs in NSW:</p> <ul style="list-style-type: none"> • Essential Energy, • Forestry Corporation of NSW, • Hunter Water Corporation, • Landcom, • Port Authority of NSW, • Sydney Water Corporation, • Transport Asset Holding Entity of NSW and • WaterNSW.
State government businesses	The NSW competitive neutrality framework uses the term government business to describe parts of the public sector that are principally engaged in trading activities, including the provision of goods and services to other parts of the public sector. The main types of state government businesses include public trading enterprises, SOCs, general government businesses and public financial corporations.

- ¹ NSW Public Service Commission, *State of the NSW Public Sector Report 2021*, December 2021, p 12.
- ² NSW Office of Local Government, [About Councils](#), accessed 22 June 2022.
- ³ New South Wales Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002
- ⁴ See e.g. NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002, p 3; Australian Government The Treasury, *Commonwealth Competitive Neutrality Policy Statement*, June 1996, p4; IPART, *Terms of Reference for a Review of NSW Competitive Neutrality Policies and Processes by IPART*, February 2022, p 2.
- ⁵ NSW Treasury website, [Competition Policy](#), last viewed 25 June 2022
- ⁶ New South Wales Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-01)*, January 2002.
- ⁷ See e.g. Capobianco, A and Christiansen, H, OECD Corporate Governance Working Papers No. 1, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options*, 2011, p 16; Rennie, M and Lindsay, F, OECD Corporate Governance Working Papers No. 4, *Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries*, 2011, p 3.
- ⁸ Telstra Corporation Limited, *Part A of Telstra's Response to the Australian Competition & Consumer Commission's Discussion Paper for the Public Inquiry to Make Final Access Determinations for the Declared Fixed Line Services, Schedule A.3: Historical Background*, June 2011, p 17.
- ⁹ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 87.
- ¹⁰ NSW Productivity Commission, *NSW Productivity Commission Green Paper - Continuing the Productivity Conversation*, August 2020, p 115.
- ¹¹ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, pp 4 and 11.
- ¹² NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 9.
- ¹³ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 11.
- ¹⁴ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 10.
- ¹⁵ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, pp 15-17 and 20.
- ¹⁶ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 12.
- ¹⁷ New South Wales Government, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, June 1996, p 11.
- ¹⁸ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 13.
- ¹⁹ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 13.
- ²⁰ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 16.
- ²¹ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 14.
- ²² NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 14.
- ²³ *Competition Principles Agreement (Cth)*, clause 3(1).
- ²⁴ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 21; NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 12.
- ²⁵ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 21.
- ²⁶ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 21; NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 12.
- ²⁷ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-02)*, June 2001, p 12.
- ²⁸ *Competition Principles Agreement (Cth)*, clause 1(3)(e) and 3(6).
- ²⁹ NSW Treasury, *Guidelines for Community Service Obligations (TPP 19-02)*, January 2019, p 1.
- ³⁰ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 7.
- ³¹ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 4.
- ³² Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 20.
- ³³ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 11-12.
- ³⁴ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 13.
- ³⁵ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 19.
- ³⁶ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 31.
- ³⁷ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 32.
- ³⁸ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 39.
- ³⁹ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 40.
- ⁴⁰ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, pp 23-24.
- ⁴¹ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 24.
- ⁴² Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 25.

- ⁴³ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, pp 14-16; Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 28.
- ⁴⁴ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, pp 28-29.
- ⁴⁵ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 43.
- ⁴⁶ See, e.g. *Local Government Act 1993*, sections 409(3) and 504.
- ⁴⁷ NSW Treasury, *Guidelines for Pricing of User Charges (TPP01-2)*, June 2001, p 8.
- ⁴⁸ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 3.
- ⁴⁹ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 16.
- ⁵⁰ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, July 1997, p 16.
- ⁵¹ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 263.
- ⁵² *Competition Principles Agreement* (Cth), clause 3(1).
- ⁵³ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 4.
- ⁵⁴ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 3.
- ⁵⁵ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 6.
- ⁵⁶ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 4.
- ⁵⁷ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 12.
- ⁵⁸ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 12.
- ⁵⁹ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, June 1997, pp 6-7.
- ⁶⁰ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 12; Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, June 1997, pp 6-7.
- ⁶¹ *Competition Principles Agreement* (Cth), clause 3(5).
- ⁶² Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, pp 264-267.
- ⁶³ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 6.
- ⁶⁴ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, pp 13-14.
- ⁶⁵ New South Wales Government, *NSW Government Policy Statement on the Application of National Competition Policy to Local Government*, June 1996, p 14.
- ⁶⁶ Department of Local Government, *Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality*, June 1997, p 8.
- ⁶⁷ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, pp 264-267.
- ⁶⁸ Queensland Government, *Competitive Neutrality and Queensland Government Business Activities*, July 1996, pp 27-28; Government of Western Australia, *Policy Statement on Competitive Neutrality*, June 1996 p 7; Commonwealth Government, *Commonwealth Competitive Neutrality Policy Statement*, June 1996, p 8.
- ⁶⁹ Government of South Australia, *Competitive Neutrality Policy Statement*, July 2002, p 14.
- ⁷⁰ *Local Government Act 2009* (Qld), section 43(4) and (5); *Local Government Regulation 2012* (Qld), section 19.
- ⁷¹ Government of Western Australia, *Local Government Clause 7 Competition Policy Statement*, June 1996, p 24.
- ⁷² NSW Treasury, *NSW Government Guide to Cost-Benefit Analysis (TPP17-03)*, March 2017.
- ⁷³ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 50.
- ⁷⁴ Commissioner for Better Regulation, *Identifying significant business activities for competitive neutrality*, May 2019, p 1.
- ⁷⁵ Commissioner for Better Regulation, *Identifying significant business activities for competitive neutrality*, May 2019, pp 1-2.
- ⁷⁶ *Independent Pricing and Regulatory Tribunal Act 1992*, Part 4C.
- ⁷⁷ *Public Works and Procurement Act 1912*, section 173.
- ⁷⁸ *Competition Principles Agreement*, clause 3(10).
- ⁷⁹ Competition Infrastructure reform agreement, February 2006, available on a [web archive](#) of the Victorian Department of Treasury and Finance website, last viewed 25 June 2022
- ⁸⁰ Web archive of the Council of Federal Financial Relations [website](#), last viewed 25 June 2022
- ⁸¹ Australian Government, *2017-18 Heads of Treasuries Competitive Neutrality Matrix*, January 2019, p 1.
- ⁸² *Local government Act 1993*, sections 405 and 532. See also Office of Local Government, *Integrated Planning & Reporting: Handbook for Local Councils in NSW*, September 2021.
- ⁸³ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 262.
- ⁸⁴ *Independent Pricing and Regulatory Tribunal Act 1992*, Part 4C; *Public Works and Procurement Act 1912*, section 173.
- ⁸⁵ Department of Local Government, *Guidelines on the management of competitive neutrality complaints*, c. 1997, p 1.
- ⁸⁶ *Independent Pricing and Regulatory Tribunal Act 1992*, section 24G(3) and (5).
- ⁸⁷ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 18; *Independent Pricing and Regulatory Tribunal Act 1992*, section 24GB(2); *Public Works and Procurement Regulation 2019*, clause 9(2).

-
- ⁸⁸ *Independent Pricing and Regulatory Tribunal Act 1992*, section 24GC(2); *Public Works and Procurement Regulation 2019*, clause 10(2).
- ⁸⁹ *Independent Pricing and Regulatory Tribunal Act 1992*, section 24GD(4); *Public Works and Procurement Regulation 2019*, clause 11(4).
- ⁹⁰ Department of Local Government, *Guidelines on the management of competitive neutrality complaints*, c. 1997, p 1.
- ⁹¹ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 267.
- ⁹² Healey, D, 'Competitive Neutrality: Addressing Government Advantage in Australian Markets' p 18, in *State-Initiated Restraints of Competition*, Edward Elgar Publishing, January 2015, pp 3–39.
- ⁹³ Office of the Tasmanian Economic Regulator, Annual reports between 2013-14 to 2020-21, available on its [website](#), last viewed 25 June 2022
- ⁹⁴ Victorian Competition and Efficiency Commission website, Investigation reports, available online at [web archive](#) of the VCEC website, last viewed on 25 June 2022
- ⁹⁵ Government of South Australia, Department of the Premier and Cabinet website, Competitive neutrality Investigations, available [online](#), last viewed 25 June 2022
- ⁹⁶ Commonwealth Productivity Commission, Competitive Neutrality Investigations, [website](#), available online, last viewed on 25 June 2022
- ⁹⁷ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 261.
- ⁹⁸ NSW Productivity Commission, *NSW Productivity Commission Green Paper – Continuing the Productivity Conversation*, August 2020, p 115.
- ⁹⁹ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 268.
- ¹⁰⁰ Harper, I, McCluskey, S and O'Bryan, M, *Competition Policy Review Final Report*, March 2015, p 267.
- ¹⁰¹ *Competition Principles Agreement* (Cth), clause 5(1).
- ¹⁰² NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, pp 19-20.
- ¹⁰³ National Competition Council, *Competitive Neutrality: Scope for Enhancement – Staff Discussion Paper*, June 2002, p 4.
- ¹⁰⁴ National Competition Council, *Competitive Neutrality: Scope for Enhancement – Staff Discussion Paper*, June 2002, p 4.
- ¹⁰⁵ NSW Treasury, *Policy Statement on the Application of Competitive Neutrality (TPP02-1)*, January 2002, p 6.
- ¹⁰⁶ NSW Productivity Commission, *NSW Productivity Commission Green Paper – Continuing the Productivity Conversation*, August 2020, p 115.

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