

## ADIA COMMENTS ON DRAFT REPORT: COMPETITIVE NEUTRALITY IN NSW

24 February 2023

Thank you for the opportunity to comment on the Draft Report of the Review of competitive neutrality policy and processes. ADIA congratulates IPART on this document, which sets out the shortcomings of the current competitive neutrality policy and proposes a robust framework to deliver competitive neutrality in NSW.

ADIA represents private and not-for-profit radiology practices providing x-ray, ultrasound, CT, nuclear medicine, PET and MRI services throughout Australia, including 220 practices throughout NSW. Our interest in competitive neutrality policy arises from funding arrangements for public hospitals providing outpatient radiology services.

Competitive neutrality is an important component of a vibrant, well-functioning economy. However, achieving competitive neutrality relies on an effective policy, administered by an independent regulator. ADIA's experience is that the existing competitive neutrality policy in NSW is inaccessible and ambiguous, and ultimately futile because it is not being used to address cases of clear non-neutrality.

Reform along the lines proposed by IPART would allow it to properly consider activities which may not be competitively neutral, including the activities of NSW public hospitals which in our view breach competitive neutrality *principles*, but may not breach current competitive neutrality *policy*.

Public hospital radiology departments that provide outpatient services are accessing funding twice: from public hospital funding (provided by the NSW Government, of which 45% is funded by the Commonwealth), and from Medicare (provided by the Commonwealth). Private radiology providers competing in the same market, on the other hand, deliver the same service for a significantly smaller cost to government – the Medicare rebate alone.

Accordingly, public hospital radiology departments are able to price their outpatient services well below market rates because the costs for the service is already covered by hospital funding. This is dramatically distorting the market for those services.

Accordingly, we consider outpatient radiology services make a good test case for the quality of IPART's Draft Recommendations, and have considered the recommendations in this context.

The draft report notes that "public hospitals in NSW have a statutory duty to provide certain health care services to patients free of charge", however this obligation does not apply to Medicare-funded outpatients. Moreover, public hospitals are not obligated to provide outpatients, and do not – they are highly selective about the services they offer.

If you have any questions about this feedback, please contact Chris Kane (CEO) on [REDACTED]

## STRUCTURE, PROPOSED OBJECTIVES AND SCOPE

### Draft Recommendation 1

Bring the competitive neutrality policies into a single document that covers both local and state government business activities.

### Draft Recommendation 2

Apply a consistent set of obligations to all entities regardless of their sector or business structure.

1. How could we further improve or simplify the competitive neutrality policy?

a. What is the impact of a consolidated policy, particularly for local government?

ADIA considers that a single consolidated document is the most appropriate means to publish a competitive neutrality policy. We also suggest publishing two guidance documents:

- One guidance document for government enterprises to assist them to meet their obligations under the policy.
- A second guidance document for private businesses, which sets out the criteria and process for making a competitive neutrality complaint to IPART.

### Draft Recommendation 3

Include a clear statement of objective and scope up-front in the policy. We recommend the objective is framed around achieving an efficient allocation of resources through the economy and clearly articulate the benefits of applying the policy.

2. Do you agree with the proposed objective statement and its inclusion in the policy?

ADIA supports the proposed objective statement, and agrees that it should be included in the policy to provide context.

### Draft Recommendation 4

Retain the current scope of competitive neutrality policy, which focuses on applying competitive neutrality principles to significant government business activities where it is in the public interest.

ADIA supports this recommendation.

## WHICH ACTIVITIES ARE SUBJECT TO COMPETITIVE NEUTRALITY?

### **Draft Recommendation 5**

The 'government ownership test' be revised to improve clarity and make it easier to apply. The proposed test focuses on whether the activity is undertaken by an entity that is government owned or is controlled by government. The proposed government ownership test is set out in Box 4.1.

ADIA supports the proposed government ownership test, which IPART has advised would cover both NSW Health, and Local health districts and Specialty networks which operate public hospitals in NSW. These are established as statutory corporations under the *Health Services Act 1997*.

### **Draft Recommendation 6**

The 'business activity test' be revised to improve clarity and make it easier to apply. The proposed test focuses on whether the activity is: undertaken by a public corporation; it involves the supply of goods and/or services with system and regularity and has a commercial character; or is bidding for goods and services. The proposed business activity test is set out in Box 4.2.

ADIA supports the proposed business activity test, noting that outpatient radiology services would likely meet criteria 2.

**Draft Recommendation 7**

The 'significance test' be revised to better target activities where competitive neutrality is likely to be cost effective. The proposed significance test is set out in Box 4.3. An activity would not pass the significance test where:

- a. the activity has an annual turnover below \$3.7 million (indexed over time)
- b. the entity undertaking the activity has assessed it as having a low market impact, or
- c. there is no prospect of competition.

ADIA supports the proposed significance test.

We consider that annual turnover of \$3.7 million is an appropriate threshold, with two caveats:

1. It is appropriate to consider market prices in this analysis (as proposed in the recommendation), rather than actual turnover. This is because public hospitals charge below market prices for most if not all outpatient services.
2. The government business entity to which the turnover threshold is required to be applied needs to be carefully considered. In radiology, an individual public hospital may not exceed the \$3.7 million threshold, but the local health district which controls it and other hospitals almost certainly will. Accordingly, the policy could specify that the turnover threshold applies to the controlling government business.

We strongly support the recommendation that the Minister be given the power to declare an activity significant following a recommendation from IPART. 10% (as proposed by IPART) is an appropriate minimum market share for the Minister to utilise this power.

This power will guard against use of loopholes to evade application of the policy.

## COMPETITIVE NEUTRALITY OBLIGATIONS

### Draft Recommendation 8

The competitive neutrality policy continues to provide information on how to estimate both avoidable costs and fully distributed costs, as valid approaches for estimating a government entity's own cost of business. However, we recommend that the revised policy provide clearer guidance on how to select the most efficient approach. The guidance we are recommending is set out in Figure 5.1.

4. Can government businesses easily identify and apply the relevant costing approach?
  - a. Does it reflect current practice?
  - b. How easily can it be integrated into existing systems and processes?
  - c. What improvements, information or tools could help?

IPART has advised ADIA that the most likely costing approach for outpatient radiology services would be the fully distributed cost model, in circumstances where hospitals increase their supply capacity (equipment and staff) to deliver outpatient services. This would apply to most hospitals and is the appropriate method to estimate costs.

ADIA's experience is that estimating the cost of providing radiology services is complex and requires technical assumptions to be utilised as part of a costing model. It is therefore important that IPART is resourced to interrogate the cost estimates generated by public hospitals during consideration of a competitive neutrality complaint.

### Draft Recommendation 9

The approach to adjusting for net cost advantages in the current competitive neutrality policies be retained as it is appropriate. However, we recommend that the revised policy provide clearer guidance to assist government entities to estimate an appropriate rate of return.

### Draft Recommendation 10

Include guidance in the revised policy on dealing with non-cost advantages and disadvantages. We recommend that the guidance states that where possible, the advantage or disadvantage be removed altogether or converted into an adjustment that can be accounted for in the government entity's costs.

### Draft Recommendation 11

Non-cost advantages and disadvantages experienced by government business activities that are not experienced by competitors be treated as a competitive neutrality issue, unless the advantage/disadvantage is already addressed through another policy or obligation. Such advantages or disadvantages could arise from government ownership or market power.

ADIA is pleased that IPART has included tax exemptions as an example of non-cost advantages enjoyed by government business enterprises. Previous analysis commissioned by ADIA found that if private radiology practices received the same exemptions from income tax, payroll tax, FBT and entertainment cost deductions, they could lower their fees by 14% without affecting their after tax return on capital.

5. How easy will it be to account for the advantages and disadvantages of government ownership? What additional guidance would help?

ADIA does not have any comments.

**Draft Recommendation 12**

Include a chapter in the revised policy on business structure that sets out high level guidance but does not require a government entity to adopt any particular structure for its business activities. We recommend including the guidance in Box 5.8

ADIA considers that guidance to government businesses on business structure separation would be invaluable. It could assist local health districts and hospitals to structure their radiology operations in a way that properly differentiates between their core business (public patients) and non-core commercial operation (outpatient services funded by Medicare).

## ASSESSING WHETHER COMPETITIVE NEUTRALITY IS IN THE PUBLIC INTEREST

### Draft Recommendation 13

The public interest test be undertaken in accordance with the following proposed framework:

- a. define what is being proposed and how it differs from the competitively neutral action
- b. identify the benefits and costs considering the factors set out in Box 6.1
- c. assess whether the benefits outweigh the costs
- d. consider whether there is a less costly way to achieve the benefits

ADIA supports the proposed public interest test. It is important that public interest is applied holistically, rather than focusing on the benefit to consumers associated with paying below market prices for goods or services.

For example, while consumers benefit from bulk billed radiology services (below market price), there are substantial harms which come from competitive non-neutrality in outpatient radiology. For example:

- Public hospitals actively prioritising outpatients (who attract Medicare revenue) over inpatients (who do not). ADIA is aware of a Sydney public hospital which sends inpatients requiring MRI to another hospital in the network around 30 minutes away (which has a MRI scanner that isn't Medicare-eligible), so that it can maximise the number of Medicare-funded outpatient examinations on its Medicare-eligible MRI scanner.
- Inpatient services in public hospitals being provided primarily by registrars, so that consultant radiologists can focus on outpatient services. At some hospitals, large numbers of inpatient examinations go unreported.
- Public hospitals do not necessarily provide a comprehensive range of services, instead 'cherry picking' radiology services which have high Medicare rebates. Services like obstetric ultrasound and breast imaging have low Medicare rebates and are not offered or tightly limited in some public hospitals.
- The labour market for radiologists is distorted due to public hospital radiologists getting a cut of every Medicare-eligible examination they report. This makes public hospitals the 'price setter', pushing up wages for all radiologists which is ultimately passed on to patients attending private radiology practices.

### Draft Recommendation 14

Establish different guidance for undertaking the public interest between state and local government:

- a. For local government business activities, a qualitative assessment for the public interest test is acceptable, although the financial cost of the subsidy must be quantified at minimum.
- b. For state government, the public interest assessment must be quantitative where possible and reasonable (i.e. effort and cost involved in quantification of costs and benefits is proportionate to the size of the business activity).

ADIA supports this recommendation. The public interest assessment for state government activities should be quantified where possible.

### Draft Recommendation 15

Government business activities re-apply the public interest test when there are major changes in the market and at minimum, once every 5 years.

ADIA supports this recommendation. The public interest test should be re-applied at a minimum every 5 years.

**Draft Recommendation 16**

The revised competitive neutrality policy outline circumstances where government businesses may decide that applying competitive neutrality would not be in the public interest. This includes:

- a. CSOs that meet the criteria and principles set out in the CSO Guidelines
- b. below cost pricing where the government business activity has significant up-front costs, the market is growing, and costs are to be recovered within a reasonable period (1-2 years)
- c. not setting prices to cover dividends, taxes or other costs avoided by not-for-profits or charities (as relevant) where most competitors are not-for-profits or charities, and there is a role for government in the market.

ADIA supports this recommendation in principle. We note the imperative to safeguard against use of CSOs as a means to evade competitive neutrality. That is, where CSOs are cited these should be bona fide CSOs rather than a CSO constructed to allow a government business to operate on competitively non-neutral terms.

**Draft Recommendation 17**

Public interest assessments be published, subject to the removal of any commercial-in-confidence material. As part of this, a template identifying information for inclusion and information that might be considered commercial in confidence would be developed by IPART.

ADIA supports this recommendation in principle, but notes that a commercial-in-confidence exemption would likely result in public interest assessments not being published by local health districts or NSW Health. IPART should carefully interrogate claims to this exemption.

**Draft Recommendation 18**

The revised competitive neutrality policies encourage but not mandate consultation on the public interest test.

ADIA strongly supports this recommendation. Public consultation should be strongly encouraged, because other participants in the relevant market are likely to have valuable perspectives that can be incorporated into the assessment.

- 6. Do you agree with our proposed approach to the public interest test?
  - a. How does this approach differ from current practice?
  - b. What tools, templates and guidance would assist?
  - c. What information should be published about a public interest test?

No further feedback.



## COMPLAINTS

### Draft Recommendation 19

The complaints process be made more open and accessible with a single process and a single investigative body (IPART). Complainants would be able to make complaints directly to the investigative body removing the need for Ministerial referral. Restrictions on who can make a complaint and requirements to contact the government business first would be relaxed.

ADIA supports this recommendation. IPART is well placed as a respected and independent regulator to oversee the complaints process.

### Draft Recommendation 20

IPART have a similar complaint handling process to that in Victoria's competitive neutrality regime, to be implemented through amendments to Part 4C of the IPART Act. Under this process IPART would not be able to initiate an investigation and would not have enforcement powers. IPART would have discretion as to whether it will investigate a complaint.

7. Do you agree with the proposed changes to the complaints process? What else do we need to consider?

ADIA supports this recommendation. We consider that IPART should allow complaints to be filed against multiple government businesses that operate on similar terms, for example multiple local health districts or multiple hospitals, with the complaints considered together.

### Draft Recommendation 21

The IPART Act be updated to reflect a broader range of options for outcomes from a complaint, including no investigative action or non-investigative action, similar to the outcomes available in Victoria.

ADIA supports this recommendation. We suggest that where a competitive neutrality complaint is upheld, the following information should be published in IPART's annual report:

- IPART's recommendations; and
- the government business' compliance with IPART's recommendations

### Draft Recommendation 22

IPART's role in assessing complaints about the public interest test be confined to assessing whether framework requirements have been applied and a reasonable conclusion reached.

ADIA supports this recommendation.

## GOVERNANCE, TRAINING AND TRANSPARENCY

**Draft Recommendation 23**

Treasury or the NSW Productivity Commission review the competitive neutrality policy every 5 years, consistent with other Treasury review processes.

**Draft Recommendation 24**

Treasury continue to provide advice to support state government entities to understand and apply competitive neutrality policies and principles. This advice would also be extended to local government entities, if the local and state government policies are combined (Draft Recommendation 1).

**Draft Recommendation 25**

A suite of resources and tools, such as templates and checklists, be developed by the complaints handling body through a co-design process to support stakeholders to understand and apply competitive neutrality policies and principles.

**Draft Recommendation 26**

Further evidence is required before investing in higher cost resources for stakeholder education, such as workshops, online modules and in-person training.

8. What types of training and advice could IPART and/or Treasury offer to best support government entities to implement and comply with competitive neutrality principles?

ADIA supports recommendations 23-26.

**Draft Recommendation 27**

Government agencies undertaking business activities be required to report basic information about competitive neutrality in their annual reports, subject to any commercial confidentiality restrictions (see Box 8.1). Templates should be developed that clearly set out the minimum reporting requirements for agencies.

ADIA supports this recommendation.

9. Do you agree with our proposal for annual reporting on competitive neutrality? How can we best balance the need for transparency with the administrative costs and need to treat commercial information in confidence?

ADIA supports this recommendation. We suggest that annual reporting could be supplemented by a requirement for government businesses to publish competitive neutrality assessments on their website.

## OTHER ISSUES

### Draft Recommendation 28

The revised competitive neutrality policy not extend to council as a purchaser of services. We recommend that the Office of Local Government considers whether the current regulations and guidance regarding procurement for local councils needs to be revised to include content that is currently sitting within the competitive neutrality policy but that would be removed under our recommended approach.

N/A.

### Draft Recommendation 29

The NSW Government review its processes to ensure that it systematically considers impacts on competition when making policy decisions that are likely to impact competition and which may not be picked up by regulatory impact assessments. This includes:

- subsidising services in a market
- acquiring minority government ownership of a business when competitive neutrality policy does not apply because the government does not control the business
- providing grants to businesses
- providing or removing access to data.

ADIA strongly supports this recommendation.

### 10. Are there any additional issues that should be addressed by competitive neutrality policies?

No further comment.

### 11. Do you agree with our findings on out-of-scope issues?

ADIA agrees with IPART's findings that the quantum of and access to Medicare rebates is out of scope for NSW competitive neutrality policy; that policy responsibility rests with the Commonwealth. What services NSW public hospitals choose to provide to outpatients and how those services are priced to the consumer is in scope.

## IMPACT OF THE PROPOSED CHANGES

### Draft Recommendation 30

Consider providing a transition period to assist government businesses time to adjust to the changes. We recommend that the transition period provide an appropriate timeframe for government businesses to review their business activities against the revised tests and to update their internal policies and processes to reflect the requirements of the new policy. We recommend that this transition period commence once Treasury and IPART have provided the advice, resources and training necessary to support and guide government businesses to implement the proposed changes.

ADIA supports this recommendation. The transition period should be short, noting that once a new competitive neutrality policy is publicly announced, it will influence strategic decisions of government businesses.