

Competitive neutrality in NSW – Submission to IPART Issues Paper

August 2022

productivity.nsw.gov.au



Acknowledgement of Country

The NSW Treasury acknowledges that Aboriginal and Torres Strait Islander peoples are the First Peoples and Traditional Custodians of Australia, and the oldest continuing culture in human history.

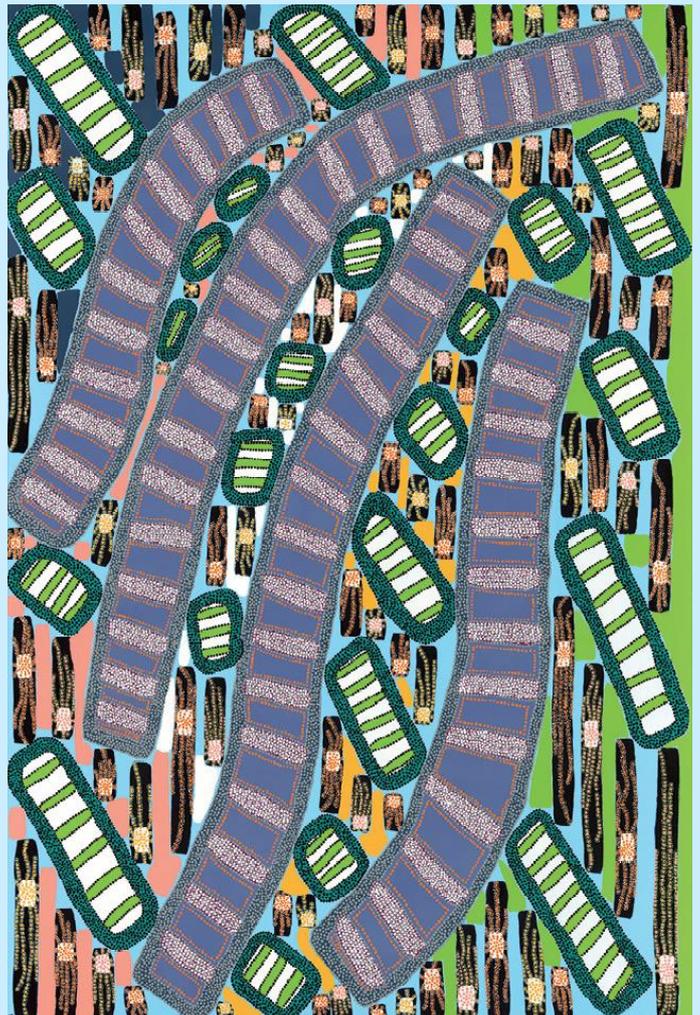
We pay respect to Elders past and present and commit to respecting the lands we walk on, and the communities we walk with.

We celebrate the deep and enduring connection of Aboriginal and Torres Strait Islander peoples to Country and acknowledge their continuing custodianship of the land, seas, and sky.

We acknowledge the ongoing stewardship of Aboriginal and Torres Strait Islander peoples, and the important contribution they make to our communities and economies.

We reflect on the continuing impact of government policies and practices and recognise our responsibility to work together with and for Aboriginal and Torres Strait Islander peoples, families, and communities, towards improved economic, social and cultural outcomes.

Artwork: 'Regeneration' by Josie Rose



Contents

Summary.....	3
Introduction.....	7
The NSW Productivity Commission.....	7
Competitive neutrality and productivity	7
This submission	8
Strengthening enforcement and compliance	9
The current complaints process is confusing and complex	9
Reporting and transparency.....	14
Regular review.....	15
Modernising the scope of competitive neutrality policies	17
What activities should competitive neutrality apply to?.....	17
Should competitive neutrality policies apply to other government activities?	23
Guidance to make competitive neutrality policies operate better.....	25
Clarifying certain obligations imposed by competitive neutrality.....	25
Improving the operation of the public interest test	26
Ensuring competitive neutrality policies are clear and accessible.....	28
Appendices.....	29
Acronyms.....	33
Reference List.....	34

Summary

NSW's competitive neutrality policies and processes are not best practice

A well-functioning competitive neutrality policy can drive public sector efficiency and promote a resilient and diverse economy. NSW's competitive neutrality policies and processes are, however, not meeting the Government's competition policy objectives.

Some changes are needed to the policies themselves, but of greater concern is enforcement and compliance. An effective complaints process should bring to light breaches and hold government businesses accountable at a state and local government level. The current complaints process is, however, overly complex. There is no clear entry point for complainants and multiple agencies are involved. This complexity may deter businesses from complaining or take up unnecessary resources. It may also explain the low number of complaint investigations in NSW to date.

Consistent reporting on compliance with competitive neutrality by government businesses is also lacking. This is concerning as transparency can be an effective compliance mechanism where a policy depends heavily on self-enforcement, as is the case with the competitive neutrality policies. Some reporting for large government business enterprises used to occur through the Council of Australian Governments' annual Competitive Neutrality matrix, but this matrix ceased to be published in the transition to National Cabinet during the COVID-19 pandemic.

There is scope to improve processes to support better enforcement and compliance

The competitive neutrality complaints processes could be streamlined and enhanced to make it easier and more accessible to bring a complaint forward. Changes could include creating a single process for all state, local and tender-related complaints and allowing complaints to be made directly to the complaints investigation body, rather than to the government business in the first instance. The requirement for ministerial referral of complaints could also be removed.

There is also scope to increase transparency by requiring state government businesses to report on compliance with competitive neutrality in their annual reports. Local government competitive neutrality reporting requirements could also be refreshed and aligned with other local government reporting processes.

Other updates would better reflect the changing nature of government business activities and the policy intent of competitive neutrality

The current competitive neutrality policy was written 20 years ago, before it was envisaged that governments might take equity stakes in private businesses. Such transactions currently fall outside of the scope of our competitive neutrality policies yet may confer advantages such as lower insurance premiums and borrowing costs. If this is the case, competitive neutrality principles should apply at the point of investment, for example through contractual arrangements.

The policy could be expanded to capture additional situations where government may unfairly compete against the private sector. For example, through the provision of goods and services for free or largely below cost, in circumstances where there is no explicit government policy to cover the costs through budget funding.

Further guidance could be provided to agencies to support better application of the policy

There are a range of situations where further guidance may assist agencies that are required to apply the policy. For example, the policy is currently silent on non-cost advantages from government ownership. Competitive neutrality principles could be explicitly extended to non-cost advantages, alongside guidance to support their application. The public interest test would also

benefit from greater guidance, as it is confusing and opaque. Government businesses are also likely to lack the internal capability to conduct the cost-benefit analysis that the test requires.

Complaints

Potential improvement 1

The complaints process could be streamlined and enhanced so that a single process applies to all state, local and tender related complaints, whereby:

- anybody could make a complaint
- complainants could be encouraged to resolve with the business in the first instance, or IPART could do so on their behalf if they are not comfortable raising directly
- the requirement for the Minister for Customer Service to refer complaints to IPART is removed
- timeframes, processes, and requirements for responding are equivalent for all complaints
- investigations and responses are publicly available.

Oversight and administration requirements

Potential improvement 2

State government businesses could be required to publish a statement of compliance with competitive neutrality in their annual report, including:

- an acknowledgement of compliance with competitive neutrality
- where competitive neutrality does not apply, a justification in accordance with the significance or public interest test
- details of the steps taken to comply with competitive neutrality
- the basis of pricing decisions, subject to any commercial confidentiality restrictions
- number of complaints received and their outcome, including any changes made by the business in response.

Potential improvement 3

Existing local council reporting requirements could be refreshed to ensure they are clear, consistent, and well-integrated with other council reporting processes.

Which Government activities do competitive neutrality policies apply to?

Potential improvement 4:

Competitive neutrality policy documents could:

- be subject to five-yearly periodic review and
- allow for minor *ad-hoc* corrections, updates or clarifications where required.

Potential improvement 5

The NSW Competitive Neutrality Policy could contain further guidance on when agencies should re-assess significance. This could include certain trigger points, such as if a government activity is expected to rapidly become significant, if the market is expected to mature or if government entity expands into a new commercial activity where competitive neutrality applies.

Potential improvement 6

Competitive neutrality principles could be applied to all equity investments by the NSW Government in significant business activities, to the extent that the investment provides an advantage from government ownership. This could be done at the point of investment, or divestiture of a controlling share of a government business.

Potential improvement 7

The NSW Competitive Neutrality Policy could be expanded to cover the provision of goods and services for free or largely below cost, but only in the absence of an explicit government policy that the costs of the goods or service are to be largely or entirely met through budget funding.

Potential improvement 8

Clarify the application of competitive neutrality to in-house business units that tender for the provision of internal services.

Potential improvement 9

Clarify what is meant by “other parts of the public sector” in the current policy.

Potential improvement 10

Clarify that competitive neutrality principles apply to government businesses that are monopolies or near monopolies.

Potential improvement 11

The requirement for self-sufficiency in the indicators of a business activity could be removed or relaxed.

Potential improvement 12

The state and local government definitions of a business activity could be aligned to promote consistency.

Potential improvement 13

To encourage a more robust application of competitive neutrality to government business activities the threshold for significance could be lowered to capture entities that:

- possess market power to create a competitive impact in the market that is more than nominal or trivial, and
- are of a size relative to the size of the market that is more than nominal or trivial.

Potential improvement 14

Further guidance on the tests for significance and the market could be provided, similar to the guidance provided in Victoria.

What obligations should competitive neutrality impose?

Potential improvement 15

Competitive neutrality principles could be explicitly extended to non-cost advantages and guidance provided to support their application.

Potential improvement 16

The guidance in the Pricing Guidelines could be amended to note that there may be certain situations where it is appropriate for a standalone business to take longer than five years to achieve a commercial rate of return. For example, where the business has large capital costs to recover or having regard to comparable businesses in the private sector.

Potential improvement 17

The public interest test could be made easier to understand and more transparent by:

- updating the policy to clarify how and when it applies, and align requirements between the state and local policies
- developing further guidance material, such as recommended methodologies and guidance on situations where a qualitative assessment may be appropriate
- requiring cost benefit analysis that is used to justify an exemption from competitive neutrality be published for both State and local government.

Potential improvement 18

All competitive neutrality policies, procedures and other documents should be made available online to the public. To aid understanding of the application of competitive neutrality requirements, companion guidelines and explanatory material could be drafted.

Introduction

The NSW Productivity Commission

Peter Achterstraat AM was appointed NSW's Productivity Commissioner in May 2018 with a mandate to develop a productivity reform agenda that will enhance the lives of NSW residents, businesses, and communities, and to drive specific reforms. The NSW Productivity Commission undertakes objective analysis to identify productivity reforms to improve the well-being of NSW citizens. This includes competition reforms, as competition is critical to productivity improvements.

The NSW Productivity Commission White Paper, released in May 2021, set out a productivity reform agenda for NSW with 60 recommendations across seven topic areas. One of the recommendations was that the Independent Pricing and Regulatory Tribunal (IPART) update the NSW Government's competitive neutrality policy and processes (NSW Productivity Commission, 2021), rec. 4.14).

This recommendation was made on the basis that NSW competitive neutrality policies and processes have not been reviewed or updated for almost 20 years. There is scope to improve the policies and processes to ensure that they more effectively deliver the policy objectives of competitive neutrality. Identified areas for potential improvement include enhancing the complaints processes and resolving if, and how, competitive neutrality should apply when the Government takes a minority ownership stake in a business.

Competitive neutrality and productivity

Competitive markets drive growth in productivity, income and living standards. In the short-term, competition can push down market prices and increases consumer access to goods and services. In the longer-term, competition underpins the efficient allocation of economic resources, and drives innovation and technological change.

Competitive neutrality is the principle that government businesses should not gain a competitive advantage (or disadvantage) because of their government ownership. A robust competitive neutrality policy ensures that government involvement in markets does not have undue anticompetitive effects and does not unfairly affect private businesses or consumer interests. The principle is particularly important in the post-COVID-19 recovery period, where failure to apply competitive neutrality will inhibit the recovery of private enterprises in competition with government business.

Exposure to competitive pressure also improves the performance of government business activities (PC, 2005; Trembath, 2002). The Australia Productivity Commission previously found that National Competition Policy (NCP) reforms had a significant impact on the financial performance of Government business activities (PC, 2005, pp. 73–77).

The Organisation for Economic Co-operation and Development (OECD) has described Australia's competitive neutrality framework as the 'most complete' (OECD, 2012a, p. 107). Submissions to the *Competition Policy Review* (Harper Review), however, argued that there were a variety of Government business activities where the application of competitive neutrality remained an issue, including telecommunications and healthcare (Harper et al., 2015, chap. 13). The Harper Review recommended that all Australian governments review their competitive neutrality policies.

This submission

This submission responds to the June 2022 IPART Issues Paper: Competitive Neutrality in NSW. It represents the view of the NSW Productivity Commission and does not represent NSW Government policy. It outlines potential options for improvements to competitive neutrality policies and processes in three broad areas:

1. strengthened enforcement and compliance
2. modernising the scope of competitive neutrality's application
3. guidance and clarification to support better application of the policy.

Strengthening enforcement and compliance

The current complaints process is confusing and complex

Issues Paper Question 7: How can the processes for lodging or investigating complaints be improved?

Issues Paper Question 8: What are the benefits and disadvantages of retaining a separate process for complaints about local government businesses?

A National Competition Council (NCC) Discussion Paper previously outlined four indicators of a best-practice complaints process (Trembath 2002, 3). These principles were broadly approved and restated in the Harper Review, which additionally recommended that:

- governments be required to publicly respond to findings of competitive neutrality complaints investigations and
- independent bodies (in NSW, IPART and the Office of Local Government (OLG)) be required to report on the number of complaints received and investigations taken ((Harper et al. 2015), rec. 16).

As shown in Table 1, neither the state or local government complaints process fully aligns with this 'best-practice' approach:

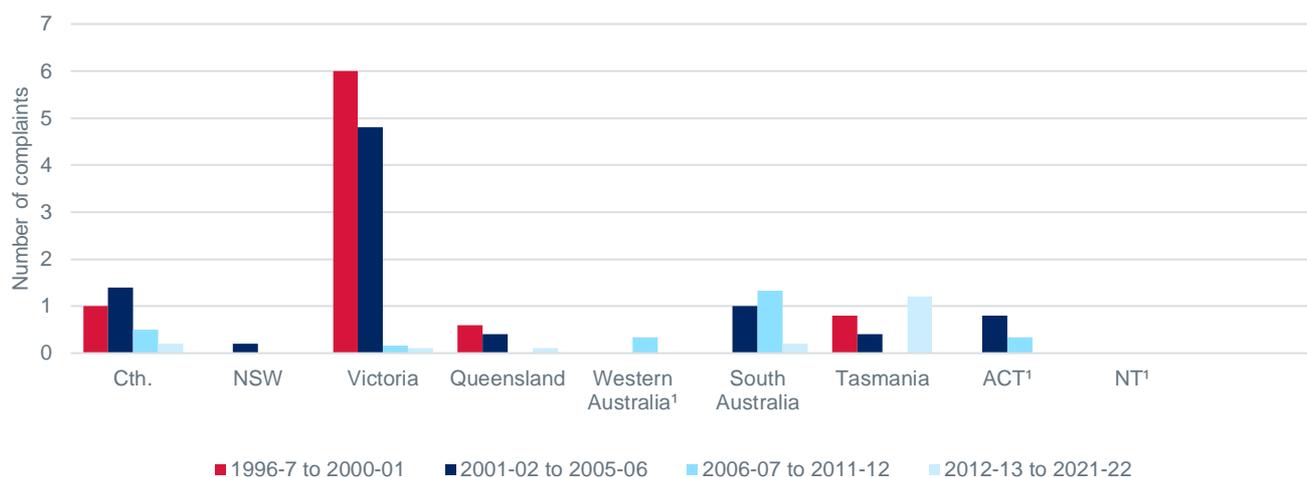
- there are no timing or content requirements placed on local council responses in the first instance
- there is no requirement for the Minister for Customer Service or Minister for Finance to provide reasons for not referring a matter to IPART or the NSW Procurement Board
- there is no requirement for OLG to publicly report its findings
- there is no requirement for a local council to respond to OLG findings.

Table 1 Alignment of NSW and best-practice competitive neutrality complaints processes

Indicator	NSW Government	Local Government
Complaints are heard by an entity separate from the Government business	Met	Met
Complainants are required to raise issues with the Government business in the first instance	Met	Met
Potential for all government business to be the subject of a complaint	Met (where competitive neutrality policy applies)	Met (where competitive neutrality policy applies)
Complaints are handled transparently	Partially met – Complaints heard by IPART and the NSW Procurement Board are transparent in their proceedings and determination, but this is not the case for complaints before an Agency or the Minister	Not met – Complaints process is opaque
Government required to publicly respond to competitive neutrality investigations	Met – section 24GE of the <i>IPART Act 1992</i> and section 12 of the <i>Public Works and Procurement Regulation</i> requires the portfolio minister to publicly respond to an investigation report within 8 weeks	Not met
Complaints body required to publicly report on the number of complaints and their outcomes	Met – IPART and NSW Procurement Board reports are made public	Not met – OLG reports are not made public

There is also evidence that the complaints process is not operating effectively and that it is harder to get a complaint investigated than in other jurisdictions. As noted by the issues paper, only one competitive neutrality investigation has been published in NSW, the lowest of any state (Figure 1).

Figure 1 Average annual competitive neutrality investigations by jurisdiction



¹ Does not appear to have published competitive neutrality complaints over the 2011–12 to 2020–21 period.

Notes: Counts may omit completed competitive neutrality investigations that have not been published – for example, against investigations into local government in Queensland.

Source: Counts for 2011–12 and prior are taken from VCEC (2013) Table 1.2 with subsequent counts taken by the NSW Productivity Commission from various publicly available sources.

Raising complaints with the business in the first instance may help to resolve matters without a formal investigation. NSW, Queensland, Tasmania and the Northern Territory have this requirement, with the exact nature differing across jurisdictions.¹ Only in NSW must complainants have reasonable grounds for not being satisfied with the response of the government business *and* request the responsible minister to refer the complaint to IPART. This effectively requires an assessment of the merits of the complaint by the responsible Minister before the complaint reaches IPART. This is a higher bar than applies in any other jurisdiction and may contribute to the very low levels of complaints in NSW.

There are low numbers of complaints in other jurisdictions too, and the number of complaints has generally been decreasing overtime. This may suggest that there are other reasons driving the low numbers of complaints, including significant instances of non-compliance being rectified when the policies were introduced.

¹ In Queensland, a complainant must show they have made a ‘genuine attempt’ to resolve a competitive neutrality complaint with the subject of the complaint (s 41 *Queensland Competition Authority Act 1997* (Qld); s 45 *Local Government Regulation 2012* (Qld)). In Tasmania a complainant is required to have ‘discussed the supposed contravention’ with the subject of the complaint (s 48 *Economic Regulator Act 2009* (Tas)). In the Northern Territory, a complainant must include information on attempts to address the subject matter of the complaint with the business concerned and the outcome of the attempted resolution (NT Government 2020, 13).

Table 2 Interjurisdictional comparisons of complaints processes

	CTH	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
Required to first raise matter with entity	X	✓	X	✓	X	X	✓	X	✓
Single entity for local / state investigations	✓	X	✓	✓	X	✓	✓	✓	✓
Single process for local / state investigations	✓	X	✓	X	X	✓	✓	✓	✓

Note: The ACT and Commonwealth Governments each administer only one level of government. The NT policy statement additionally notes that no significant business activities are undertaken by local governments in the NT.

Source: NSW Productivity Commission.

Additionally, the NSW process is difficult to navigate, with no clear entry point for business and multiple agencies involved. Complaints in NSW are handled by IPART, OLG and the Procurement Board, contributing to the confusion and complexity in the system. All other jurisdictions — except Western Australia, which has a separate office for local government and state government complaints — have only one responsible authority. Most jurisdictions also have a single process that applies to state and local government activity, whereas in NSW the processes are separate. The process that applies to local government complaints is also poorly defined. The local government policy document only states that OLG will handle complaints that have not been resolved where the request is reasonable, and even this information is difficult to find publicly.

As noted in the Productivity Commission White Paper, this complexity may deter businesses from complaining or take up unnecessary business resources. Examples that illustrate the complexity and opaqueness of the current system include a draft local council policy document incorrectly advising that IPART will pursue complaints that have not been resolved by the council.² Despite not having jurisdiction over the process, the Productivity Commission has also been approached by businesses seeking assistance regarding complaints. One example involved a business who was bounced between agencies for over 18 months in relation to some local council pricing policies for printing businesses. The relevant councils were written to by the OLG to seek compliance with competitive neutrality, but there was no follow up to ensure compliance.

Making it easier to bring a complaint

There is considerable scope to rationalise and enhance the competitive neutrality complaints process. Options to make the process clearer and more accessible include:

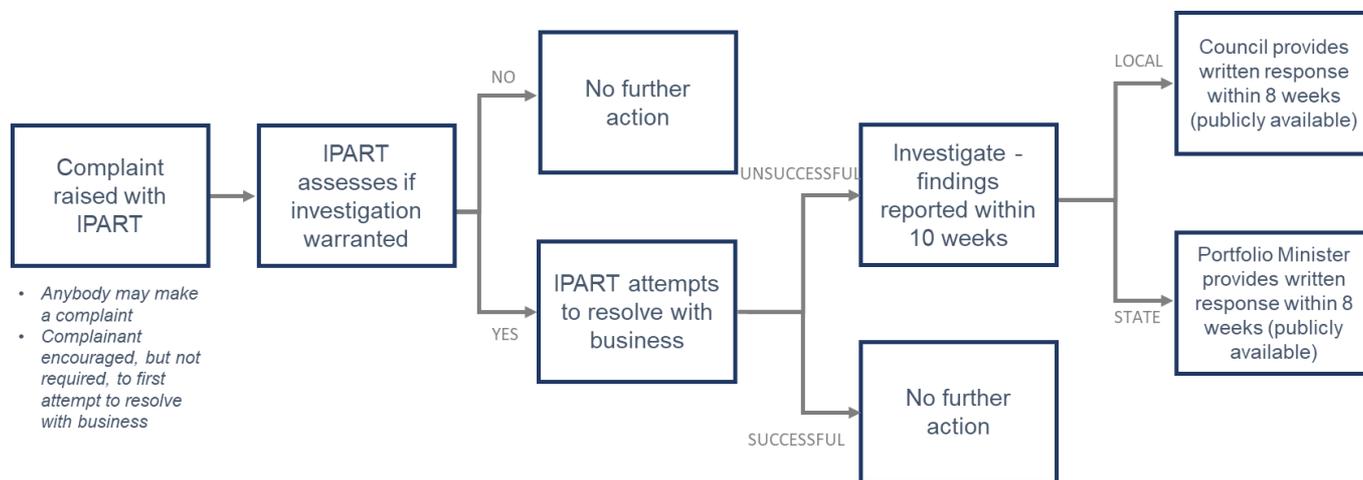
- **Removing the requirement that the complainant is an actual or potential competitor to the business.** Allowing anybody to raise a complaint could assist some genuine complaints to be made, for example where a business does not want to be identified and another party can make a complaint on their behalf. Experience in other jurisdictions and historical complaints in NSW suggest overall complaint numbers would remain low and manageable and there would be minimal downsides to the change.

² <https://yourvoice.qprc.nsw.gov.au/45368/documents/103870>

- **Create a single process for all complaints.** Aligning the processes that apply to state and local government businesses, as well as tender complaints, would make the process easier to navigate. The same requirements for transparency, reporting and responses by the relevant Minister or council would apply to both. The policy documents should provide guidance on what should be contained in responses to ensure that where IPART’s findings are not adopted, strong justification is provided, with reference to the public interest test.
- **Allowing complaints to be made directly to IPART.** Removing the requirement for the Minister for Customer Service to refer complaints to IPART would speed up the process and remove a barrier to complaints being investigated. IPART, rather than the Minister, would then apply the relevant criteria to determine whether the complaint should be investigated for all state, local and tender related complaints.
- **Encourage, but do not require, complainants to first raise issues with the business.** The requirement for a complainant to raise the issue with the business prior to investigation may deter some genuine complaints by individuals who do not want to be identified. An alternative approach, like the process applied in Victoria, could encourage complainants to raise the issue with the business in the first instance. But if a complainant feels unequipped to do this themselves, or does not want to be identified, they could instead go directly to IPART, who could attempt to resolve with the business on behalf of the complainant prior to an investigation.
- **Ensure the process is transparent.** The current policy requires IPART and the NSW Procurement Board’s investigations and government responses to those investigations to be made public. This requirement should be retained, and similar requirements applied to local council investigations. Public accessibility would be improved by making all reporting available in a central location.

Figure 2 provides a high-level overview of what the complaints process would look like for state and local government businesses should these changes be implemented. Amendments to the *IPART Act 1992* and the *Public Works and Procurement Act 1912* would be required.

Figure 2 Potential operation of a streamlined complaints process



Potential improvement 19

The complaints process could be streamlined and enhanced so that a single process applies to all state, local and tender related complaints, whereby:

- anybody could make a complaint
- complainants could be encouraged to resolve with the business in the first instance, or IPART could do so on their behalf if they are not comfortable raising directly

- the requirement for the Minister for Customer Service to refer complaints to IPART is removed
- timeframes, processes, and requirements for responding are equivalent for all complaints
- investigations and responses are publicly available.

Reporting and transparency

Issues Paper Question 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?

Information on the application of competitive neutrality should be open and available to the public, limited only by confidentiality or privilege. As noted by the OECD:

The ability to identify the cost structure of entities providing commercial and non-commercial services in parallel is essential – not to the principle of competitive neutrality per se, but to enable authorities to enforce it credibly...

High standards of transparency and disclosure should be maintained among State Owned Enterprises (or other entities entrusted with public service obligations) ... The cost structure of publicly funded entities involved in commercial activities should be fully disclosed to the relevant regulatory authorities and to the largest extent possible (given concerns such as commercial confidentiality) be open to scrutiny by the general public (OECD 2012, 37).

This could be achieved by requiring government businesses to publicly report on compliance with competitive neutrality in their annual reports – as recommended by the Harper Review (Harper et al. 2015), rec. 17, as already occurs in other jurisdictions. The Commonwealth policy requires entities to report against a list of prescriptive requirements (Australian Government 1996, 22). Victoria, on the other hand, leaves details of reporting to the government businesses.³

It is important to strike the right balance between increasing transparency and avoiding imposing unnecessary additional reporting. It should, however, be noted that compliance with competitive neutrality depends heavily on self-enforcement, in which transparency can be a very effective compliance mechanism. Guidance about what should be reported could have benefits by instilling a culture of compliance and increased transparency.

For state government businesses, reporting could occur in the business' annual report, if they are required to publish a standalone annual report, or in their department's annual report. The requirement should extend to all state government businesses, whether actually subject to the policy or not, so that all state government businesses at a minimum consider the policy and demonstrate that they have applied the public interest and significance tests. Regulatory amendments to embed the reporting requirement alongside other annual reporting requirements for Departments and Statutory Corporations could be considered to help ensure compliance and raise awareness around competitive neutrality obligations.

³ For example, in its 2020-21 report, Development Victoria included a section on competitive neutrality which included a summary of the Victorian CN policy, dot points on compliance with the policy and number of assessable complaints received (Development Victoria 2021, 41).

Local councils have a range of financial reporting requirements aimed at ensuring decision making is transparent and accountable. For declared business activities they must prepare Special Purpose Financial Statements and are provided detailed guidance on their format through the Local Government Code of Accounting.⁴ In addition, the NSW Government Policy Statement on the Application of National Competition Policy to Local Government requires councils to report on progress in implementing competitive neutrality in their annual reports, and the Department of Local Government to report on overall progress in their annual report. The summary is also to make reference to complaints received and associated implementation issues.

Review of a selection of council annual reports and Special Purpose Financial Statements suggests that compliance with financial reporting requirements through Special Purpose Financial Statements is high. Reporting in annual reports regarding competitive neutrality implementation progress or complaints received, however, appears to be limited. In addition, while financial information is available through the Special Purpose Financial Statements, it can be difficult to see how competitive neutrality principles have been applied. A review and refresh of local council reporting requirements may be warranted to ensure that requirements are clear and integrated into other council reporting processes.

Potential improvement 20

State government businesses could be required to publish a statement of compliance with competitive neutrality in their annual report, including:

- an acknowledgement of compliance with competitive neutrality
- where competitive neutrality does not apply, a justification in accordance with the significance or public interest test
- details of the steps taken to comply with competitive neutrality
- the basis of pricing decisions, subject to any commercial confidentiality restrictions
- number of complaints received and their outcome, including any changes made by the business in response.

Potential improvement 21

Existing local council reporting requirements could be refreshed to ensure they are clear, consistent, and well-integrated with other council reporting processes.

Regular review

Issues Paper Question 4: How often should government businesses re-assess their activities for competitive neutrality? What circumstances could trigger a reassessment?

Competitive neutrality policies and processes should be periodically reviewed

Competitive neutrality policy and processes should be routinely updated to allow for novel or unforeseen developments, to ensure they are operating effectively and no aspects of them are outdated or redundant. For example, the NSW *Policy Statement on the Application of Competitive Neutrality (TPP 02-01)* (the NSW Competitive Neutrality Policy) refers to the 'State Contracts Control

⁴ [Local Government Code of Accounting Practice and Financial Reporting - Section 3 - Special Purpose Financial Statements \(nsw.gov.au\)](#). The Code is prepared in accordance with Pricing and Costing for Council Businesses: A Guide to Competitive Neutrality.

Board', an entity that was abolished in 2012 and replaced by the NSW Procurement Board. The NSW Government Guide to Better Regulation requires regulation to be periodically reviewed (NSW Treasury 2019, 19).

Ongoing currency of the policy could be ensured by building a periodic review process into the policy itself. A five yearly review would align with requirements that apply to other NSW Treasury policy documents. Review could be undertaken by NSW Treasury as the policy holder. An additional option would be to include a process for minor *ad-hoc* changes with minimal formality to allow for corrections to be made as surrounding context changes – for example, replacing references to the State Contracts Control Board.

Potential improvement 22:

Competitive neutrality policy documents could:

- be subject to five-yearly periodic review and
- allow for minor *ad-hoc* corrections, updates or clarifications where required.

Government businesses should regularly reassess application of competitive neutrality policies

A NCC discussion paper identified the regular review of significance as a feature of best practice competitive neutrality policy (Trembath 2002, 14). The paper also noted the role of an effective complaints mechanism in maintaining the currency of the significance list as it allows people to suggest that government activities that are not considered significant should be so classified. The NSW Competitive Neutrality Policy is, however, silent on re-assessing significance.

In Victoria, a guidance note elaborates on trigger points that may help government entities in determining when they need to re-assess the status of an activity (OCBR Victoria 2016):

- *Maturing market.* Government entities may provide goods or services in markets that are small and undeveloped (and, therefore, unprofitable for private firms). This could change as the market matures and grows (e.g. due to population growth, technological change and/or demand growth).
- *Change of government policy.* The business status of a government activity might change if government policy changes to increase contestability or remove a statutory monopoly.
- *Changes to the structure of the activity.* A government entity primarily undertaking non-commercial activities may expand an existing commercial activity or expand into a new commercial activity where competitive neutrality applies.

Additionally, a government activity may commence as a small-scale activity. The application of competition neutrality should be considered proactively if the government activity is expected to become significant.

Potential improvement 23

The NSW Competitive Neutrality Policy could contain further guidance on when agencies should re-assess significance. This could include certain trigger points, such as if a government activity is expected to rapidly become significant, if the market is expected to mature or if government entity expands into a new commercial activity where competitive neutrality applies.

Modernising the scope of competitive neutrality policies

What activities should competitive neutrality apply to?

Issues Paper Question 3: how should governments identify the activities that need to apply competitive neutrality principles?

The competitive neutrality principles outlined in the Competition Principles Agreement (CPA) apply to:

- all significant Government business enterprises, which are classified as “Public Trading Enterprises” (PTEs) and “Public Financial Enterprises” (PFEs)⁵ and
- other agencies that undertake ‘significant business activities’ (CPA 3.4 and 3.5).

Aspects of the scope of the NSW competitive neutrality policies could be improved, to capture situations where government may unfairly compete against the private sector.

Potential advantages from minority equity stakes

The NSW Competitive Neutrality Policy sets out the following indicators that an entity is part of the government:

1. some form of public sector ownership;
2. subject to executive control (NSW Treasury 2002, 3).

Without executive control, governments can face difficulties in applying competitive neutrality to significant businesses. Elsewhere, the NSW Competitive Neutrality Policy refers to government businesses as “those parts of the *public sector* that are principally engaged in trading activities” (emphasis added (NSW Treasury 2002, 4)).

In the twenty years since NSW’s competitive neutrality policies were last updated, the nature of the NSW Government’s participation in markets has changed. For instance, the NSW Government set up an equity fund to buy stakes in companies with potential to create new jobs in NSW (Minister for Regional NSW 2018).

The reference to “public sector” in the NSW Competitive Neutrality Policy and the requirement for executive control excludes the application of competitive neutrality to private companies in which the NSW Government has a less-than-controlling equity stake. This is despite the entity potentially benefiting from minority government ownership or backing through advantages such as lower

⁵ As per Australian Bureau of Statistics Classifications in 1996. These are now referred to as Public Financial Corporations and Public Non-Financial Corporations.

insurance premiums or borrowing costs under the principle of joint and several liability.⁶ Advantages may not arise in every instance and would need to be assessed on a case-by-case basis.

Given the possible competitive neutrality advantages from even a minority government equity share, the NSW Government should commit to applying competitive neutrality principles, to the extent relevant, to all equity investments. This would require the NSW Government to undertake a considered and transparent assessment of competitive neutrality prior to becoming a part owner of a business or divesting a controlling share of a government business. This is the point at which the NSW Government can implement competitive neutrality principles, for example through contractual arrangements. Other policy considerations should also apply, including whether it is an appropriate role for government and broader competition policy implications.

Potential improvement 24

Competitive neutrality principles could be applied to all equity investments by the NSW Government in significant business activities, to the extent that the investment provides an advantage from government ownership. This could be done at the point of investment, or divestiture of a controlling share of a government business.

Revisiting indicators of business activities

The CPA is clear that the principles of competitive neutrality “only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.” (COAG 1995).

There are opportunities to revisit the current indicators of business activities in NSW to better reflect competitive neutrality principles.

User-charging

Apart from Tasmania and the Australian Capital Territory, all jurisdictions including NSW consider the act of user charging, (that is, supplying goods and services to users for a given price) to be an indicator of a business activity (see Table 3).⁷

A NCC discussion paper suggests that a best practice definition of business encompasses all government activities that charge users and trade in goods or services (Trembath 2002, 1). This is consistent with the NSW definition.

There may, however, be instances where government activities distort the market and yet also function outside the current definition of ‘government business’ in NSW. For instance, where an agency provides a good or service in a market for free and there is no explicit government policy that the costs of the goods or services are to be met through budget funding. Expanding the NSW Competitive Neutrality Policy to cover this situation would be consistent with the intent of competitive neutrality to create a level playing field between government and non-government business.

⁶ This is a legal principle whereby all investors are liable individually to pay the whole amount for liabilities regardless of their share.

⁷ Tasmania applies competitive neutrality broadly to government agencies producing goods or services in an actually, or potentially, competitive market. Tasmania considers that further tests, relating to significance, cost and the public benefit, provide the appropriate means for eliminating those Government business activities that should not be subject to competitive neutrality (Government of Tasmania 1996, i). The ACT defines government businesses as “organisational units within the public sector that produce goods and services which are, or could be sold or tendered in the marketplace without compromising government’s economic or social objectives.” (ACT Department of Treasury 2010, 11).

Table 3 – comparison of business criteria across jurisdictions

	CTH	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
User charging	✓	implied	✓	✓	✓	✓	X	X	✓
User charging meets most of the costs of or revenue from providing good and services	X	X	✓	✓	✓	X	X	X	✓
Actual or potential competitors	✓	implied	✓	X	implied	implied	✓	X	implied
Independence in relation to production, supply and/or price of the good or service	✓	✓	✓	X	X	X	X	X	X

Source: NSW Productivity Commission analysis

Below-cost pricing

Under the NSW Government’s *Performance Reporting and Monitoring Policy for Government Businesses* (TPP18-02), which is a part of the Commercial Policy Framework, a government business is defined in general terms as “an entity that provides market goods and/or services to clients in return for fees *that contribute to a significant share of its expenses*” (emphasis added) (NSW Treasury 2018, 2).⁸ Recovery of a large share of expenses through user charging is also an indicator of a business activity under the Victorian, Queensland, Western Australian and Northern Territory competitive neutrality policies. In contrast, the NSW Competitive Neutrality Policy does not require fees for goods and/or services to cover a significant share of expenses.

Setting prices to recover most costs is characteristic of a business activity, apart from short-term loss-leading pricing. On the other hand, where a government activity is explicitly funded by the budget, the charging of nominal fees is typically not indicative of a business activity.

As with the provision of goods and services for free, the application of competitive neutrality could turn on whether the Government’s policy intention is for the cost of provision to be predominantly met through the budget. If that is not the policy intention, then competitive neutrality principles could apply to the activity.

Contestable in-house goods or services

The NSW Competitive Neutrality Policy includes the provision of goods and services to other parts of the public sector in the definition of a ‘business activity’. It excludes the application of competitive neutrality to goods or services supplied by internal business units. This differs from the *Guidelines for Pricing of User Charges (TPP 01-2)* (the Pricing Guidelines) which apply to in-house business units that tender for the provision of internal services (NSW Treasury 2001, 15).

The scope of the NSW Competitive Neutrality Policy could be extended to in-house business units that compete against external bids for the provision of internal services. This would align the scope of the NSW Competitive Neutrality Policy and the Pricing Guidelines. It is also consistent with the

⁸ In practice, identification of an entity that is a government business references the classification of entities considered material for the whole-of-government reporting purposes. This is contained in the NSW Budget Papers Appendix: Classification of Agencies. For example, TPP18-02 notes that public financial corporations (PFCs) and public non-financial corporations (PNFCs) are automatically classified as government businesses.

intention of competitive neutrality to create a level-playing field between government and non-government businesses in circumstances where an internal service is contestable.

The NSW Competitive Neutrality Policy could also provide greater clarity on what is meant by “provision of goods and services to other parts of the public sector”. For instance, should the policy apply to the provision of goods and services to a public sector entity with a different Australian Business Number (ABN), even if they are part of the same broad grouping (in NSW, a “cluster”)?

Actual or potential competition

Most jurisdictions apply competitive neutrality principles to government business activities in markets where there is actual or potential competition (see Table 3). This is on the basis that competitive neutrality aims to remove net competitive advantages relative to private sector competitors. There is scope to clarify that the NSW Competitive Neutrality Policy should apply to monopoly government businesses, to promote allocative efficiency and to encourage potential competition where relevant. This would align with the position taken in Queensland (Queensland Treasury 1996, 25).

Self-sufficiency

The NSW Competitive Neutrality Policy refers to a large measure of self-sufficiency as being an indicator of a business activity but does not elaborate on what this means. A similar requirement exists in the Commonwealth and Victorian competitive neutrality policies, which refer to managers of the activity having a degree of independence in relation to the production or supply of the good or service and the price at which it is provided (see Table 3).

The Victorian guidance on this requirement notes that constraints on a government entity’s independence may arise from a range of sources, including regulation, government policy statements and/or Ministerial directions (OCBR Victoria 2016). It sets out a case study of where an entity was so substantially constrained in its independence that it did not constitute a business for competitive neutrality purposes in Victoria (see Box 1).

Box 1 – Independence requirement and Ambulance Victoria

In considering a complaint regarding non-emergency patient transport (NEPT) services provided by Ambulance Victoria (AV), the former Victorian Competition and Efficiency Commission (VCEC) found that AV had independence over the pricing of these services but faced government-imposed constraints on the way the services were provided. These constraints included (i) an obligation to act as a ‘fail safe’ provider for NEPT services, and (ii) Government policy and funding commitments to maintain service and staffing levels in specific locations.

On balance, the VCEC concluded that these constraints were substantial enough for the independence criterion not to be met. The activity was, therefore, found not to constitute a business for competitive neutrality purposes (OCBR Victoria 2016b).

Alternatively, Ambulance Victoria could comply with competitive neutrality if its obligations to maintain service and staffing levels in specific locations, and to act as a ‘fail safe’ provider for NEPT services were viewed as Community Service Obligations. The pricing and provision of other NEPT services could then be separately assessed as business activities potentially subject to competitive neutrality, depending on their significance.

The self-sufficiency indicator could be relaxed or removed, to promote the application of competitive neutrality where government is engaged in trading goods or services.

Local government definition of business

The local government policy position is that a local government business activity will generally involve the supply of goods and services for a fee or charge (NSW Government 1996, 12) although charging for a good or service may not be enough. For example, the policy notes that a local council's road building services are unlikely to be a business even if it generates revenue for the council. It is not clear in the policy why road building services are unlikely to be a business.

This is at odds with the NSW Competitive Neutrality Policy, whereby charging for a good or service is enough to make the activity a business activity, so long as several other conditions are also satisfied (actual or potential competitors and self-sufficiency).

The local government competitive neutrality policy also lists several other factors that point to an activity being a business activity:

- is subject to competition (for example, council bids for external contracts or there is actual or potential competition from other firms)
- is significant to the people who are supplied by it⁹ and
- has an impact on the local, regional or broader economy.

The latter two factors relate to significance, rather than the nature of the activity as a business or non-business activity.

It is unclear why the definitions of business should be different at the local government and state government levels. The definitions could be aligned.

Potential improvement 25

The NSW Competitive Neutrality Policy could be expanded to cover the provision of goods and services for free or largely below cost, but only in the absence of an explicit government policy that the costs of the goods or service are to be largely or entirely met through budget funding.

Potential improvement 26

Clarify the application of competitive neutrality to in-house business units that tender for the provision of internal services.

Potential improvement 27

Clarify what is meant by "other parts of the public sector" in the current policy.

Potential improvement 28

Clarify that competitive neutrality principles apply to government businesses that are monopolies or near monopolies.

Potential improvement 29

The requirement for self-sufficiency in the indicators of a business activity could be removed or relaxed.

⁹ Further guidance notes that the nature of the activity matters. Some activities, like community service functions, can be difficult to treat as a business (Department of Local Government 1997, 6).

Potential improvement 30

The state and local government definitions of a business activity could be aligned to promote consistency.

Potential improvements to the significance test

The threshold for significance could be lowered

Australian jurisdictions have varied significance requirements (see [redacted] in the Appendix). Most jurisdictions, including NSW, list the size of the business relative to the market and the impact on competition as relevant considerations.

South Australia has a particularly low threshold for significance, requiring the entity to:

- possess market power to create a competitive impact in the market that is more than nominal or trivial, and
- be of a size relative to the size of the market that is more than nominal or trivial.

A relatively low threshold for significance may encourage a more robust application of competitive neutrality than the current definition.

A multi-criteria test for significance remains appropriate

The Commonwealth and to an extent Western Australia, employ a monetary threshold test for significance. The WA Policy, which was last updated in 1996, states that a government business is unlikely to be significant if its annual revenue base or asset base is lower than \$10 million. The Commonwealth employs a \$10 million annual revenue threshold, also set in 1996. In today's dollars, this would be \$18 million, using the Reserve Bank of Australia's inflation calculator.

While a monetary threshold has the advantage of simplifying the application of the significance test, it lacks the nuance of looking at the specific market and whether the behaviour of the government business affects competition. This has several disadvantages relative to the multi-criteria test applied in NSW and other jurisdictions. Most notably, activities that fall under a monetary threshold may still have significant impacts in a small market.

Guidance on the definition of a market and significance indicators could be provided

Victoria and South Australia both provide guidance on what constitutes a market, for the purposes of competitive neutrality analysis:

- South Australia: an area of close competition between firms with four dimensions (product, functional, geographic and temporal). Substitutability between products and sources of supply in response to price changes (South Australian Department of Premier and Cabinet 2002, 15).
- Victoria: substitutable goods and services in a given geographic area (OCBR Victoria 2016, 4).

The NSW Competitive Neutrality Policy could be updated to provide guidance on the definition of a market, similar to the guidance provided in South Australia and Victoria.

Victoria also elaborates on the factors in their significance test (OCBR Victoria 2016). The guidance outlines the following factors as being relevant considerations for the size of the business activity relative to the size of the market, to be considered together and in conjunction with other factors:

- the category and number of goods and services offered in competition with private sector providers
- the volume of sales and revenue generated relative to other competitors
- the number of actual or potential competitors.

The guidance also notes several ways in which government business activities can influence a market:

- the mix and price of goods and services sold — for example, bundling different products and offering them at a discounted price
- the delivery channels through which products and services are distributed — for example, being able to influence access by competitors to customers or having preferential access to customers
- supply sources — for example, if the public activity is part of a government-wide purchasing program that enables it to obtain supplies more cheaply than its competitors
- promoting the public activity, such as through paid advertising or sponsorship arrangements
- financial capacity to sustain loss-making activities — for example, larger government entities may be more able to absorb short-term financial losses than are private competitors.

It reiterates that the focus of competitive neutrality investigations are advantages that relate to government ownership (as opposed to innate attributes such as the size of the business or skill of employees). These are all valid points which may assist agencies in determining the significance of their activities.

Potential improvement 31

To encourage a more robust application of competitive neutrality to government business activities the threshold for significance could be lowered to capture entities that:

- possess market power to create a competitive impact in the market that is more than nominal or trivial, and
- are of a size relative to the size of the market that is more than nominal or trivial.

Potential improvement 32

Further guidance on the tests for significance and the market could be provided, similar to the guidance provided in Victoria.

Should competitive neutrality policies apply to other government activities?

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

Impacts on competition should be considered by policymakers as part of any significant regulations, contractual arrangements, or other government activities. The NSW Government Guide to Better Regulation already imposes a requirement that regulatory proposals that impose material

restrictions on competition be assessed for whether the benefits outweigh the costs. Guidance on how to complete such an assessment is available on the NSW Productivity Commission website.¹⁰

There may be areas where competition impacts could be more closely examined. For example, a policy gap may exist with respect to potential competition impacts of tax exemptions such as payroll tax exemptions for not-for-profit childcares. The application of the public interest test (as per the Competition Principles Agreement and NSW Government Guide to Better Regulation) to both existing payroll tax exemptions in the *Payroll Tax Act 2007* and proposals for new payroll tax exemptions could be considered.

We support the objective of promoting efficient competition between public and private businesses and look forward with interest to the shortlist of areas where extension of competitive neutrality policy could yield the most significant and tangible benefits. We do, however, note that competitive neutrality policy, which is specifically targeted at removing unfair advantages for government businesses, may not be the right tool for promoting competition in all instances. In making its recommendations, the Review should consider whether competitive neutrality policy, or other mechanisms, including strengthening those that already exist, would be the best approach to achieving the objective of strengthened competition.

¹⁰ https://www.productivity.nsw.gov.au/sites/default/files/2018-05/Assessment_Against_the_Competition_Test-April_2017_1.pdf

Guidance to make competitive neutrality policies operate better

Clarifying certain obligations imposed by competitive neutrality

Issues Paper Question 1: What obligations should competitive neutrality place on non-government businesses?

We consider that the key obligations set out in the current competitive neutrality policies are sound, appropriate and in line with good practice. There is, however, scope to improve the policy by providing further guidance in two specific areas: non-cost advantages and start-up government businesses.

Non-cost advantages

There may be scope to clarify and provide further guidance in relation to how competitive neutrality applies to non-cost advantages of government businesses. For example, we are aware of instances where government businesses that have non-cost advantages such as access to information have been uncertain how to apply competitive neutrality principles. We are also aware of examples where government businesses have significant regulatory advantages yet are not actively applying competitive neutrality.

This is not to say that government businesses should always have equivalent pricing to the private sector, or that government businesses should never utilise these advantages. There may be good reasons why government is able to deliver goods and services more efficiently than the private sector that neither can nor should be corrected by competitive neutrality. Rather, the question should be whether it is an unfair advantage and whether it would be in the public interest to apply competitive neutrality principles.

In some situations, it could be appropriate to quantify non-cost advantages. In others, it may be more effective to remove the advantage altogether, for example by making advantageous information available to the private sector, or to structure government businesses so that they do not receive regulatory advantages.

Ultimately, many unique situations will arise and case by case consideration and exercise of judgement will be needed. But some clear principles could help, for example covering the types of non-cost advantages that should be considered and the responses that may be appropriate.

Start-up government businesses

It may take some time for government businesses to break-even and start delivering a commercial rate of return in the “start-up” stages of government businesses.

Currently, under the *Guidelines for Pricing of User Charges (TPP 01-02)* (Pricing Guidelines), a stand-alone NSW Government 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) (NSW Treasury 2001, 15).

The Pricing Guidelines do not apply to government businesses that are a part of the NSW Government’s Commercial Policy Framework (NSW Treasury 2001, 4). The Commercial Policy Framework imposes commercial expectations upon the entities that it applies to through, among other things, capital structure and dividend requirements. These requirements vary according to the risk profile of the business.

The period over which a commercial rate of return should be earned for businesses in their start-up phase has been contested at the Commonwealth level. For NBN Co, a business case set over 30 years with positive cash flows after 12 years was found to breach CN policy in the absence of NBNs’ community service obligations being quantified although no clear rationale was given for why the period was too long (AGCNCO 2011).

The guidance on timeframes for achieving a commercial rate of return in the Pricing Guidelines could note that there may be certain situations where it is appropriate for a standalone business to take longer than five years to achieve a commercial rate of return. For example, where the business has large capital costs to recover or having regard to comparable businesses in the private sector. The appropriate timeframe will depend on the nature of the business.

Potential improvement 33

Competitive neutrality principles could be explicitly extended to non-cost advantages and guidance provided to support their application.

Potential improvement 34

The guidance in the Pricing Guidelines could be amended to note that there may be certain situations where it is appropriate for a standalone business to take longer than five years to achieve a commercial rate of return. For example, where the business has large capital costs to recover or having regard to comparable businesses in the private sector.

Improving the operation of the public interest test

Competition is a means to improving productivity and living standards, rather than an end itself. The public interest test is a central part of NSW’s Competitive Neutrality Policy, as required under the CPA subclause 3(6). The CPA also includes factors to be considered in applying the public interest test (see Box 2).

Box 2 – Factors to be taken into account in applying the public interest test

A list of non-exhaustive factors includes:

- ecologically sustainable development
- social welfare and equity, including community service obligations
- occupation health and safety, industrial relations, industrial access and industrial equity
- economic and regional development, including employment and investment growth
- the interests of consumers generally, or of a class of consumers
- the competitiveness of Australian business, and
- the efficient allocation of resources.

(COAG 1995, sec. 1(3); NSW Treasury 2002, 6)

Application of the public interest test should be transparent

Part of the confusion and complexity around applying the public interest test may stem from a lack of clarity in the policy, as well as inconsistencies around how the term is used and applied by different jurisdictions.¹¹ In Victoria, for instance, a quantification of the costs and benefits of applying competitive neutrality is followed by a qualitative public interest test, based on the factors outlined in the CPA. Queensland, on the other hand, applies a cost benefit assessment, which includes the CPA factors, prior to application of competitive neutrality. The NSW requirements, in comparison, have a presumption in favour of the application of competitive neutrality, meaning that a formal cost benefit analysis need be completed only where an exemption is sought.

This may substantially limit the circumstances where a cost benefit analysis is undertaken, and as acknowledged by the issues paper make significance the primary test applied in practice. The NSW Competitive Neutrality Policy, however, has no requirement to publish the analysis, which makes it difficult to judge its effectiveness.

For category 1 businesses (turnover greater than \$2 million) the local government competitive neutrality policy statement also requires councils to ‘conduct an independent cost-benefit analysis to substantiate a view that the public interest will not be served by applying competitive neutrality’ and requires the analysis to be made public. We are, however, not aware of any instances where such a cost benefit analysis has been made public.

Quantifying the benefits of competition is hard, but important

Application of the public interest test can be challenging as benefits such as improved efficiency and competition can be difficult to quantify. As acknowledged by the issues paper, it can be done, however government businesses are likely to lack the internal capability to do this.

These challenges are common in policy areas that look to cost benefit analysis to support government decision making, including infrastructure funding, program funding, and regulatory impact assessment. As with these policy areas and in accordance with the NSW Government Guide to Cost Benefit Analysis, the type and rigour of analysis required will vary on a case-by-case basis and should consider the significance of the activity and whether costs and benefits are able to be

quantified. In some cases, a qualitative cost benefit analysis may be appropriate. NSW Treasury regularly provides advice to agencies and government businesses on these matters and agencies and government businesses should be encouraged to engage in relation to competitive neutrality public interest assessments.

Overall, we support the current NSW approach. The presumption in favour of competitive neutrality helps strike a balance between ensuring competitive neutrality applies only where it is in the public interest and avoiding imposing an unnecessary burden in applying the public interest test. There are, however, opportunities to clarify and smooth the process for applying the public interest test.

Potential improvement 35

The public interest test could be made easier to understand and more transparent by:

- updating the policy to clarify how and when it applies, and align requirements between the state and local policies
- developing further guidance material, such as recommended methodologies and guidance on situations where a qualitative assessment may be appropriate
- requiring cost benefit analysis that is used to justify an exemption from competitive neutrality be published for both State and local government.

Ensuring competitive neutrality policies are clear and accessible

Issues Paper Question 2: What guidance do government agencies require to support them to correctly apply the competitive neutrality principles to their activities?

To assist government business in applying competitive neutrality, NSW Treasury could retain its role in helping both agencies and business to understand the principles and application of the policy through drafting further explanatory materials and companion guidelines. Several NSW Government policy documents already take this approach – for example, *TPP 07-3: Service Costing for General Government agencies* – as do other jurisdictions – for example, the Commonwealth Government’s *Competitive Neutrality Guidelines for Managers* (Australian Treasury 2004).

While there is a competitive neutrality framework in relation to local Government, these policies documents are difficult to access – for example, only the *Pricing and costing for council businesses: a guide to competitive neutrality* appears to be available online, and only in a scanned Portable Document Format (PDF).

In addition, the current policy documents are dated and difficult to navigate. A refresh of the policy could include reducing the number of different policy documents and ensuring relevant principles are clear, succinct and consistent.

Potential improvement 36

All competitive neutrality policies, procedures and other documents should be made available online to the public. To aid understanding of the application of competitive neutrality requirements, companion guidelines and explanatory material could be drafted.

Appendices

Table 4 – indicators of businesses activities across Australian jurisdictions

Jurisdiction	Indicators
NSW	<ul style="list-style-type: none"> Engaged in trading goods and/or services, including the provision of goods to other parts of the public sector; and has a large measure of self-sufficiency. <p>The requirement for actual or potential competitors is implied where the NSW Policy notes that the CPA applies to significant government businesses in contestable markets (NSW Treasury 2002, 4).</p>
Commonwealth	<p>Activities must meet three criteria:</p> <ul style="list-style-type: none"> user-charging for goods or services presence of an actual or potential competitor and managers having a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.
Victoria	<p>Activities must meet four criteria:</p> <ul style="list-style-type: none"> activities result in the sale of a good or service the costs of providing the goods or services are predominantly met by users actual or potential competitors and managers having a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.
Queensland	<ul style="list-style-type: none"> Falls within the ABS classification of a PFE or PTE and/or Meets the following criteria: <ul style="list-style-type: none"> trades goods and/or services as their predominant activity meets a substantial part of their operating costs or earns a substantial part of their operating revenue from user charges, and has predominantly a commercial or profit-making focus. <p>Such activities may provide commercial goods and/or services either to the public, private firms or other Government agencies.</p>
Western Australia	<p>Activities must meet the following criteria:</p> <ul style="list-style-type: none"> the business activity relates to the production of goods or services for sale in a market there is user-charging for the goods or services (where the user may be a member of the general public, a private firm or another government agency), and the agency supplying the good or service is required to recover all costs (possibly including a margin for profit) or a significant proportion of these costs from the supply of the good or service (whether or not full cost recovery or profits are actually achieved). <p>Additionally, includes general government activities which are the subject of an in-house bid competing with external bids in a formal tender process.</p>
South Australia	<ul style="list-style-type: none"> Falls within the ABS classification of a PFE or PTE or Meets the following criteria:

- the activity is primarily involved in producing goods and services for sale in the market; and
- has predominantly a commercial or profit-making focus
- there is user charging for goods and/or services, or
- Where a government agency submits a tender in competition with the private sector.

Tasmania	<ul style="list-style-type: none"> • Competitive neutrality applies to a government agency producing goods and/or services in an actually, or potentially, competitive market.
Australian Capital Territory	<ul style="list-style-type: none"> • Competitive neutrality applies to all government organisational units that produces goods and services that could be sold or tendered in the marketplace without compromising government’s economic or social objectives. These trading activities extend to the provision of goods and services to other parts of the public sector.
Northern Territory	<ul style="list-style-type: none"> • Earns a substantial part of its operating revenue from user charges.

Table 5 – activities that are not business activities across Australian jurisdictions

Jurisdiction	Indicators
NSW	N/A
Commonwealth	N/A
Victoria	N/A
Queensland	<p>“Business activities” do not include activities which:</p> <ul style="list-style-type: none"> • provide goods and/or services only to their own department and are not engaging in competition with any other provider outside the department • have a predominantly regulatory or policy-making role, or • have, as their prime function, responsibility for providing a community service obligation or social policy function. Queensland then lists activities with such functions.
Western Australia	<p>The competitive neutrality policy provides explicit exceptions to what are regarded as business activities:</p> <ul style="list-style-type: none"> • the imposition or collection of taxes, levies or fees for licences • granting, refusing to grant, revoking, suspending or varying licences • policy development and advice, and <p>the provision of goods and/or services by an agency for its own consumption where there is no direct competition with any other provider outside the agency.</p>
South Australia	<p>An activity will not be a business activity if:</p> <ul style="list-style-type: none"> • it provides goods or services to government, and, for reasons of policy or law, there is no competition with alternative suppliers, or • it is clear that the intention of government is that the activity’s predominant role is regulatory or policy-making or where the achievement of public policy outcomes is the main priority of the activity.
Tasmania	<p>Certain activities are excluded from the Tasmanian definition:</p> <ul style="list-style-type: none"> • isolated and one off transactions

- regulatory or policy functions are not business activities and neither is the imposition of fees and charges associated with performing such functions
- taxing and licensing activities excluded under Part IV of the *Commonwealth Trade Practices Act*, and
- services provided and used solely by State Government departments, whether or not under a tied contract arrangement, will not be subject to the competitive neutrality principles agreed under the CPA.

Australian Capital Territory N/A

Northern Territory N/A

Table 6 – definition of significance across Australian jurisdictions

Jurisdiction	State Government	Local Government
NSW	<p>Determined by reference to a range of factors including:</p> <ul style="list-style-type: none"> • business size, • influence on the market, • resources commanded, and • the effect of poor performance. 	<p>Competitive neutrality applied to all council business activities to the extent practicable, with corporatisation to be applied to council business activities with annual sales over \$2 million</p>
Commonwealth	<ul style="list-style-type: none"> • Employs a \$10 million annual revenue threshold. 	<ul style="list-style-type: none"> • N/A
Victoria	<ul style="list-style-type: none"> • The size of the relevant business activity in relation to the size of the relevant market, and • the influence or competitive impact of the business activity in the relevant market. 	<ul style="list-style-type: none"> • Same as state government
Queensland	<p>Multi-criteria test:</p> <ul style="list-style-type: none"> • scale of operation as indicated by annual expenditure <p>Business activities exceeding \$10 million in annual expenditure are subject to commercialisation or full cost pricing, and those exceeding \$15 million are subject to corporatisation.</p> <ul style="list-style-type: none"> • market share • impact on the Queensland economy of poor performance by the business activity. 	<p>Expenditure greater than \$7.5 million per annum for water and sewerage businesses or in the case of other enterprises, greater than \$5 million in 1992/3 terms are to be subject to commercialisation if shown to have a net benefit. Corporatisation applies to expenditure greater than \$25 million per annum for water and sewerage businesses or in the case of other enterprises, greater than \$7.5 million</p>
Western Australia	<ul style="list-style-type: none"> • 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. <p>A government business is unlikely to be significant unless its annual revenue base or turnover, or asset base is greater than \$10 million.</p>	<p>\$200,000 threshold for the specific business activity in question, with corporatisation to be applied to councils with an annual turnover of \$2 million or more</p>

South Australia	Thresholds of \$2 million in annual revenue, and \$20 million for asset base or:	N/A
	<ul style="list-style-type: none"> possesses market power to create a competitive impact in the market that is more than nominal or trivial, and size relative to the size of the market as a whole is more than nominal or trivial. 	
Tasmania	Public Trading Enterprises, Public Financial Enterprises or Government Business Enterprises.	<ul style="list-style-type: none"> What is the relevant market? What is the size of the relevant market and of the Local Government body's activity compared to the whole market? What is the competitive impact (including the potential competitive impact) of the business activity in the relevant market? Is the business activity a major player in the overall market? If the business activity is the only local or regional provider of the service to the community, would competitors emerge if tenders were called?
ACT	<ul style="list-style-type: none"> It has or could have a significant impact on the relevant market; and the impact of poor performance is substantial. 	N/A
Northern Territory	<ul style="list-style-type: none"> Size of the business activity in relation to the size of the relevant market, and the business activity's influence on competition 	N/A

Acronyms

Acronym	Definition
ABN	Australian Business Number
ABS	Australia Bureau of Statistics
AV	Ambulance Victoria
COAG	Council of Australian Governments
AGCNCO	Australian Government Competitive Neutrality Complaints Office
CPA	Competition Principles Agreement
IPART	Independent Pricing and Regulatory Tribunal
NCC	National Competition Council
NCP	National Competition Policy
NEPT	Non-emergency Patient Transport
OECD	Organisation of Economic Co-operation and Development
OCBR	Office of the Commissioner for Better Regulation
OLG	Office of Local Government
PDF	Portable Document Format
PFE	Public Financial Enterprises
PTE	Public Trading Enterprises
RBA	Reserve Bank of Australia
SOE	State Owned Enterprise
VCEC	Victorian Competition and Efficiency Commission

Reference List

- ACT Department of Treasury. 2010. "Competitive Neutrality in the ACT."
https://www.treasury.act.gov.au/__data/assets/pdf_file/0004/1885063/competitive-neutrality-policy-in-the-ACT.pdf.
- AGCNCO. 2011. "NBN Co." Competitive Neutrality Investigation 14. Canberra: Productivity Commission.
- Australian Government. 1996. "Commonwealth Competitive Neutrality Policy Statement."
- Australian Treasury. 2004. "Australian Government Competitive Neutrality Guidelines for Managers." 9. Financial Management Guidance. Canberra, ACT: Department of Finance and Administration.
- COAG. 1995. "Competition Principles Agreement."
- Department of Local Government. 1997. "Pricing & Costing for Council Businesses: A Guide to Competitive Neutrality."
- Government of Tasmania. 1996. "Competitive Neutrality Principles Guidelines."
- Harper, Ian, Peter Anderson, Su McCluskey, and Micheal O'Bryan. 2015. "Competition Policy Review: Final Report." Australian Government.
- Minister for Regional NSW. 2018. "NSW Government Finds Pearl in Oyster Industry." NSW Department of Industry. May 25, 2018.
<https://www.industry.nsw.gov.au/media/releases/2018/nsw-government-finds-pearl-in-oyster-industry>.
- NSW Government. 1996. "Policy Statement on the Application of National Competition Policy to Local Government."
- NSW Treasury. 2001. "Guidelines for Pricing of User Charges." TPP 01-02.
- — —. 2002. "Policy Statement on the Application of Competitive Neutrality." TPP 02-1.
- — —. 2018. "Commercial Policy Framework: Performance Reporting and Monitoring Policy for Government Businesses." TPP 18-02. https://arp.nsw.gov.au/assets/ars/1c20d3c1db/TPP18-02_Commercial_Policy_Framework_Performance_Reporting_and_Monitoring_Policy_for_Government_Businesses.pdf.
- — —. 2019. "NSW Government Guide to Better Regulation." TPP19-01.
<https://www.treasury.nsw.gov.au/sites/default/files/2019-01/TPP19-01%20-%20Guide%20to%20Better%20Regulation.pdf>.
- NT Government. 2020. "Competitive Neutrality."
- OCBR Victoria. 2016. "Identifying Significant Business Activities for Competitive Neutrality: Guidance Note." Melbourne.
- OECD. 2012. "Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business." Paris: Organisation for Economic Co-operation and Development.
https://www.oecd-ilibrary.org/industry-and-services/competitive-neutrality_9789264178953-en.
- Queensland Treasury. 1996. "Competitive Neutrality and Queensland Government Business Activities."
- South Australian Department of Premier and Cabinet. 2002. "Competitive Neutrality Policy Statement."
- Trembath, Andrew. 2002. "Competitive Neutrality: Scope for Enhancement : National Competition Council Staff Discussion Paper." National Competition Council.
- VCEC. 2013. "Competitive Neutrality Inter-Jurisdictional Comparison Paper."

