



Australian Government

Review of the Commonwealth Government's Competitive Neutrality Policy

Consultation Paper
March 2017

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INTRODUCTION

ABOUT THIS REVIEW

Competitive neutrality requires that government business activities should not enjoy any net competitive advantages simply by virtue of public sector ownership. This ensures market competition drives efficient production by the lowest cost business.¹

Commonwealth, state and territory governments committed to implement competitive neutrality regimes in the 1995 *Competition Principles Agreement*, which was enhanced through the 2006 *Competition Infrastructure Reform Agreement*. For Commonwealth business activities, this commitment was implemented through the 1996 *Competitive Neutrality Policy Statement* and the 2004 *Competitive Neutrality Guidelines for Managers*.

The introduction of competitive neutrality policies was an important part of broader economic reforms that were introduced over several decades – for example, in international trade, domestic regulation and public sector management – and increased reliance on market-based mechanisms and competition to promote efficiency and economic growth. Over time, many business activities have been moved out of general government bureaucracies and into government-owned corporations where they have been subject to similar regulation, taxation and financing costs as their private sector competitors. In addition, competitive neutrality principles have generally ensured that, where government departments or agencies continue to conduct significant business activities, they do not gain a competitive advantage relative to actual or potential competitors.

The OECD recently concluded that Australia has one of the most complete competitive neutrality systems in the world (OECD 2012, p107). Nonetheless, the Competition Policy Review led by Professor Ian Harper made recommendations that all Australian governments should review their competitive neutrality policies and strengthen the accountability and transparency around the operation of the policies and complaint processes. In its response to the Competition Policy Review, the Commonwealth Government committed to review its competitive neutrality policy.

Treasury has established a Competitive Neutrality (CN) Review Secretariat to review the Commonwealth's competitive neutrality policy, in consultation with the Department of Finance. The purpose of this Consultation Paper is to seek your feedback on the issues listed in the terms of reference below. Following consultations and submissions, the CN Review Secretariat will make recommendations to the Treasurer, including proposed revisions to the Commonwealth's competitive neutrality policy, and associated implementation arrangements. Following Government consideration, the Treasurer will release the revised Competitive Neutrality Policy and a supporting statement that reflects submissions from stakeholders and the CN Review Secretariat's report.

¹ Competitive neutrality is sometimes used in a broader sense to refer to the neutral application of government regulation to different businesses. It may also be taken to refer to government intervention to redress the perceived disadvantages of some businesses relative to others. Neither of these applies to this review.

TERMS OF REFERENCE

The Review will evaluate the effectiveness of the current 1996 *Competitive Neutrality Policy Statement* (the CN Policy) in achieving a level playing field between government business activities and their competitors. The Review will report on the following issues:

- whether the scope of the current CN Policy remains appropriate including, in particular, the level and relevance of the threshold for a 'significant' business activity, and the possible application of competitive neutrality to other government activities;
- how the CN Policy should apply to government business activities in the start-up stage and whether this could be improved, including through changes to the guidance material;
- the effectiveness of the Commonwealth's complaints mechanism, including how the Commonwealth responds to the findings of the Competitive Neutrality Complaints Office;
- whether the current reporting arrangements, including the annual Competitive Neutrality Matrix Report, provide sufficient transparency and accountability for compliance with the competitive neutrality principles; and
- whether current arrangements for the oversight and administration of the CN Policy are satisfactory to ensure there is appropriate guidance, reporting, compliance and enforcement by government entities.

CONSULTATION QUESTIONS

Updating the CN Policy: How should the CN policy be updated to reflect commitments made since 1996?

Scope of the CN Policy: What is the appropriate scope of the CN Policy to best fulfil the objective of competitive neutrality? In particular, could the current test for 'significant business activities' be improved and should the application of CN be subject to a broader public interest test?

Start-up government businesses: How should the competitive neutrality policy be applied to new government business activities in their start-up phase?

Reporting and accountability: Are current compliance reporting and accountability requirements for government entities adequate? In particular, should government entities also be required to include a statement on competitive neutrality compliance in their annual reports?

Complaints process: Is the current competitive neutrality complaints process effective and how should the Government respond to the findings of complaint investigations?

Oversight and administration: The CN Review Secretariat will work with relevant government agencies on the effectiveness of current oversight and administration arrangements and whether they could be improved. It is also seeking your views on these issues.

Other issues: Are there any other improvements that could be made to the 1996 CN Policy statement and the 2004 CN guidelines?

MAKING A SUBMISSION

We are seeking the views of all interested stakeholders in sufficient detail to inform the review. This feedback will inform revisions to the policy. Some of you will have specific issues you would like to raise while others may have views or perspectives that span a broader set of issues. We have provided the questions above to stimulate and focus discussion.

While this is a review of the Commonwealth's policy, it is possible submissions will address issues relevant to both the Commonwealth and the States and Territories. Treasury will liaise with our State and Territory colleagues during and after the review process so that issues and concerns raised are directed to the responsible jurisdictions. Confidential submissions will be marked accordingly and only forwarded with the agreement of the provider.

In considering your submission to this review, you may wish to consult the key documents that set out the Commonwealth's current competitive neutrality policy and reporting. These documents are listed in the References section at the end of this Consultation Paper. Alternatively, you may wish to refer to the appendices:

- **Appendix A:** lists the competitive neutrality principles that were agreed by the Commonwealth, States and Territories in 1995 and 2006;
- **Appendix B:** sets out the Competition Policy Review's recommendations, and the Commonwealth's response, in relation to competitive neutrality; and
- **Appendix C:** provides a summary of investigations into competitive neutrality complaints conducted by the Australian Government Competitive Neutrality Complaints Office (AGCNCO).

Submissions are to be provided by 21 April 2017.

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Confidential submissions

Unless you indicate that you would like all or part of your submission to remain confidential, all information (including name and address details) contained in submissions will be published on the Treasury website.

Confidential submissions should be clearly marked as confidential - automatic confidentiality statements in emails are not sufficient to make your submission confidential. If you would like part of your submission to remain confidential, you should provide this information clearly marked as such in a separate submission.

BACKGROUND TO THIS REVIEW

THE COMPETITION POLICY REVIEW AND COMPETITIVE NEUTRALITY

The Government commissioned the independent Competition Policy Review to ensure Australia's competition policy framework remains fit for purpose. This was the most comprehensive review of Australia's competition institutions, policies and laws in a generation. The independent Review Panel received almost 350 submissions in response to its Issues Paper and around 600 submissions in response to its Draft Report.²

Submissions to the Review generally supported the principle of competitive neutrality that government business activities should not enjoy any net competitive advantages simply by virtue of public sector ownership. However, various submissions identified areas in which competitive neutrality policies or their implementation may be improved. Some submissions also argued there is a lack of community awareness about competitive neutrality and limited public disclosure of governments' compliance with competitive neutrality (see, for example, PC 2014 and Queensland Competition Authority 2014).

The Competition Policy Review (Chapter 13) made three recommendations on competitive neutrality relating to competitive neutrality policies, the complaints process, and reporting on compliance. In its response to the Competition Policy Review, the Government supported the recommendations to review the Commonwealth's competitive neutrality policy and strengthen the complaints process, and indicated that it remains open to the recommendation in relation to reporting.

COMPETITIVE NEUTRALITY AND HUMAN SERVICES

The Competition Policy Review recommended that consumer choice and supplier diversity should extend into human services and that, although the current CN Policy applies generally to all sectors, there may be scope to extend the principle of competitive neutrality to markets where governments are supplying services, including human services (see especially Competition Policy Review pp269-270). The Review argued that the case for extending the principle of competitive neutrality is strongest when:

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

² The Panel consisted of Professor Ian Harper (Chair), Mr Peter Anderson, Ms Su McCluskey and Mr Michael O'Bryan QC.

The Government has tasked the Productivity Commission with reviewing the introduction of competition and informed user choice into human services. The review includes an initial study report identifying services within the human services sector that are best suited to the introduction of greater competition and contestability and user choice, including the effectiveness of practices and trials in Australian jurisdictions and international examples of best practice. In the second stage, the review will make recommendations on how to introduce greater competition, contestability and user choice to key sectors. Since the CN Policy applies generally to all sectors, the findings of the CN Review may, by extension, have implications for government involvement in human services. While the CN review may note these implications where appropriate, it will **not** be making specific findings in relation to the application of the competitive neutrality to human services since this can be addressed either as part of, or following, the Productivity Commission's review.

UPDATING THE COMPETITIVE NEUTRALITY POLICY

Australian Governments first committed to the competitive neutrality in the 1995 *Competition Principles Agreement* (CPA).

3(a) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.

The Commonwealth's 1996 *Competitive Neutrality Policy Statement* (CN Policy) endorsed this objective and set out:

- the rationale for competitive neutrality;
- the scope of the CN Policy (where it will be applied);
- CN principles (organisational structure and corporatisation; and neutrality in relation to tax, debt, regulation, rate of return, and pricing);
- oversight, compliance and reporting arrangements for the CN Policy; and
- the process for receiving and investigating CN complaints.

While the CN Policy recognises there are a number of disadvantages and advantages of government ownership, it only seeks to address those areas of competitive advantage that are widespread and easy to observe and address (listed in the third dot-point above). Other issues have been raised in CN complaints, such as the insurance premiums paid by government entities.

The CN Policy also includes a list of government business activities that were subject to the policy at the time. Currently, the annual *Competitive Neutrality Matrix Report* is the only similar list however it is not exhaustive as it is mostly confined to government business enterprises (GBEs).

In November 2000, the Council of Australian Governments (COAG) clarified some practical issues involved in implementing the competitive neutrality principles set out in the CPA and agreed that governments could have regard to the following factors (see NCC 2002, p2.17).

- ***GBEs not subject to executive control:*** Where a government business is not subject to the executive control of a government (for example, a university), a 'best endeavours' approach could be adopted. This would require, at a minimum, that governments provide a transparent statement of competitive neutrality obligations to the business.
- ***Community service obligations (CSOs):*** Governments are not required to undertake a competitive process for the delivery of CSOs, and are free to determine who should receive a CSO payment or subsidy, which should be transparent, appropriately costed and directly funded by government.

- **Full cost attribution:** A range of costing methods, including fully distributed cost, marginal cost and avoidable cost, satisfy the term ‘full cost attribution’ in subclause 3.5(b).

Australian governments made further commitments to ‘enhance the application of competitive neutrality principles to GBEs engaged in significant business activities’ in the 2006 *Competition and Infrastructure Reform Agreement* (CIRA). Specifically, they agreed that:

- **Objectives:** GBEs will have clear commercial objectives; will clearly specify and publicly report any non-commercial objectives; and will not exercise regulatory or planning approval functions in markets where they compete with private sector enterprises.
- **Governance:** boards are accountable against published performance measures; board appointments are made based on skills needed; GBEs have operational autonomy; dividend policies are publicly specified; and competitive neutrality payments to governments are identified transparently.
- **Reporting:** GBEs will report publicly on: commercial and non-commercial performance; any government directions to GBEs; and any derogations from competitive neutrality in the GBEs’ enabling legislation.

Finally, in December 2016, the Commonwealth and five other jurisdictions signed the *Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms* (IGA CPR), which reaffirmed their commitments to competitive neutrality in the CPA and CIRA and, more generally, they included competitive neutrality in an updated set of competition principles:

9(f) Subject to the public interest test in clause 10 of this Agreement, all levels of government will be guided by the following competition principles: ... Government business activities that compete with private providers, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.³

The Commonwealth’s CN Policy has not been updated to reflect COAG’s points of clarification from November 2000, the additional commitments made in the 2006 CIRA, nor the updated competition principle in the IGA CPR. The CN Review Secretariat plans to make the necessary changes to reflect these commitments.

Consultation questions: updating the 1996 CN Policy

The CN Review is seeking your views on how the policy should be updated to reflect commitments made since 1996.

³ The IGA also discusses reviews of competitive neutrality policies, setting out issues for consideration that are reflected in the terms of reference for this review (see Appendix A, clauses 8-10).

SCOPE OF THE COMPETITIVE NEUTRALITY POLICY

The Commonwealth's CN Policy applies to significant government businesses but only to the extent that the benefits of the arrangements outweigh the costs. A number of entities are automatically considered significant, for example, Government Business Enterprises (GBEs) and Commonwealth Companies. For other entities, the Policy provides a set of criteria to determine if the entity is undertaking a 'business activity' and then if that activity is 'significant'.

The CN Review is seeking your views on whether these criteria achieve the appropriate scope to fulfil the principle of competitive neutrality and so this section describes the current criteria and identifies possible issues for comment.

IS THE GOVERNMENT CONDUCTING A 'BUSINESS ACTIVITY'?

The Commonwealth's CN Policy sets out the criteria for identifying a 'business activity'.

For the purposes of competitive neutrality in the Commonwealth sector, to be considered a 'business activity' the following criteria must be met:

- *there must be user-charging for goods or services (the user may be in the private sector or public sector);*
- *there must be an actual or potential competitor (either in the private or public sector) i.e. users are not restricted by law or policy from choosing alternative sources of supply; and*
- *managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided. (CN Policy, p7)*

The intent of these criteria is to ensure that non-commercial government activities are not required to comply with the policy. For example, regulatory activities are not considered business activities because there are no actual or potential competitors, even though there may be an element of user charging or cost recovery involved.

In practice it can sometimes be complex to determine if government is undertaking a business activity according to these criteria. For example, assessing whether there are actual or potential competitors will often require a definition of the relevant market in which the good or service is being provided.

Where the government decides not to charge for a good or service, that activity is excluded from the scope of current CN Policy even though it may be regarded as commercial in nature (for example, because there are potential competitors involved). Stakeholders may wish to comment on whether this criterion remains appropriate, noting that charging is governed by the Government's Charging Framework.

IS THE BUSINESS ACTIVITY ‘SIGNIFICANT’?

The CN Policy also sets out criteria to determine whether a business activity is ‘significant’. Certain entities are automatically deemed to be significant: ‘all Government Business Enterprises (GBEs) and their subsidiaries, other share-limited trading companies, and all designated business units’. This terminology was updated in the criteria set out in the Commonwealth’s 2004 Competitive Neutrality Guidelines – see immediately below – but may need to be further updated to reflect changes arising from the *Public Governance, Performance and Accountability Act 2013*.

The following business activities are considered significant for the purposes of [the CN Policy]:

- *all [Government-Business Enterprises (GBEs)] and their subsidiaries;*
- *all Commonwealth Companies;*
- *all Business Units;*
- *baseline costing for activities undertaken for market testing purposes;*
- *public sector bids over \$10 million;*
- *business activities not in these categories that are undertaken within (non-GBE) Prescribed Agencies and Commonwealth Authorities or Departments, with a commercial turnover of at least \$10 million per annum.*

CN arrangements must be applied to significant business activities, but only to the extent that the benefits of the arrangements outweigh the costs. It should be noted that other business activities (not listed above) are subject to the complaints mechanism and may be required to apply CN if a complaint against them is upheld. These business activities may choose to apply CN on a notional basis, to preclude complaints. (CN Guidelines, p13)

The \$10 million turnover threshold is designed to exclude small-scale ancillary activities from the scope of the CN Policy, since the costs of implementing competitive neutrality are assumed to outweigh the benefits in such cases. However, the Competition Policy Review (Recommendation 15) recommended that competitive neutrality reviews should examine whether the threshold for identifying significant business activities remained appropriate. While \$10 million provides a simple threshold to assess significance, it is possible that a business activity is significant in its market while earning substantially less revenue. This may be due to a product’s life, the number of competitors or the size of the market.

In contrast to the Commonwealth’s use of a threshold to determine significance, several other Australian jurisdictions have adopted a principle-based test. For example⁴:

- NSW assesses significance on a case-by-case basis. Considerations include: the size of the business; its influence on the market; resources commanded; and the effect of poor performance.

⁴ See: NSW Treasury 2002, Victorian DTF 2012 (p3) and NT DTF 2016 (p5).

- Victoria's Competitive Neutrality Policy states that, in assessing significance, '... relevant considerations include the size of the relevant business activity in relation to the size of the relevant market and its influence or competitive impact in the relevant market. An activity should not be regarded as significant or insignificant solely because of its size relative to the overall size of the public or local government business.'
- The Northern Territory's Policy Statement on Competitive Neutrality states that: 'Determinations of a significant business activity should be made on a case by case basis. In making a determination, relevant considerations should include the size of the business activity in relation to the size of the relevant market, the business activity's influence on competition and whether the activity earns a substantial part of its operating revenue from user charges.'

THE PUBLIC INTEREST TEST

The CPA (subclause 3(6)) requires Australian Governments to apply competitive neutrality principles to the extent that the benefits of implementation outweigh the costs. It was envisaged that this cost-benefit assessment would constitute a broad public interest test:

where this Agreement calls ... for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action ... the following matters shall, where relevant, be taken into account ... (subclause 1(3))

The same section of the CPA then lists a range of matters to be taken into account including: social welfare and equity, ecologically sustainable development, occupational health and safety, industrial relations, economic and regional development, consumer interests, the competitiveness of Australian business, and the efficient allocation of resources.

This broad approach is reflected in, for example, the Victorian CN Policy (Section 6), which explicitly includes a public interest test that balances competitive neutrality considerations with other public policy objectives. Victoria's application of the public interest test to competitive neutrality is largely consistent with the interpretation of the National Competition Council and others (see, for example, see NCC 1996, NCC 1999 and Banks 2001) although the Victorian policy adopts both a public interest test and a cost-benefit test.

The Commonwealth has adopted a different interpretation of the requirement for a cost-benefit analysis. The Commonwealth's CN Guidelines (p14) state that 'the costs of the application of the CN policy should be largely administrative' and that the 'AGCNCO has recognised that the costs of applying CN principles are generally not significant'. Therefore, 'the general assumption ... is that benefits of CN generally outweigh the costs'.⁵

The CN Review is seeking your views on the merits of retaining or amending the cost-benefit test in its current form. If a broader public interest test were adopted, this would raise ancillary questions about how this should be implemented. Such questions emerged in the late 1990s as jurisdictions began to implement the CPA and were addressed in some detail by two parliamentary inquiries (Australian Parliament 1997, Chapter 2 and Australian Parliament 1997, Chapter 4).

⁵ This reflects the discussion of 'cost-effectiveness' in an AGCNCO complaint investigation for the Australian Institute of Sport Swim School (see CCNCO 1999, p10).

SCOPE OF THE CN POLICY: OTHER ISSUES

The CN complaints mechanism applies more broadly than the policy itself. The CN Policy states that, in addition to significant business activities, the AGCNCO:

will also respond to complaints that other Commonwealth organisations should be required to comply with competitive neutrality arrangements, notwithstanding that activities are smaller than the 'significant' criteria set out in [the Policy].
(CN Policy, p20)

Refinements to the 'significant business activity' test may mean that the scope of the policy and the complaints process can be aligned. (See also 'Competitive Neutrality Complaints Process' for further discussion.)

Some significant business activities may not be subject to Executive control, either where their legislation states that they are not subject to government direction or where the Commonwealth is a minority shareholder. In November 2000, the Council of Australian Governments (COAG) acknowledged this as an issue for applying the CN principles in the *Competition Principles Agreement* and agreed that, in such circumstances, a 'best endeavours' approach could be adopted. This would require, at a minimum, that governments provide a transparent statement of competitive neutrality obligations to the business. The issue of Executive control applies to at least three Commonwealth entities: the ANU, ABC and SBS however the Commonwealth's CN policy has not been updated to reflect this COAG decision.⁶ The CN Review Secretariat plans to address this as part of its update for commitments made since 1996 (see earlier discussion on updating the CN Policy).

Consultation questions: scope of the CN Policy

The CN Review is seeking your views on the appropriate scope of the CN Policy that will best fulfil the principle of competitive neutrality. In particular, could the current tests for 'significant business activities' be improved? Related questions include:

- *'Business activity'*: Could the three criteria for identifying 'business activities' be improved or clarified?
- *'Significant'*: Should the \$10 million threshold be retained or adjusted (and, if adjusted, what should the new threshold be)? Or should a principle-based test be adopted instead (and if so, what criteria should be used)?
- *Public interest test*: Should the CN Policy incorporate a broad public interest test (and, if so, how should this be done)? Or should it reaffirm the current practice of conducting a more limited assessment of the costs and benefits of *implementing* the principle of competitive neutrality?

⁶ Each of these entities are protected by their enabling legislation from government directions, including directions made under the *Public Governance, Performance and Accountability Act 2013*. See *Australian National University Act 1991*, Sn 4A(1) and 4A(2); *Special Broadcasting Service Act 1991*, Sn 13(1); and *Australian Broadcasting Corporation Act 1983*, Sn 78(6) and 78(7).

COMPETITIVE NEUTRALITY AND START-UP GOVERNMENT BUSINESSES

Competitive neutrality requires that significant business activities should achieve a commercial rate of return.

All Commonwealth organisations identified as engaging in significant business activities will be required to earn commercial returns at least sufficient to justify the long-term retention of assets in the business, and to pay commercial dividends ... to the Budget from those returns. ... (CN Policy, pp17-18; emphasis added)

The CN guidelines add that:

Managers must ensure that the prices of their goods and services are at least sufficient to earn their business activity a commercial rate of return overall and over a reasonable period of time. (CN guidelines, p29; emphasis added).

The Competition Policy Review (Recommendation 15) recommended that competitive neutrality reviews examine whether it is possible to provide clearer guidelines on the application of competitive neutrality policy during the start-up stages of new government business enterprises that are, or will be, engaged in significant business activities, including the extent to which competitive neutrality provisions should be included in business models and initial planning. Specifically, the Competition Policy Review suggested that the CN Policy or guidelines should clarify the meaning of 'long term' or 'over a reasonable period of time' since, as the PC states, 'this term is not defined, nor is there guidance on its application to a start-up business' (PC submission to the Competition Policy Review, p34). The motivation for this recommendation was that, while new government business activities may (like private businesses) legitimately take several years to earn a commercial rate of return, this creates the risk that a new activity could avoid its CN obligations for an unreasonable period.

Consultation questions: start-up government businesses

The CN Review is seeking your views on how the competitive neutrality policy should be applied to new government business activities in their start-up phase. Related questions include:

- Should competitive neutrality be incorporated into the planning and business model of a new government business activity? For example, should start-up business activities be required to publish their pricing policies, including how they will lead to a commercial rate of return within a reasonable period of time?
- Given that there is a wide variation in the different markets that government businesses operate in, is it possible to define the 'longer term' for the purposes of earning a commercial rate of return and, if so, how could this be done?

COMPETITIVE NEUTRALITY COMPLIANCE REPORTING & ACCOUNTABILITY

Compliance with the competitive neutrality principles is monitored by Heads of Treasuries, who have published compliance reports – the Competitive Neutrality Matrix Report – annually since 2008-09.⁷ These reports provide an assessment of compliance for each jurisdiction against the competitive neutrality principles set out in the *Competition Principles Agreement* 1995 and the *Competition and Infrastructure Reform Agreement* 2006. The latter agreement strengthened the application of competitive neutrality to government business enterprises (GBEs) and so, reflecting this focus, most jurisdictions restrict their compliance assessments to GBEs and do not provide assessments for other agencies that are engaged in significant business activities.

Previously, Australian governments reported on their compliance with the competitive neutrality principles through National Competition Policy Annual Reports that were submitted to the National Competition Council (NCC) to inform the NCC's annual NCP assessments.⁸ The NCC's assessments focused on: coverage of competitive neutrality policies (that is, whether they reached all significant business activities), the investigations of CN complaints, the treatment of Community Service Obligations, and the financial performance of GBEs (particularly their low rates of return on capital).

The Competition Policy Review received a number of submissions that suggested there is a lack of community awareness about competitive neutrality and limited public disclosure of governments' compliance. Further, the Competition Policy Review recommended all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual report (Recommendation 17).

Consultation questions: reporting and accountability

The CN Review is seeking your views on the adequacy of current compliance reporting and accountability requirements for government entities. Related questions include:

- Could the current Competitive Neutrality Matrix Report be improved to give a more accessible account of government business enterprises' (and other government entities') compliance with competitive neutrality without creating excessive reporting burden (red tape)?
- Should government entities be required to include a statement on competitive neutrality compliance in their annual reports? If yes, how could this be done whilst minimising the associated reporting burden for affected entities?

7 These reports have been published on the Council of Federal Financial Relations website since 2011-12, see: www.federalfinancialrelations.gov.au/content/performance_reporting.aspx.

8 Earlier Commonwealth reports and NCC assessment are published on the NCP website: www.ncp.ncc.gov.au The Commonwealth's final report under this arrangement, the *Australian Government National Competition Policy Report 2005-2007*, was published on the Treasury website: www.treasury.gov.au/PublicationsAndMedia/Publications/2007/NCP-Report-2005-07.

COMPETITIVE NEUTRALITY COMPLAINTS PROCESS

The CN Policy established a complaints mechanism for businesses or other organisations who felt that a government business activity had breached its competitive neutrality obligations.

The role of the complaints mechanism is to:

- *respond to concerns that Government businesses are not complying with the competitive neutrality principles;*
- *advise on whether significant government businesses have caused distortions in resource allocations; and*
- *consider whether Government businesses have net competitive advantages resulting from public ownership. (CN Policy, pp20-21)*

The Australian Government Competitive Neutrality Complaints Office (AGCNCO) was established within the Productivity Commission under the *Productivity Commission Act 1998* as an independent complaints office to administer the complaints mechanism. If anyone believes that a Commonwealth business, department or agency is not complying with the competitive neutrality policy they may make a complaint to the AGCNCO. As noted earlier, it may also receive complaints in relation to business activities even when they do not satisfy the criteria for 'significance' under the CN Policy.

If the AGCNCO judges that the complaint represents a possible breach of competitive neutrality then it will conduct an investigation, publish a report and make recommendations to the Treasurer. Further, the CN Policy requires the Treasurer, in consultation with the relevant portfolio Minister, to make a determination on the appropriate remedy within 90 days. The CN Policy does not allow for penalties or the award of damages to affected parties for a breach, though it does place responsibility for non-compliance on the business activity's managers (CN Policy pp21-22). Any non-compliance is to be reviewed as part of the evaluation of the business activity's management.

The AGCNCO has investigated 15 complaints since 1999 and received many more inquiries that did not lead to a formal investigation. See **Appendix C** for a summary of these complaints and the findings of the AGCNCO's investigations. (All reports on competitive neutrality complaints are available on the Productivity Commission's website.)

The Competition Policy Review (Recommendation 17) recommended that all Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints process, including a requirement for government to respond publicly to the findings of complaint investigations. In its response to the Competition Policy Review, the Commonwealth Government supported this recommendation in full and committed to publicly respond to findings of future AGCNCO investigations. This commitment will be reflected in the updated CN Policy and the CN Review Secretariat welcomes comments on how this should best be done.

While the AGCNCO currently investigates complaints, it does not undertake any follow-up review to determine if a competitive neutrality breach has been rectified. It is possible such reviews would improve compliance with competitive neutrality and public accountability. Some jurisdictions, such as Victoria, conduct follow-up reviews and provide an example of

how such a regime could operate (VCEC 2013, p7; Office of the Commissioner for Better Regulation 2016, pp5-6).

Consultation questions: complaints process

The CN Review is seeking your views on the effectiveness of the current competitive neutrality complaints process. Related questions include:

- *Complaint investigations:* Could the process for lodging or investigating complaints be improved and, if so, how?
- *Response and remedies:* How should the Commonwealth Government implement its commitment to publicly respond to AGCNCO investigations? For example, should the Ministerial response be tabled in parliament? Should the AGCNCO conduct follow-up reviews? Should other remedies be available to complainants if their complaint is upheld and, if so, how might they be designed?

COMPETITIVE NEUTRALITY OVERSIGHT AND ADMINISTRATION

An effective CN Policy requires ongoing oversight and administration by relevant government agencies, including the following specific responsibilities:

- *Scope and coverage*: regular assessment and review of which government activities fall within scope of the CN policy;
- *Awareness*: ongoing activities to maintain awareness of the CN policy amongst government agencies and external stakeholders;
- *Compliance*: ongoing monitoring of CN compliance;
- *Enquiries*: response to enquiries about the interpretation of the CN policy and guidelines;
- *Neutrality adjustments or charges*: administration of neutrality charges in relation to taxation, regulation, debt, rate of return, insurance or others;
- *Reporting*: regular reporting on CN coverage, compliance, complaints and administration;
- *Complaints*: assess and investigate CN complaints; and
- *Policy and guidelines*: periodic review and update of the CN policy and guidelines.

Consultation questions: oversight and administration

The CN Review Secretariat will work with relevant Commonwealth government agencies on the effectiveness of current oversight and administration arrangements and whether they could be improved. It is also seeking your views on these issues.

OTHER ISSUES

Consultation questions: other issues

The CN Review is seeking your views on any other improvements to the 1996 CN Policy statement (and the 2004 CN guidelines) that do not fall under other headings in this consultation paper. Related questions include:

- Is the current CN policy effective in achieving its objective and, if not, how could it be made more effective?
- Does the policy still address the major neutrality issues (tax, debt, regulation, rate of return and pricing) or are there others that are 'widespread and easy to observe and address'? For example, could there be important neutrality issues in relation to insurance arrangements or advertising practices adopted by affected government entities?
- Are the policy and guidance material sufficient for government entities, the AGCNCO and other stakeholders to understand and comply with the policy? Is there scope to simplify the policy or guidance material?

KEY DOCUMENTS AND REFERENCES

KEY DOCUMENTS

Commonwealth Competitive Neutrality Policy Statement 1996:

<http://archive.treasury.gov.au/documents/275/PDF/cnps.pdf>

Commonwealth Competitive Neutrality Guidelines for Managers 2004:

<https://www.finance.gov.au/archive/publications/finance-circulars/2004/01.html>

Competitive Neutrality Annual Matrix Reports:

http://www.federalfinancialrelations.gov.au/content/performance_reporting.aspx

Competition Principles Agreement (CPA) 1995:

<https://www.coag.gov.au/node/52>

Competition and Infrastructure Reform Agreement (CIRA) 2006:

<http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Competition-reform-agreement>

Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms (IGA CPR) 2016:

<https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-competition-and-productivity-enhancing-reforms>

Harper Competition Policy Review Final Report:

<http://competitionpolicyreview.gov.au/>

Australian Government Competitive Neutrality Complaints Office (AGCNCO) investigation reports:

<http://www.pc.gov.au/about/core-functions/competitive-neutrality>

Commonwealth Government's Charging Framework:

<https://www.finance.gov.au/resource-management/charging-framework/>

Commonwealth GBE governance and oversight guidelines:

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<http://ncp.ncc.gov.au/docs/2002%20assessment.pdf>

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<http://ncc.gov.au/images/uploads/OINcplm-001copy.pdf>

NCC 1996, 'Considering the public interest under the National Competition Policy'

<http://ncp.ncc.gov.au/docs/PIRePu-001.pdf>

NSW Treasury 2002, *Policy Statement on the Application of Competitive Neutrality*, Office of Financial Management Policy and Guidelines Paper

http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0007/3868/tpp02-1.pdf

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Victorian OCBR (Office of the Commissioner for Better Regulation) 2016, *Conventions for the competitive neutrality function*
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APPENDIX A: COMPETITIVE NEUTRALITY AGREEMENTS

COMPETITION PRINCIPLES AGREEMENT (1995)

Interpretation

- 1.(3) Without limiting the matters that may be taken into account, where this Agreement calls:
- (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
 - (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
 - (c) for an assessment of the most effective means of achieving a policy objective, the following matters shall, where relevant, be taken into account:
 - (d) government legislation and policies relating to ecologically sustainable development;
 - (e) social welfare and equity considerations, including community service obligations;
 - (f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
 - (g) economic and regional development, including employment and investment growth;
 - (h) the interests of consumers generally or of a class of consumers;
 - (i) the competitiveness of Australian businesses; and
 - (j) the efficient allocation of resources.

Competitive Neutrality Policy and Principles

- 3.(1) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.
- 3.(2) Each Party is free to determine its own agenda for the implementation of competitive neutrality principles.

- 3.(3) A Party may seek assistance with the implementation of competitive neutrality principles from the Council. The Council may provide such assistance in accordance with the Council's work program.
- 3.(4) Subject to subclause (6), for significant Government business enterprises which are classified as "Public Trading Enterprises" and "Public Financial Enterprises" under the Government Financial Statistics Classification:
 - (a) the Parties will, where appropriate, adopt a corporatisation model for these Government business enterprises (noting that a possible approach to corporatisation is the model developed by the inter-governmental committee responsible for GTE National Performance Monitoring); and
 - (b) the Parties will impose on the Government business enterprise:
 - (i) full Commonwealth, State and Territory taxes or tax equivalent systems;
 - (ii) debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and
 - (iii) those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, on an equivalent basis to private sector competitors.
- 3.(5) Subject to subclause (6), where an agency (other than an agency covered by subclause (4)) undertakes significant business activities as part of a broader range of functions, the Parties will, in respect of the business activities:
 - (a) where appropriate, implement the principles outlined in subclause (4); or
 - (b) ensure that the prices charged for goods and services will take account, where appropriate, of the items listed in paragraph 4(b), and reflect full cost attribution for these activities.
- 3.(6) Subclauses (4) and (5) only require the Parties to implement the principles specified in those subclauses to the extent that the benefits to be realised from implementation outweigh the costs.
- 3.(7) Subparagraph (4)(b)(iii) shall not be interpreted to require the removal of regulation which applies to a Government business enterprise or agency (but which does not apply to the private sector) where the Party responsible for the regulation considers the regulation to be appropriate.
- 3.(8) Each Party will publish a policy statement on competitive neutrality by June 1996. The policy statement will include an implementation timetable and a complaints mechanism.
- 3.(9) Where a State or Territory becomes a Party at a date later than December 1995, that Party will publish its policy statement within six months of becoming a Party.
- 3.(10) Each Party will publish an annual report on the implementation of the principles set out in subclauses (1), (4) and (5), including allegations of non-compliance.

COMPETITION AND INFRASTRUCTURE REFORM AGREEMENT (2006)

Interpretation

- 1.(4) For the purposes of clause 6.1 government business enterprises are enterprises that are incorporated under State, Territory or Commonwealth legislation and are classified as Public Financial Corporations or Public Non-Financial Corporations, excluding central borrowing authorities, under the Government Financial Statistics Classifications.

Competitive neutrality of government business enterprises

- 6.(1) The Parties agree to enhance the application of competitive neutrality principles to government business enterprises engaged in significant business activities in competition with the private sector:

Objectives

- (a) That the enterprise has clear commercial objectives.
- (b) That any non-commercial objectives or obligations established for the enterprise are clearly specified and publicly reported.
- (c) That enterprises do not exercise regulatory or planning approval functions in circumstances in which they compete with private sector enterprises.

Governance

- (d) That the responsibilities of the governing board of the enterprise and the performance measures against which the board will be held accountable are published.
- (e) That the governing board is appointed on the basis of particular skills needed by the board.
- (f) That having received strategic guidance from the government about the achievement of its objectives, the enterprise has operational autonomy in the day to day management of its affairs.
- (g) That the dividend policy applicable to the enterprise should be clearly and publicly specified.
- (h) That any payments to the government as shareholder or for the purposes of competitive neutrality, such as taxes, tax equivalent payments, special dividends, capital repayments, are identified in a transparent manner.

Reporting

- (i) That at least annually the enterprise will report publicly on its commercial performance and on its performance of any non-commercial activities.
- (j) That any directions given to the enterprise by the government are published.
- (k) That where the legislation establishing an enterprise derogates from competitive neutrality the derogation has been published.

APPENDIX B: THE COMPETITION POLICY REVIEW ON COMPETITIVE NEUTRALITY

This appendix sets out the Competition Policy Review's recommendations on competitive neutrality and the Government's response released in November 2015.

RECOMMENDATION 15: COMPETITIVE NEUTRALITY POLICY

All Australian governments should review their competitive neutrality policies. Specific matters to be considered should include: guidelines on the application of competitive neutrality policy during the start-up stages of government businesses; the period of time over which start up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Recommendation 43).

The Government supports this recommendation.

The Government supports updating its competitive neutrality policies and guidance and will encourage the states and territories to undertake similar reviews, including by seeking to update the competition principles, as outlined in the response to Recommendation 1.

The Government will update its competitive neutrality policy and guidance and will include a requirement for portfolio ministers to publicly respond to findings of future complaint investigations undertaken by the Australian Government Competitive Neutrality Complaints Office.

See also Recommendation 43 for the Government's response regarding the Australian Council for Competition Policy.

RECOMMENDATION 16: COMPETITIVE NEUTRALITY COMPLAINTS

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaint processes. This should include at a minimum:

- assigning responsibility for investigation of complaints to a body independent of government;
- a requirement for government to respond publicly to the findings of complaint investigations; and
- annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Recommendation 43) on the number of complaints received and investigations undertaken.

The Government supports this recommendation.

Competitive neutrality complaints are considered by the Australian Government Competitive Neutrality Complaints Office, which operates within the independent Productivity Commission.

The Government encourages those jurisdictions without independent complaint bodies to consider establishing such a body. It supports the Government responding publicly to the findings of complaint investigations, and encourages other governments to do the same.

The Productivity Commission currently includes updates on Government competitive neutrality investigations as part of its annual reporting.

See also Recommendation 43 for the Government's response regarding the Australian Council for Competition Policy.

RECOMMENDATION 17: COMPETITIVE NEUTRALITY REPORTING

To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.

The proposed Australian Council for Competition Policy (see Recommendation 43) should report on the experiences and lessons learned from the different jurisdictions when applying competitive neutrality policy to human services markets.

The Government endorses the principles of accountability and transparency of its competitive neutrality policy. It remains open to this recommendation and will be consulting on its competitive neutrality policy in 2016.

Competitive neutrality principles are monitored by Heads of Treasuries who provide a high-level report via COAG processes, noting any issues that may require discussion.

Further to the response to Recommendation 2, the Government will ask the Productivity Commission, as part of developing policy options in human services sectors, to consider how competitive neutrality can be improved in these markets.

See also Recommendation 43 for the Government's response regarding the Australian Council for Competition Policy.

APPENDIX C: AGCNCO COMPLAINT INVESTIGATIONS

The AGCNCO has investigated 15 complaints since 1999 however it received many more inquiries that did not lead to a formal investigations. These complaints and the subsequent findings of the AGCNCO are summarised in the table below. (All reports on competitive neutrality complaints are available on the Productivity Commission’s website at: <http://www.pc.gov.au/about/core-functions/competitive-neutrality>.)

The two most recent investigations related to NBN Co in 2011 and PETNET in 2012. The investigations found NBN Co was potentially *ex ante* in breach and PETNET was *ex ante* in breach of competitive neutrality requirements. (Both breaches were *ex ante* because both government entities were still in their start-up phase and the breach or potential breach related to their plans for future rates of return.) The former Minister for Broadband, Communications and the Digital Economy, Stephen Conroy, responded to the NBN Co investigation through a media release.⁹ There was no official response to the PETNET complaint.

Government entity	Report date	Nature of complaint	AGCNCO finding
PETNET Australia, a subsidiary of the Australian Nuclear Science and Technology Organisation (ANSTO)	Apr 2012	The complaint included the claim that PETNET was not charging prices that fully reflect its costs and was not generating commercially acceptable profits.	While AGCNCO rejected some aspects of the complaint, it found that forecasts over 10 and 15 years demonstrate that PETNET’s commercial operations are unlikely to achieve a commercial rate of return on equity, representing an <i>ex ante</i> breach of competitive neutrality policy. (Finding 2.3)
NBN Co	Dec 2011	Three complainants made a series of claims including that NBN was not seeking a commercial rate of return, was not charging appropriately for infrastructure provided to greenfield developments, and that it received regulatory advantages through Ministerial determinations.	While AGCNCO rejected several aspects of the complaint, it found that NBN’s targeted rate of return and expected timeframe for achieving a commercial rate of return represented potential <i>ex ante</i> breaches of competitive neutrality policy. (Findings 3.6 and 3.7)
Defence Housing Australia (DHA)	May 2008	The complaint claimed that DHA was advantaged by its exemption from having to employ licensed real estate agents for the provision of property sales and management services.	The AGCNCO found that DHA did not gain a regulatory advantage as a result of being government owned and so did not breach the regulatory neutrality provisions of the competitive neutrality policy. (Investigation Report, Section 2.3: Findings)

⁹ Office of Minister for Broadband, Communications and the Digital Economy, media release, ‘Conroy defends uniform pricing model for NBN’, 8 December 2011.

Government entity	Report date	Nature of complaint	AGCNCO finding
EDI Post, a division of Australia Post that provided transactional mail services	Jun 2005	The complaint primarily related to the pricing of Australia Post's transactional mail services	The AGCNCO found that EDI and Australia Post were not in breach of the competitive neutrality policy. (Investigation Report, Section 2.3: Findings)
Australian Valuation Office (AVO), a business unit of the Australian Taxation Office (ATO)	May 2004	The complaint claimed that the pricing regime used by the AVO in tendering situations systematically fails to adequately reflect the full costs of service provision.	While AGCNCO rejected several aspects of the complaint, it found that the professional indemnity insurance premium paid by the AVO should be increased. (Investigation Report, Section 2.4: Findings)
OzJobs, a business division of Employment National Ltd that provided recruitment and human resources services.	Jun 2002	The complaint alleged that the Commonwealth was subsidising the operation of OzJobs and that OzJobs was not paying payroll taxes on a basis comparable to that of its private sector competitors.	The AGCNCO found that OzJobs was operating in a manner consistent with its obligations under the competitive neutrality policy. (Investigation Report, Section 2.6: Findings)
Meteorological services to aviation: Civil Aviation Safety Authority (CASA) and the Bureau of Meteorology (BoM)	Dec 2001	The complaint alleged that CASA's administration of aviation regulations conferred a regulatory advantage on the BoM by preventing the complainant from competing in the market for meteorological services to the aviation industry.	The AGCNCO found that restrictions on competition in the provision of value-added meteorological services to the aviation industry were not justified. It noted that the Government was considering options for introducing competition in the provision of meteorological services to aviation and recommended that this be completed as soon as possible.
Sydney and Camden Airports: Sydney Airport Corporation Ltd (SACL) and Camden Airport Ltd (CAL)	Dec 2001	The complaints related to the ownership, lease, occupation and use of the Sydney and Camden airports, and the consequences of their proposed privatisation. In particular, the complaints claimed that SACL and CAL benefited from tax and regulatory advantages.	The AGCNCO found that: (a) the activity of leasing the land on which SACL and CAL operate does not meet all of the criteria to be deemed a 'business activity' for the purposes of competitive neutrality; (b) the question of tax neutrality did not apply because certain payments made by SACL and CAL were not taxes; and (c) SACL and CAL faced comparable regulatory arrangements to their competitors and so were not in breach of the regulatory neutrality principle. (Investigation Report, Section 2.4: Conclusion)

Government entity	Report date	Nature of complaint	AGCNCO finding
Docimage Business Services (DBS), a business unit within Australian Securities and Investment Commission (ASIC)	Dec 2001	DBS engaged in competitive tendering and contracting for documentary imaging services. The complaint claimed that DBS was able to undercut the traditional market players in the legal copying and imaging market because DBS was not subject to the same costs or tax regime as those service providers in the private sector.	The AGCNCO found that DBS was operating in a manner consistent with the competitive neutrality policy. (Investigation Report, Section 2.4: Findings)
ARRB Transport Research Ltd, which provided road research, consulting and technical services	Sept 2001	The complaint alleged that ARRB enjoyed several competitive advantages including a tax-free status, low rate of return, and privileged access to government assets and government guarantees.	The AGCNCO found, amongst other things, that ARRB did not breach tax neutrality and nor did it cross-subsidise between commercial and non-contested research work. It also found that ARRB's recent rate of return was below a commercial rate but that, since it was still making the transition to a fully commercial business, this did not reflect a deliberate attempt to gain a competitive advantage. However, a sustained failure to achieve an appropriate rate of return would represent a breach of competitive neutrality principles. (Investigation Report, Section 2.4: Conclusion)
Australia Post	Jul 2000	The complaint alleged that Australia Post enjoy a competitive advantage by virtue of the different regulatory arrangements for postal and non-postal items. In particular, the complaint alleged preferential treatment by Customs, due to the higher dollar thresholds for postal items to be subject to screening requirements (relative to non-postal items) and the exemption from reporting and cost-recovery charges for high volume, low value consignments.	The AGCNCO recommended that the value thresholds for Customs screening of postal and non-postal items be aligned, at a level that strikes a balance between the objectives of revenue-collection and risk management. It also recommended that the government should give further consideration to whether Australia Post should pay cost recovery charges for the informal screening of incoming postal consignments. (Investigation Report Section 3.4: Summary of recommendations)

Government entity	Report date	Nature of complaint	AGCNCO finding
ABC Production Facilities, which had facilities, equipment and staff to produce television programs for broadcast on the ABC network	May 2000	The complaint alleged that ABC Productions had access to resources purchased for non-commercial production, enabling it to produce services at a lower cost than competitors. The complaint alleged that ABC Production facilities were not priced to fully cover costs and were not subject to a range of taxed paid by private competitors.	The AGCNCO found that ABC Productions was not in breach of competitive neutrality. The method of costing used by ABC Productions identified and allocated all relevant costs, and the pricing of its services was consistent with CN Policy. ABC Productions generated a commercial level of profits.
National Rail Corporation Ltd (NRC)	Feb 2000	The complaint alleged that NRC was in breach of CN Policy because it had not achieved a commercial rate of return in the three financial years prior to the complaint, and that its financial performance was worsening.	The AGCNCO found that NRC had not achieved a commercial rate of return for the three financial years prior to the complaint. However, the NRC had undergone a substantial restructuring and associated delays during that period, and so was not found to be in breach of the requirement to earn a commercial rate of return over a reasonable period. The AGCNCO noted that if the NRCs projected level of return continued over the longer term, NRC would not be in compliance with CN requirements.
Australian Institute of Sport Swim School (AISSS)	Nov 1999	The complaint alleged that, amongst other things, the AISSS enjoyed a competitive advantage due to government subsidisation, and that its costing and pricing policy did not comply with CN Policy.	The AGCNCO found that the AISSS was a business activity and should be subject to CN Policy. The AGCNCO found that AISSS did not enjoy a significant competitive advantage by virtue of its government ownership or tax-exempt status, and that its costing and pricing was not only consistent with commercial practice but exceeded the requirements of CN Policy.
Australian Protective Service (APS), a division within the Attorney-General's Department which provides protective services including counter-terrorist first response (CTFR) security at major airports	Feb 1999	Under government policy, APS were to provide all CTFR services at major airports. In 1998, APS increased its charges to comply with CN Policy. The complaint alleged that CTFR services are not a 'business activity' and CN Policy should not apply because there is no actual or potential competitor and airports cannot choose the level or provider of the service.	The AGCNCO found that CN Policy applied, particularly given a government decision to allow State and Territory police forces and the Australian Federal Police to compete to provide the services, and that the provision of CTFR services constituted a business activity. The AGCNCO found that APS had allocated its costs and charged consistently with CN Policy, but that APS remove interest and corporate tax from its cost base calculations.