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COMPETITION COMMITTEE

ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Australia --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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AUSTRALIA

Introduction

1. Australia promotes competitive neutrality by two principal mechanisms. First, through national competition legislation, the *Competition and Consumer Act 2010* (CCA), which applies the same competition law provisions to all businesses in Australia including government businesses. Secondly, by the operation of nationally consistent competitive neutrality policy, achieved following agreement among governments at both federal and state level in what is known as the Competition Principles Agreement (CPA). Both mechanisms were the product of a major review of competition policy in the early 1990s (the Hilmer Review), and form part of a broader microeconomic reform program, the National Competition Policy (NCP) implemented in 1995.

2. The background to those reforms was increasing participation by government businesses in private sector markets in the late 1980s and early 1990s. Australian competition policy did not then deal with competitive neutrality as a distinct policy element. Australian governments addressed competitive neutrality on an ad hoc basis with moves towards corporatisation. At that time certain commercially oriented government businesses enjoyed various Crown immunities and advantages over private sector counterparts, including immunity from taxes and regulatory requirements, debt guarantees, concessional interest rates, and no requirement to achieve a commercial rate of return on assets. The potential effect was to reduce allocative efficiency by enabling inefficient government businesses to price below more efficient rivals, and take business from them. The Hilmer Review successfully put competitive neutrality on the agenda in Australia.

3. Future reforms in the area of competitive neutrality have been recommended in a recent independent 'root and branch' review of Australia's competition laws and policy, the Competition Policy Review, chaired by Professor Harper (the Harper Review). The Final Report was released on 31 March 2015.[1] It supported (but recommended improvements and extensions to) the existing competitive neutrality policy system, and the scope of application of general competition law. The Government is still considering its response to the Report.

This submission discusses:

- the operation of Australia's competitive neutrality policy
- how Australia advances competitive neutrality through the general competition law, and
- recommended changes to the existing competitive neutrality regime in Australia.

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1 See Competition Policy Review, Final Report, March 2015. The website for the Review is at: http://competitionpolicyreview.gov.au/

1. Australia's competitive neutrality policy

1.1 Scope, content and operation

4. The federal and state governments have each developed their own competitive neutrality policy and guidelines.[2] To provide institutional support for its competitive neutrality policy each jurisdiction also agreed in the CPA to establish a competitive neutrality complaints mechanism, and to report annually on implementation. This was preferred over a national law system with the threat of legal sanctions, as it reflects considerations of comity in Australia's federal system. Government business entities are not subject to penalties for non-compliance. However, the complaints procedures ensure public accountability for the implementation of those principles.

5. Although there are variations across jurisdictions this submission will focus primarily on the federal, or Australian Government's policy.[3] The underlying principle of that policy, which reflects the CPA to which all jurisdictions are committed, is that

> *Governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector.*[4]

6. The competitive neutrality policy is directed at:

- offsetting net competitive advantages of the public sector over the private sector that result from government ownership
- ensuring that public resources are used as efficiently as possible
- improving the overall performance of government businesses
- improving transparency and accountability of government businesses, presenting costs in a way that enables comparison to the private sector; and
- providing a better basis for agency managers to assess the mode of delivery for government business activities.[5]

7. The competitive neutrality policy focuses specifically on the following competitive advantages enjoyed by government businesses that are widespread and relatively easy to observe and correct.[6]

- Exemptions from various taxes (taxation neutrality). The policy requires public business activities to bear a similar tax burden to their private sector competitors, by removing taxation exemptions from identified organisations where this can be achieved in a cost effective and administratively simple manner. The alternative is to retain taxation exemptions and establish taxation equivalence regimes.
- Access to borrowings at concessional interest rates (debt neutrality), where public businesses derive a competitive advantage from being able to borrow at lower cost than private firms, because of lower risk to the lender. Debt neutrality is achieved by subjecting public businesses to similar borrowing costs to those faced by private sector businesses.
- Exemptions from regulatory requirements imposed on private sector competitors (regulatory neutrality). As far as practicable, government businesses should operate in the same

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2 At federal level see: Commonwealth Competitive Neutrality Policy Statement 1996; Australian Government Competitive Neutrality Guidelines for Managers 2004.

3 Commonwealth Competitive Neutrality Policy Statement 1996.

4 Commonwealth Competitive Neutrality Policy Statement 1996, p.5.

5 Australian Government Competitive Neutrality Guidelines for Managers, 2004, p.1.

6 Commonwealth Competitive Neutrality Policy Statement 1996, p. 6.

regulatory environment as private sector competitors, e.g. prudential, local planning, building and environmental laws. Where there are difficulties subjecting government entities to particular regulations, they must make allowance for any resultant cost advantages.

- Other benefits associated with not having to achieve a commercial rate of return (ROR) on assets (commercial rate of return requirements). The policy requires that publicly owned businesses should make a ROR on the assets used, on a yearly basis, that is comparable to that earned by the majority of firms in that industry (otherwise they would be able to undercut private sector competitors by factoring lower profit margins into their prices or bids). The ROR must be sufficient to justify the long-term retention of assets in the business.[7]

8. The competitive neutrality policy is applied to significant government businesses[8] where the benefits from doing so outweigh the costs.[9] A business activity is defined as one where:

- there is user charging for goods or services (not necessarily to the final consumer)
- there is an actual or potential competitor either in the private or public sector (that is, users are not restricted by law or policy from choosing alternative sources of supply)
- 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.

9. Some complaint mechanisms are handled by independent units; others by regulators or departments. The Australian Government Competitive Neutrality Complaints Office (AGCNCO) is an autonomous unit within the Productivity Commission and operates as the Australian Government's competitive neutrality complaints body. It receives and assesses complaints, proceeds with complaints which require investigation and provides independent advice to the Treasurer on each matter. The Government is not obliged to accept this advice. AGCNCO also undertakes research on implementation issues.[10] Any interested party may make a complaint to the AGCNCO on the grounds that: a government business activity has not been exposed to competitive neutrality arrangements; the government business activity is not complying with competitive neutrality arrangements that apply to it; or the current competitive neutrality arrangements are not effective in removing a government business activity's competitive advantage, which arises due to government ownership.

10. Where AGCNCO (after preliminary investigation) considers that competitive neutrality arrangements are not being followed, it may directly advise government business entities where there are inadequacies in their competitive neutrality arrangements and on how they can improve compliance with the policy. Alternatively, if a suitable resolution of a complaint cannot be achieved

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7 Competitive neutrality does not require governments to remove community service obligations (CSOs) from their government businesses but limits the ability for these CSOs to be financed through cross subsidies within the business.

8 Competitive neutrality policy deems the following organisations as significant as they have been specifically structured to operate along commercial lines: all Government Business Enterprises and their subsidiaries; other share-limited trading companies, and all designated business units. Other activities which operate in accordance with the definition of a business and generate in excess of $10 million in revenue from commercial activities are also considered to be significant.

9 The costs of the application of competitive neutrality policy should largely be administrative. Costs may include changes to accounting systems, asset valuations, reviews of activities and general administration. AGCNCO has recognised that the costs of applying competitive neutrality principles are generally not significant and build naturally on agencies' existing costing systems. Consequently, very few businesses that pass the business activity test will be able to demonstrate that the costs outweigh the benefits.

10 Two AGCNCO publications (on cost allocation and pricing, and rate of return issues) were released in 1998 and continue to be in demand and use.

by this advisory role, AGCNCO may recommend appropriate remedial action or that the Treasurer hold a formal public inquiry.

11. AGCNCO reports annually to the Treasurer on the operation of the complaints mechanisms, including allegations of non-compliance. This information is incorporated into the Treasurer's annual report on the implementation of policy.[11] AGCNCO circulates its reports and research to state government agencies responsible for competitive neutrality policy and complaint investigations to facilitate the exchange of information and to share procedural experiences.

12. AGCNCO has conducted 15 competitive neutrality investigations. Most have resulted in findings of policy compliance. One of the most significant, that resulted in findings of non-compliance relates to the pharmaceuticals sector, and is summarised in the following case study.

Case Study: PETNET

In August 2011 Cyclopharm Limited complained that competitive neutrality had not been correctly applied to the activities of PETNET Australia, a wholly owned subsidiary of the Australian Nuclear Science and Technology Organisation (ANSTO).

Positron emission tomography (PET), also called PET imaging, is a type of nuclear medicine imaging. The most common PET radiopharmaceutical is Fluorodeoxy-glucose (FDG). Cyclopharm manufactured FDG through its wholly owned subsidiary CycloPet Pty Limited. PETNET manufactures and sells FDG. Cyclopharm complained (among other things) that:

- PETNET failed to comply with the competitive neutrality principles by not passing the ROR test and because it cannot achieve a commercial ROR in the timeframe set out by ANSTO (initially 10 years then extended to 15 years), and

- through subsidised prices, and non-compliance with competitive neutrality guidelines, ANSTO/PETNET had secured a New South Wales tender to supply a particular radiopharmaceutical to the public hospital sector. 'Even by attaining this dominant position, the venture will continue to be heavily subsidized by taxpayer funding. … The recent decision by NSW Health in favour of PETNET's profoundly subsidized pricing has rendered CycloPet commercially unsustainable. Furthermore, in light of ANSTO's anticompetitive market positioning, it is unlikely that any private cyclotron operator will ever invest in another facility in Australia.'

In March 2012 AGCNCO found that revenue and expenditure forecasts over 10 and 15 years demonstrated that PETNET's commercial operations were unlikely to achieve a commercial rate of return on the equity invested over either time period, and that this represented an ex ante breach of competitive neutrality policy.

On the issue of offering prices below other producers, AGCNCO found that the pricing of individual services in particular market segments, in itself, was not a breach of competitive neutrality policy. For compliance with competitive neutrality policy, it is not the price of any specific product that is at issue, but rather whether a commercial rate of return is achieved from the overall activities of a business. Nevertheless, AGCNCO recommended that for ANSTO to comply with competitive neutrality policy, it would need to adjust PETNET's business model such that it can be expected to achieve a commercial rate of return that reflects its risk profile and the full investment in PETNET Australia.

In June 2012 Cyclopharm instituted proceedings in the Federal Court against PETNET for alleged predatory pricing of FDG in breach of section 46 of the CCA (misuse of market power). In March 2014 Cyclopharm announced the decision to cease production and sale of FDG at its cyclotron facility and exit the molecular imaging business when it became known that PETNET was entering into new contracts at prices lower than those already raised in Cyclopharm's proceedings.[12] The proceedings against PETNET settled in 2014 for a cash sum of $2.65 million.[13]

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11 All governments are required under the CPA to publish an annual report on competitive neutrality implementation.

12 Cyclopharm letter dated 28 March 2014 to Australian Securities Exchange Limited.

13 Cyclopharm's Annual Report 2014.

2. How Australia advances competitive neutrality through general competition law

2.1 General application of the CCA

13. Competitive neutrality is not specifically regulated under the CCA. The CCA applies the prohibitions against anti-competitive conduct to all businesses in Australia, including government businesses, by removing immunity from the Crown (at federal, state or territory level) insofar as it '*carries on a business*'.[14] To that extent the intention is to subject the public sector to the same competition law provisions as the private sector.

14. General competition enforcement measures are therefore available, for example, where a government business misuses its substantial power in a market,[15] where it engages in cartel activity,[16] where it enters into a contract, arrangement or understanding that is likely to substantially lessen competition in a market,[17] or where it engages in exclusive dealing by supplying goods or services on condition that the purchaser will not acquire goods or services from a competitor.[18] Also, the prohibition against mergers that would have the effect, or likely effect, of substantially lessening competition in a market apply to privatisations and other asset sales by government.[19] The ACCC is able to take public enforcement action for restrictive trade practices breaches but it is equally open to private parties affected by such a breach to take their own independent action. An example is provided by the proceedings instituted by Cyclopharm against PETNET in the case study above. Another example is the litigation between a government-owned power company, the Power and Water Authority (PAWA), and a potential competitor, NT Power. NT Power requested PAWA to supply the electricity transmission and distribution infrastructure services needed for it to sell electricity to consumers in competition with PAWA. When PAWA refused, NT Power claimed this amounted to a misuse of market power.[20] PAWA claimed that it was not '*carrying on a business*' in denying access to its infrastructure. The High Court held that although the conduct in question (the refusal) did not constitute the actual business of PAWA, the conduct nevertheless formed part of '*carrying on a business*' so that PAWA did not have Crown immunity. The Court also found that PAWA took advantage of its substantial market power in the refusal. It was only by virtue of its control of the market for the supply of services for the transport of electricity along its infrastructure and the absence of other suppliers that PAWA could withhold access to infrastructure.

15. Some concerns over competitive neutrality can be addressed through privatisation, especially where the opportunity is taken to separate potentially competitive activities. However, the structure of privatisation transactions, or any acquisition of a government business, can have significant impacts on competition, particularly where they perpetuate the advantages or privileges of former government ownership or have material impacts on competition in the relevant markets (including markets upstream or downstream from the privatised asset). Remedies in the context of mergers and acquisitions can play an important but limited, role and may enable the ACCC to address some competition concerns by means of court enforceable undertakings accepted from the purchaser.[21] However, merger review and remedies focus on the characteristics of the acquirer, such

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14 CCA s.2B.

15 S.46 CCA.

16 Ss. 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK CCA.

17 S.45 CCA.

18 S.47 CCA. The conduct is prohibited if it has the purpose, effect, or likely effect of substantially lessening competition.

19 S.50 CCA.

20 *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

21 An undertaking under s.87B of the Competition and Consumer Act 2010 (CCA) given in the context of assessment of the relevant acquisition under section 50 of the CCA.

as its interests in competing assets (horizontal aggregation), or its interests upstream or downstream at the time of sale (vertical integration), rather than the enduring characteristics of the assets being privatised.[22] One of the lessons learnt since implementing the Hilmer reforms is that failure to structurally separate natural monopoly functions from competitive activities prior to privatisation by governments can result in significant detriment to consumers and the Australian economy as a whole. The ACCC considers that governments should structurally separate natural monopoly from potentially competitive activities unless the cost outweighs the benefit. [23]

16. The ACCC also stated in its submission to the Harper Review that the terms of privatisation can have profound and long-term effects on competition.

17. There are signs that, in privatising assets, Australian governments are focusing overly on short term budget goals without sufficient regard to longer term competition, for example by separating, rather than integrating, potentially competitive facilities… Another key issue is the nature of the regulatory settings that apply to monopoly assets when privatised by governments. Governments should avoid the temptation to attempt to maximise sale revenue by privatising without appropriate price and access regulation in place.'[24]

18. The ACCC provided the following examples of government actions taken in the course of privatising major infrastructure or other assets:

- Sydney Airport – where the national government leased Sydney Airport with the right of first refusal to operate a second Sydney airport. The right of first refusal confers on Sydney Airport a monopoly over the supply of aeronautical services for international and most domestic flights in the Sydney Basin, and forecloses the potential for competition between Sydney Airport and an independent operator of a second airport.
- Ports Botany and Kembla and the Port of Newcastle – where the NSW government leased the ports with clauses that may restrict Newcastle from competing against Botany and Kembla for container trade. [25]

19. The Review Panel's view was that '[g]overnments need to approach privatisation carefully, ensuring that impacts on competition and consumers are fully considered and addressed. Where monopoly infrastructure is contracted out or privatised, it should be done in a way that promotes competition and cost-reflective pricing. Maximising asset sale prices through restricting competition or allowing unregulated monopoly pricing post sale amounts to an inefficient, long-term tax on infrastructure users and consumers.'[26]

2.2. Evaluating Competition from and between SOEs

20. In its consideration of some mergers and alliances, the ACCC has had to take into consideration and assess the independence of related SOEs and the competitive constraint that they exert.

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[22] Also, the compressed timeframes and one-off nature of merger processes are not conducive to establishing long term behavioural remedies. Added to this, the ACCC has limited information-gathering powers to ensure ongoing compliance with the provisions of a section 87B court enforceable undertaking.

[23] ACCC submission to the Harper Review of 25 June 2014, section 3.2.

[24] ACCC submission to the Harper Review of 25 June 2014, section 3.3.1.

[25] ACCC submission to the Harper Review of 26 November 2014, section 2.2.

[26] Harper Report section 11.

21. In recent years in Australia, there has been considerable investment by foreign SOEs in mining assets and privatised infrastructure. In the case of an acquisition which involves a foreign SOE, the merger test is the same regardless of whether the entity is foreign or not. In many cases foreign direct investment is more likely to be pro-competitive for the market. However where a foreign SOE is acquiring an interest in Australia and there are related SOE owned horizontal or vertical interests that may impact on competition, the ACCC will consider the effect of this carefully. The ACCC takes a conservative and pragmatic approach in its consideration of the ownership and control arrangements by basing its competition analysis on the assumption that these related foreign SOEs are subsidiaries of the same parent entity and therefore may have common commercial incentives. If no competition concerns are raised based on this assumption, then it is not necessary to reach a view on the challenging control issue.

22. The question of whether related SOEs are independent has also arisen in the ACCC's current consideration of an airline alliance where a rival airline to the alliance is also a related SOE to one of the alliance partners. While other factors mean that the question of whether or not the related SOEs were sufficiently independent was ultimately not determinative to the ACCC's draft decision,[27] there is an increasing likelihood that the ACCC will encounter a merger or alliance decision where the level of related SOE independence will be critical to the assessment. This is likely to create a significant challenge in terms of obtaining the necessary information to thoroughly assess the level of independence and therefore the impact on competition.

23. In contrast to the issues raised in mergers and alliances involving foreign SOEs, decisions made by some Australian state governments to re-integrate SOEs that were previously separated and gradually exposed to competition from the private sector have also been a focus for the ACCC. For example, the re-integration of a dominant electricity generator and retailer is likely to change the ability and incentive for the re-integrated entity to restrict access by other generators and retailers to customers and energy and may also raise barriers to entry and expansion by independent generators and retailers. In other cases, re-integration has occurred at the horizontal level, for example between two SOE electricity generators. The ACCC has actively highlighted the potential competition concerns arising as a result of state government decisions to re-integrate SOEs and encouraged them to consider alternative approaches.

24. In a different context, the ACCC has received claims from some alliance partners in support of their applications for exemption from prosecution under the competition law that the alliance is necessary for them to compete against foreign SOEs which receive favourable state assistance. For example, in the authorisation of the Qantas-Emirates alliance, Qantas submitted that it is unable to compete effectively or operate profitably as a result of 'embedded structural cost disadvantages' compared to other international carriers, which benefit from more favourable geography, more favourable tax regimes, lower labour costs and government funded infrastructure.

25. The ACCC accepted that Qantas is likely to be at a competitive disadvantage in its operations between Australia and UK/Europe, compared to mid-point carriers based in the Middle East and Asia, as a result of its inability to achieve the same economies of scale and density and comparatively higher labour costs.

26. However, in all other areas of Qantas' international operations, the ACCC considered that any structural disadvantages are likely to be largely or entirely offset by Qantas' strength in Australian domestic aviation and Qantas' customer loyalty through corporate contracts and frequent flyers.

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27 Qantas Airways Limited & China Eastern Airlines Corporation Limited – Draft Determination re Authorisation numbers A91470 & A91471): http://registers.accc.gov.au/content/index.phtml/itemId/1182892/fromItemId/278039/display/acccDecision.

27. The ACCC specifically did not accept Qantas' claim that its services between Australia and Asia face a structural disadvantage or are in terminal decline, noting that a number of initiatives recently implemented by Qantas were likely to improve the competitiveness and profitability of its services in that region.[28]

28. While much of the discussion regarding competitive neutrality focuses on the potential for SOEs to leverage their state ownership to distort competition, in some circumstances state ownership of some businesses may limit their ability to compete with private service providers. For example, in mergers involving hospitals and pathology providers, the ACCC has concluded in many of these reviews that the public sector is not a significant constraint on the private sector providers because their focus is on providing publicly available health care services while any for profit services they also provide are typically ancillary to their core business.

2.3 Exemptions

29. A further limitation on the general application of the CCA is the power to enact statutory exemptions. Each government currently has explicit power to legislate that certain conduct is exempt from the restrictive trade practices provisions of the CCA.[29] Statutory exemptions for anti-competitive conduct may undermine the important principle that competition policy should be implemented in a uniform manner across the economy. The ACCC suggested to the Harper Review that there should be a sunset clause for exemptions legislated by all governments, to ensure that any restrictions on competition are regularly reviewed through a transparent and accountable process prior to being renewed (for example, through the passage of new legislation).[30] The Harper Panel recommended that these exemptions should be examined to ensure they remain necessary and appropriate in their scope, and that any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.[31]

2.4 Residual Crown immunity and exemptions under the CCA

30. Although Crown immunity has been removed where the Crown '*carries on a business*', there is residual immunity in other areas of commercial activity, such as when the Crown is undertaking its own procurements, including for large infrastructure projects or the regular requirements of the health or education systems. Another example might be the terms on which governments lease infrastructure assets, as illustrated by the examples of Sydney Airport, Ports Botany and Kembla, and the Port of Newcastle above. To the extent Crown immunity applies, government will be free to impose conditions that have an anti-competitive purpose or effect.[32] However, while a government entity can avoid liability under the CCA when it is not carrying on a business, this immunity does not extend to private businesses contracting with it. The conclusion of an important long-running case was that there is no derivative crown immunity in favour of a company contracting with a government entity, even if the latter has immunity.[33] Other significant commercial arrangements which governments may engage in with the private sector without carrying on a

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[28] Qantas Airways Limited and Emirates – Determination re Authorisation numbers A91332 & A91333 (2012): http://registers.accc.gov.au/content/index.phtml/itemId/1078153/fromItemId/401858.

[29] CCA s.51(1).

[30] ACCC submission of 25 June 2014, section 4.2.5.

[31] Harper Report pp.43, 121, Recommendation 8.

[32] The *Commonwealth Procurement Rules 2012* encourage competition but focus on non-discrimination in that context and ethical procurement methods rather than CCA compliance.

[33] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* ([2007] HCA 38. In that case the ACCC alleged that Baxter's bundling of its products for government tenders, and subsequent contracts, breached CCA ss.46 (misuse of market power) and 47 (exclusive dealing).

business include public-private partnerships (such as for toll roads, hospitals and water supply facilities); and commissioning for the direct provision of human services.

3. Recommended changes to the existing competitive neutrality regime in Australia.

31. The Harper Review made a number of recommendations to extend the coverage of the CCA by limiting the scope of Crown immunity and to strengthen the effectiveness of the competitive neutrality policies.

3.1 Limit the scope of Crown immunity

32. The Harper Panel recommended a broadening of the existing exclusion from Crown immunity so that the Crown should be subject to the competition laws '*insofar as it undertakes activity in trade or commerce*'.[34] This would place government bodies engaging in commercial activities on the same footing as private parties. It would prevent Crown immunity from operating in relation to a government's own procurements, and also in the licensing of assets (e.g. to exploit a state's minerals), that occur in trade or commerce, not just (as now) when the government is carrying on a business. The proposal is not intended to capture all government activity that impacts on trade, which are strictly governmental in character, such as administrative and regulatory functions, including a ministerial decision as to which pharmaceutical drugs to list for government subsidy.[35]

3.2. Review of policies and guidelines

33. In the Harper Review, stakeholders overwhelmingly supported the principle of competitive neutrality. Others raised concerns about its implementation, for example in private activities that compete with government.

34. A number of submissions relate to businesses competing with local government, for example: where local governments operate child care centres, aged care facilities, and gyms in sport and recreation centres in competition with private operators; where local councils charge for waste collection through rate payments (impeding private competitors that are able to offer lower prices); or where local councils provide free access to showgrounds or parklands for motorhomes, making it difficult for local caravan park owners to compete. There were comments about the threshold of 'significant business activity', which may not be met on a council by council basis but where the impact could be significant if it recurs for the same type of businesses across the state. Submissions expressed concern at the exercise of regulatory or planning approval functions by governments while operating businesses that compete with the private sector.

35. Competitive neutrality policy requires that government businesses earn a commercial rate of return to justify the retention of assets over the longer term. The Harper Panel found that there would be merit in providing greater guidance on how this term should be interpreted, including its application to start-up businesses.

36. The Harper Review Panel recommended that all Australian governments should review their competitive neutrality policies, including guidelines on their application 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 Panel

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[34] See Report section 14.2. The Harper Review noted the broader application of competition law to government activities than the CCA in the New Zealand Commerce Act 1986 (which covers the Crown 'insofar as it engages in trade') and in the UK Competition Act 1998 (which applies to government activities where the body is an 'undertaking' for the purposes of the law and where its activities are commercial in nature).

[35] In *Glaxo New Zealand Ltd v Attorney General* [1991] 3 NZRL 129, such a ministerial decision was not found to be 'engaging in trade'.

also recommended that the review of competitive neutrality policies should be overseen by an independent body to be established more generally to provide leadership and drive implementation of the evolving competition policy agenda (the Australian Council for Competition Policy).

3.3 Complaints, reporting and transparency

37. A number of submissions to the Harper Review suggested stronger obligations on governments to respond to documented breaches of competitive neutrality policy and associated recommendations for remedial action. The Panel noted that the absence of any requirement to respond to documented breaches of competitive neutrality policy is clearly undermining its efficacy but it did not make any specific recommendations on this issue. However, in order to increase the transparency and effectiveness of competitive neutrality complaints processes the Harper Panel recommended at a minimum that governments should assign responsibility for investigation of complaints to an independent body; that there should be annual reporting on complaints by that body on the number of complaints received and investigations undertaken; and that governments should be required to respond publicly to the findings of complaint investigations.

38. To strengthen accountability and transparency the Harper Panel recommended that government businesses should be required to include a statement on compliance with competitive neutrality policy in their annual reports.

ANNEX. NATIONAL COMPETITION POLICY REVIEW FINAL REPORT

RECOMMENDATIONS

Recommendation 1 — Competition principles

The Australian Government, state and territory and local governments should commit to the following principles:

- Competition policies, laws and institutions should promote the long-term interests of consumers.
- Legislative frameworks and government policies and regulations binding the public or private sectors should not restrict competition.
- Governments should promote consumer choice when funding, procuring or providing goods and services and enable informed choices by consumers.
- The model for government provision or procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and should encourage a diversity of providers.
- Governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities.
- Government business activities that compete with private provision, 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.
- A right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest.
- Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.

Applying these principles should be subject to a public interest test, such that legislation or government policy should not restrict competition unless:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

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).

Recommendation 16 — Competitive neutrality complaints

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints 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.

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.

Recommendation 18 — Government procurement and other commercial arrangements

All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes.

Procurement and privatisation policies and practices should not restrict competition unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the policy can only be achieved by restricting competition.

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with reporting on progress in reviewing government commercial policies and ensuring privatisation and other commercial processes incorporate competition principles.

Recommendation 43 — Australian Council for Competition Policy — Establishment

The National Competition Council should be dissolved and the Australian Council for Competition Policy (ACCP) established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP should be established under legislation by one State and then by application in all other States and Territories and at the Commonwealth level. It should be funded jointly by the Australian Government and the States and Territories.

The ACCP should have a five-member board, consisting of two members nominated by state and territory Treasurers and two members selected by the Australian Government Treasurer, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories combined. The Chair should be appointed on a full-time basis and other members on a part-time basis.

Funding should be shared by all jurisdictions, with half of the funding provided by the Australian Government and half by the States and Territories in proportion to their population size.