GUIDELINE ON THE COMPETITIVE NEUTRALITY COMPLAINTS PROCESS

Version 3

September 2022

Printed September 2022
Office of the Tasmanian Economic Regulator
Level 3, 21 Murray Street, Hobart TAS 7000
GPO Box 770, Hobart TAS 7001
Phone: (03) 6145 5899

ISBN 978-1-922379-90-0

Table of Contents

THE REGULATOR'S ROLE AND THE COMPLAINTS PROCESS

The Tasmanian Economic Regulator is responsible for investigating competitive neutrality complaints in Tasmania under Part 6 of the *Economic Regulator Act 2009* (the Act).

Businesses or other affected parties that believe a government entity has not correctly applied the competitive neutrality principles can make a formal complaint to the Regulator by following the process outlined in this Guideline.

A person may make a complaint to the Regulator if that person:

- believes that a prescribed body[1] has contravened any of the national competition policy competitive neutrality principles and that person is adversely affected by that alleged contravention; and
- has discussed the alleged contravention with the prescribed body that the complaint relates to.

The Regulator does not accept complaints considered vexatious, frivolous or not made in good faith.

Once the investigation has been completed, the Regulator reports on its findings to the complainant, the prescribed body, the Minister and the Portfolio Minister and makes its recommendations public in its annual reports.

The complaints process

The process, which governs the review of complaints concerning the application of the competitive neutrality principles, can be divided into three stages:

Stage 1 - identification and lodgement of a complaint.

Stage 2 - investigation of the complaint.

Stage 3 - reporting on investigation outcomes.

Appendix 5 of this Guideline provides a schematic overview of the Tasmanian complaints mechanism.

Stage 1 - identifying and lodging a complaint

Potential complainants are required, in the first instance, to discuss their concerns with the prescribed body. Some complaints may be resolved informally by the complainant obtaining

[1] A prescribed body means an Agency, a statutory authority, a local government body, a Government Business Enterprise or a State-owned company.

further information about the costing structure and regulatory environment of the prescribed body business activity.

If a complainant considers that the complaint remains unresolved, the complainant may wish to take the matter further by lodging a formal complaint with the Regulator.

Potential complainants may contact the Regulator's Office to discuss whether the matter can be considered under the competitive neutrality complaints framework.

Formal complaints

The Regulator will consider written complaints submitted on the competitive neutrality complaint form. Required information includes:

- a description of the nature of the business affected, including any special features that the Regulator needs to be aware of;
- the prescribed body's business activity which is the subject of the complaint;
- a summary of the complaint and description of the type of unfair advantage;
- information that supports the complaint (for example, sales data and pricing information for similar products or services); and
- details as to how the complainant has been adversely affected by the alleged failure of the prescribed body to apply the competitive neutrality principles.

Competitive neutrality complaint form (PDF 214kb)

The Regulator will not reject a complaint on the grounds that it lacks sufficient form or content without first giving the complainant the opportunity to consult with the prescribed body and clarify the basis of the complaint. The Regulator may also request a complainant to provide further information or documents to support the claim and/or verify all or any part of the complaint by statutory declaration.

To be considered as 'adversely affected', a person must be able to demonstrate that the prescribed body's actions have been the primary cause of the detrimental effect upon the complainant.

Complaints from industry or community groups or from persons not directly affected by the contravention of the prescribed body may not fall within the meaning of 'adversely affected'. Consequently, complaints from such groups or persons will not be accepted by the Regulator unless the group demonstrates that it, rather than its members, has been 'adversely affected'.

A fee of 110 fee units[2] is payable when making a complaint. This fee is refundable if the Regulator finds that the complaint is justified.

[2] The value of a fee unit is calculated in accordance with Section 5 of the *Fee Units Act 1997*. Advice as to the current value of the fee may be obtained by contacting the Office of the Tasmanian Economic Regulator.

Stage 2 - investigating the complaint

Regulator's preliminary assessment of the complaint

Within 30 days of receiving a complaint, the Regulator must, under the Act, determine whether or not an investigation of the complaint is necessary or appropriate. This assessment is based on information from the complainant, the Regulator's own desktop research, and where appropriate, the relevant prescribed body.

Key issues that the Regulator considers in making a decision about whether to investigate the complaint include:

- whether the activity is a significant business activity and in scope of the competitive neutrality principles;
- the evidence supporting the allegation that one or more of the principles have been contravened; and
- how the complainant has been adversely affected by the alleged failure to apply the competitive neutrality principles.

The Regulator does not accept complaints considered vexatious, frivolous or outside the scope of the competitive neutrality principles.

When undertaking its preliminary assessment, the Regulator may require the complainant or prescribed body to provide further information or documents and/or verify any part of the complaint or other information or document by statutory declaration. A court imposed fine may be applied if a prescribed body refuses to provide information during this preliminary assessment.

After assessing the complaint, the Regulator will notify the complainant of its decision to:

- refuse to investigate and explain the reasons for the refusal;
- take action to resolve the issue with the parties without investigation; or
- accept the complaint for investigation.

When a complaint has been accepted, the Regulator will provide written notice of the intention to investigate to the complainant, the prescribed body concerned and the body's Portfolio Minister.

Commencing an investigation

Prescribed body review of complaint

Within 30 days of being notified by the Regulator that it intends investigating the complaint, the prescribed body that is the subject of the complaint must, under the Act, provide the Regulator with a written response to the complaint as outlined below.

Each prescribed body should ensure it has in place procedures which will enable the timely review of any complaint the Regulator notifies it of in relation to the operation of a business activity which the prescribed body undertakes. A court imposed fine may be applied if a

prescribed body fails to provide an adequate written response within the prescribed 30-day period.

Where a complaint is unclear or contains insufficient information for the prescribed body to undertake a proper review, the reviewing officer is encouraged to seek additional information as appropriate.

The prescribed body's internal review needs to consider:

- the material lodged by the complainant;
- the *Competition Principles Agreement*; and
- relevant Government guidelines, policies and Application Statements.

The prescribed body must notify the Regulator in writing of the outcome of its internal review and include a 'statement of facts'.

The statement of facts

The statement of facts must specify whether the prescribed body believes the complaint is:

- justified;
- partly justified; or
- not justified.

The statement of facts must contain all the steps of reasoning linking the facts to the prescribed body's final position in relation to the complaint. It must not state conclusions without explaining how they were reached.

If the prescribed body believes that the complaint is justified or partly justified, the statement of facts should contain details of the action being taken, or planned to be taken, to prevent any further contravention of the competitive neutrality principles which were the subject of the complaint or to ensure that such a contravention does not occur again.

If the prescribed body believes that the complaint or part of the complaint is not justified, the statement of facts must set out the grounds on which that belief is based.

The findings on material questions of fact:

The prescribed body is required to address material questions of fact that are set out in the complaint. If the statement of facts is silent on certain matters raised by the complainant, it is open to the Regulator to conclude that the complainant's presentation of the information is an accurate account of the facts.

The competitive neutrality principles, application statements, guidelines and policies:

The statement of facts must address relevant parts of the competitive neutrality documentation and comply with procedures set out in the statements, guidelines and policies.

Conclusions:

The statement of facts must contain the prescribed body's conclusions in respect of the complaint and all the steps of reasoning linking the facts to its conclusion. The factors taken into account and the importance given to each of those factors should be stated.

Future actions:

Where the complaint is accepted as being justified, whether in whole or in part, the prescribed body must advise the Regulator of the proposed actions to be taken by the prescribed body to address the issues raised in the complaint.

Regulator's investigation of the complaint

Where the Regulator decides to investigate a complaint, the Regulator will:

- investigate to establish whether there is a breach of competitive neutrality policy;
- consider the prescribed body's response and statement of facts;
- if necessary, hold further discussions with the prescribed body and/or the complainant;
- determine whether or not the complaint is justified;
- prepare a report on the outcomes of the investigation and if necessary, make recommendations for the prescribed body to action;
- distribute the report; and
- where relevant, take follow-up action to ensure the prescribed body has implemented the Regulator's recommendations.

The investigation must be completed within 45 days of the date that the prescribed body provided its response to the complaint (or such later date as allowed by the Minister ie the Minister may grant an extension of time).

During an investigation the Regulator may, having regard to all the circumstances of the case, decide not to continue the investigation.

The Regulator's decision in relation to the complaint is final as the Act does not contain any further review rights.

The complainant is not entitled to compensation if the Regulator determines that the complaint is justified or partly justified.

Stage 3 - reporting on investigation outcomes

Regulator's reporting requirements

If the Regulator determines that the complaint is justified, the Regulator will provide to the Minister and the Portfolio Minister a written report containing recommendations:

a) that the application of the competitive neutrality principles be changed; and/or

b) that the prescribed body be directed to change how it applies the competitive neutrality principles to the business activity which was the subject of the complaint.

The Regulator will also provide the complainant and the prescribed body with a copy of the report (the Investigation Report).

If the Regulator resolves a complaint with the agreement of the parties without conducting an investigation, the Regulator will provide a copy of the complaint and the resolution to the prescribed body concerned, the relevant Portfolio Minister and the complainant.

Actions subsequent to the Investigation Report

If the Regulator recommends that the prescribed body should change how it applies the competitive neutrality principles:

- the prescribed body must notify the Regulator, within 30 days of the date of receiving the Investigation Report, of any action it has taken or intends to take to implement the recommendations, including the proposed deadline for the intended actions to be taken;
- within 45 days of receiving the prescribed body's written notice of the actions it has taken or intends taking, the Regulator must report to the Minister and the Portfolio Minister on those actions, including whether there are any recommendations in the Investigation Report that the prescribed body has actioned or does not intend actioning; and
- where required, the Minister may, with the agreement of the Portfolio Minister, direct the prescribed body to take actions the Minister considers necessary to ensure the prescribed body implements the Regulator's recommendations.[3]

The Regulator will monitor the prescribed body's actions to ensure that any changes required to be implemented as a result of the complaint investigation are put in place. The Regulator will also update the Minister as necessary.

[3] As set out in Section 60A of the Act.

Regulator's annual report

The Regulator will report on the outcomes from its oversight of the competitive neutrality complaints mechanism in its annual report to Parliament. The report will include:

- particulars of any contraventions of the principles admitted by a prescribed body in response to a complaint or determined by the Regulator during an investigation;
- particulars of any action taken by a prescribed body as a result of such an admission or determination of a contravention of the principles;
- other particulars or matters the Minister requires to be included; and
- other particulars or matters that the Regulator considers appropriate.

Prescribed body's record keeping and reporting

It is recommended that prescribed bodies maintain accurate and detailed records of each complaint received including:

- the original complaint;
- additional information received relating to the complaint;
- the statement of facts advising the outcome of the prescribed body's internal review;
- the Regulator's findings in relation to the review; and
- actions taken, if any, by the prescribed body in response to the complaint.

The prescribed body is not required to publish information concerning complaints made against it in its annual report. The Regulator will, however, publish a summary in its annual report.

BACKGROUND

The *Competition Principles Agreement* (CPA) requires Tasmania to have in place a mechanism to consider complaints relating to the application of the competitive neutrality principles.

The Tasmanian Government has decided that the Tasmanian Economic Regulator is the body responsible for the investigation of competitive neutrality complaints.

The Regulator is empowered to conduct complaint investigations by the inclusion of this function under Part 2, section 10 of the *Economic Regulator Act 2009* and by following the procedures set out under Part 6 of the Act.

This Guideline should be read in conjunction with the:

- *Economic Regulator Act 2009* (see Part 6);
- the *Government Business Enterprises Act 1995* (GBE Act); and
- guidance issued by the Department of Treasury and Finance which is available at: https://www.treasury.tas.gov.au/economy/economic-policy-and-reform/competitive-neutrality-policy.

National Competition Policy

At the April 1995 Council of Australian Governments (COAG) meeting, all Australian Heads of Government signed a number of Agreements designed to boost the competitiveness and growth prospects of the national economy. The Agreements give effect to many of the recommendations in the Hilmer Report on National Competition Policy, which was released in August 1993.

One of these Agreements is the *Competition Principles Agreement* (CPA). Clause 3 of the CPA states that the objective of competitive neutrality policy is to eliminate resource allocation distortions arising out of public ownership of significant businesses.

Further, Clause 3 requires government businesses to operate within a framework that ensures they do not enjoy any net competitive advantage simply as a result of their public ownership.[4]

As a general principle, significant government businesses should be corporatised and their costs should reflect[5]:

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

[4] *Competition Principles Agreement,* Sub-clause 3(1)

[5] *Competition Principles Agreement*, Sub-clause 3(4)

iii) 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. [6]

However, where a prescribed body undertakes significant business activities as part of a broader range of functions and corporatisation is not considered appropriate, the CPA states that in respect of these business activities the relevant party will:

- where appropriate, implement the above principles; or
- ensure that the prices charged for goods and services will take account, where appropriate, of the items listed above, and reflect full cost attribution for these activities.[7]

The CPA also requires each jurisdiction to have a mechanism to consider complaints relating to the application of the competitive neutrality principles. Clause 3(1) states that the principles only apply to the business activities of a government business, not to non-business, non-profit activities. Appendix 1 of this Guideline sets out Clause 3 in full.

Clause 7(1) of the CPA states that the principles set out in that Agreement are also to apply to local government. Each state and territory government is responsible for applying these principles to local government.

Principles of competitive neutrality

As previously noted, the objective of competitive neutrality policy is to eliminate resource allocation distortions arising out of public ownership of entities engaged in significant business activities (SBAs).

Resource allocation distortions can arise where government businesses face different costs than if the same business were a private business or if they conduct their business in a different way from private sector businesses.

These differences may provide a government business with competitive advantages or disadvantages that will influence its pricing and production decisions.

Competitive neutrality principles relate to removing any advantages a government business might otherwise enjoy as a result of its government ownership and any disadvantages which may similarly be imposed on the business.

The CPA categorises government businesses as:

- Significant government business enterprises[8] (SGBEs), which are to be subject to the corporatisation model; or

---

6 *Competition Principles Agreement*, Sub-clause 3(4).

7 *Competition Principles Agreement,* Sub-clause 3(5).

8 Sub-clause 3(4) of the CPA defines significant government business enterprises to be those classified as 'Public Trading Enterprises' and 'Public Financial Enterprises' under the Government Financial Statistics Classification.

- **SBAs undertaken by a government agency as part of a broader range of functions**. These businesses are to be subject to the corporatisation model, where appropriate, or if not appropriate, the full cost attribution (FCA) model is to apply.

There is a different model for applying the principles to businesses in each category.

The two Application Statements[9], which separately apply to State Government and local government, set out in detail the circumstances in which, and how, the corporatisation model or the FCA model applies to the business activities of each tier of government. The two models are summarised below. This is described in diagrammatic form in Appendix 2 of this Guideline.

Competitive neutrality does not have to be applied where a Community Service Obligation (CSO) has been identified and funded.[10] This requires a specific policy decision to provide the subsidy and for the value of the subsidy to be budgeted and fully disclosed.

In addition, competitive neutrality measures do not have to be applied if it can be demonstrated that their application would not be in the public benefit.[11] This requires a prescribed body to assess, via a rigorous public benefit process, that the benefits to be realised from the implementation of competitive neutrality principles are outweighed by the costs. It is necessary to provide information to support this assessment.

The full cost attribution model

The FCA model is to be applied to SBAs where it is not appropriate to apply the corporatisation model.

Significant business activity

Tasmania has adopted a broad definition of business activity 'requiring only that a government agency produce goods and/or services in an actually, or potentially, competitive market'.[12] A preliminary list of SBAs was published on page 18 of the Application Statement.[13] There is no single criterion that is used to assess whether a business activity is an SBA.

---

[9] (1) Government of Tasmania, *Application of the Competitive Neutrality Principles Under National Competition Policy*, June 1996; and

(2) Government of Tasmania, *National Competition Policy: Applying the Principles to Local Government in Tasmania*, December 2013.

[10] See Department of Premier and Cabinet Local Government Division: *Community Service Obligation Policy and Guidelines for Local Government in Tasmania,* November 2000.

[11] What may constitute a public benefit will vary from case to case. See the Department of Treasury and Finance's webpage for guidance on undertaking a public benefit assessment.

[12] Government of Tasmania, *Application of the Competitive Neutrality Principles under National Competition Policy*, June 1996; page 15.

[13] *Ibid,* page 18.

Prescribed bodies are required to make their own assessment using a range of criteria including:

(a) the relevant market for the good or service;

(b) the barriers to entry in the market;

(c) the degree of concentration in the market, including the criticality of the good or service provided; and

(d) the potential impact on other markets (eg the loss of efficiency in an upstream or downstream market).

However, if a formal complaint is made to the Regulator, the Regulator is required to make its own assessment as to whether a SBA is being conducted.

The Regulator takes a broad view of what constitutes a business activity, and it includes an activity undertaken by a prescribed body to produce goods and/or services for use in an actually or potentially competitive market. The Regulator determines whether a business activity is a SBA by examining the influence, or potential influence, of the business activity on its market.

The Government's competitive neutrality policy at https://www.treasury.tas.gov.au/economy/economic-policy-and-reform/competitive-neutrality-policy provides guidance to prescribed bodies on identifying and reporting on SBAs.

In the first instance, prescribed bodies should identify which business activities are significant. However, if a complaint is made, the ultimate decision as to what is a business activity and a SBA may need to be resolved by the Regulator. In considering whether a government business activity is 'significant', the Regulator considers the influence, or the potential influence, of the government business activity on the market with regard to the factors listed above in (a) to (d) inclusive. As markets change over time, whether a business activity is a SBA can only be established by accounting for the facts of each case at the time of the complaint. Given this, the Regulator also recommends that prescribed bodies undertake regular reviews to assess whether circumstances have changed. An example of the process for determining whether a government business activity is 'significant' is provided in Appendix 4.

Application of full cost attribution to prescribed bodies

The application of the corporatisation model involves a number of costs, including legislative, governance and compliance costs and risks to Government. This being the case, it is unlikely that the corporatisation model will pass the public benefit test for smaller SBAs in councils and State Government agencies. In these cases, the CPA requires the prices charged for goods and services to reflect FCA.[14]

Where FCA is to apply, prices for goods and services must take account of, where appropriate, tax equivalents, debt guarantee fees and the application of regulations on an equivalent basis to private sector organisations.

[14] *Competition Principles Agreement*, Sub-clause 3(5)b.

The application of FCA means that the total cost of the resources used in providing the activity are accounted for by the prescribed body, irrespective of who pays for those resources. The full cost must take into account the direct cost of providing the activity and a proportional share of indirect costs. Costs will include wages, workers' compensation, rents, rates, travel expenses, equipment maintenance, capital costs and, where appropriate, tax equivalents and the other provisions in clause 3(4)(b) of the CPA.

The prescribed body is to adjust the costs that it incurs in undertaking the SBA for any cost advantages or disadvantages arising from public ownership.

More information on the FCA model is available at: https://www.treasury.tas.gov.au/economy/economic-policy-and-reform/competitive-neutrality-policy.

In applying FCA, it is desirable to separate policy, regulatory and contract management functions from operational or service delivery functions. This is necessary to ensure there is no conflict of interest and those business activities do not enjoy any advantage over private sector competitors. However, it is recognised that for smaller organisations it may not be possible to separate these functions.

Full cost attribution - costs and prices

There are a number of cost allocation methods that can be used to apply FCA to a SBA. The most useful method is likely to depend on the SBA in question.

Under competitive neutrality principles, the price charged for goods and/or services must take into account their full cost. This does not imply, however, that prices cannot take into account additional market and competitive considerations. For a given set of costs, a range of prices may be consistent with competitive neutrality principles. However, over the longer term, if prices are below the full costs of production, this is not consistent with competitive neutrality principles unless this pricing is justified by a public benefit assessment or a CSO is in place.

Weighing up the costs and benefits

The decision to implement a specific competitive neutrality measure depends on the expected benefits outweighing the expected costs. The CPA requires prescribed bodies to implement competitive neutrality measures only '…to the extent that the benefits to be realised from implementation outweigh the costs'.[15]

[15] *Competition Principles Agreement*, Sub-clause 3(6).

GLOSSARY OF TERMS

Terms used in this Guideline have the same meaning as those used in the *Economic Regulator Act 2009*. The Glossary of Terms included in this section is provided as a summary of the terms used in this Guideline.

'Act' means the *Economic Regulator Act 2009;*

'Application Statement' means:

(a) in relation to a council or joint authority within the meaning of the *Local Government Act 1993*-

the *National Competition Policy: Applying the Principles to Local Government in Tasmania* paper, reissued by the Government of Tasmania in December 2013,

(b) in relation to a Government department, GBE or other statutory authority-

the *Application of the Competitive Neutrality Principles under National Competition Policy* paper, issued by the Government of Tasmania in June 1996;

'business activity' means an activity undertaken by a prescribed body to produce goods and or services for use in an actually or potentially competitive market;

'CPA' means the Competition Principles Agreement signed by all Heads of Government at the April 1995 Council of Australian Governments meeting;

'competitive neutrality principles' mean the national competition policy competitive neutrality principles, which are defined in the Act as including the principles set out in clause 3 of the Competition Principles Agreement or any policies adopted by the State for the purpose of complying with or giving effect to the principles;

'CSO' means a Community Service Obligation, which is defined in the Act and may include a function, service, or concession performed by a prescribed body that would not have been performed, provided or allowed if the prescribed body was a business in the private sector acting in accordance with sound commercial practice;

'FCA' means full cost attribution;

'GBE' means a Government Business Enterprise listed in Schedule 1 of the GBE Act: a forestry corporation established by the *Forestry Act 1920*, the Hydro-Electric Corporation, the Motor Accidents Insurance Board, the Port Arthur Historic Site Management Authority, the Public Trustee and the Tasmanian Public Finance Corporation;

'GBE Act' means the *Government Business Enterprises Act 1995*;

'Minister' means the Minister administering the Act;

'NCC' means the National Competition Council;

'NCP' means National Competition Policy;

'**Portfolio Minister**' means;

(a) in respect of an Agency, the Minister to whom the Agency is assigned; or

(b) in respect of a statutory authority or Government Business Enterprise constituted or continued by or under an Act or a provision of an Act, the Minister to whom the administration of that Act or provision is assigned; or

(c) in respect of a statutory authority or Government Business Enterprise not established, constituted or continued by or under an Act or a provision of an Act, the Minister to whom the administration of the statutory authority or Government Business Enterprise is assigned; or

(d) in respect of a Local Government Body, the Minister to whom the administration of the *Local Government Act 1993* is assigned; or

(e) in respect of a State-owned company, the Minister to whom the administration of the Act requiring or authorising the formation of the company is assigned;

'prescribed body' means one of the following entities:

(a) an Agency;

(b) a statutory authority;

(c) a local government body;

(d) a Government Business Enterprise; or

(e) a State-owned company;

'Regulator' means the Regulator appointed under Section 9 of the Act; and

'Treasury' means the Department of Treasury and Finance.

APPENDIX 1: THE COMPETITION PRINCIPLES AGREEMENT - CLAUSE 3

(3) Competitive neutrality policy and principles

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.

2) Each Party[16] is to determine its own agenda for the implementation of competitive neutrality principles.

3) A Party may seek assistance with the implementation of competitive neutrality principles from the Council[17]. The Council may provide such assistance in accordance with the Council's work program.

4) Subject to sub-clause (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[18] 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.

5) Subject to sub-clause (6), where an agency (other than an agency covered by sub-clause (4)) undertakes significant business activities as part of a broader range of functions the parties will, in respect of the business activities:

---

[16] Being the Parties to the Agreement, ie the Commonwealth and each state and territory.

[17] 'Council' refers to the National Competition Council (the NCC).

[18] Government Trading Enterprise.

a) where appropriate, implement the principles outlined in sub-clause (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.

6) Sub-clauses (4) and (5) only require the Parties to implement the principles specified in those sub-clauses to the extent that the benefits to be realised from implementation outweigh the costs.

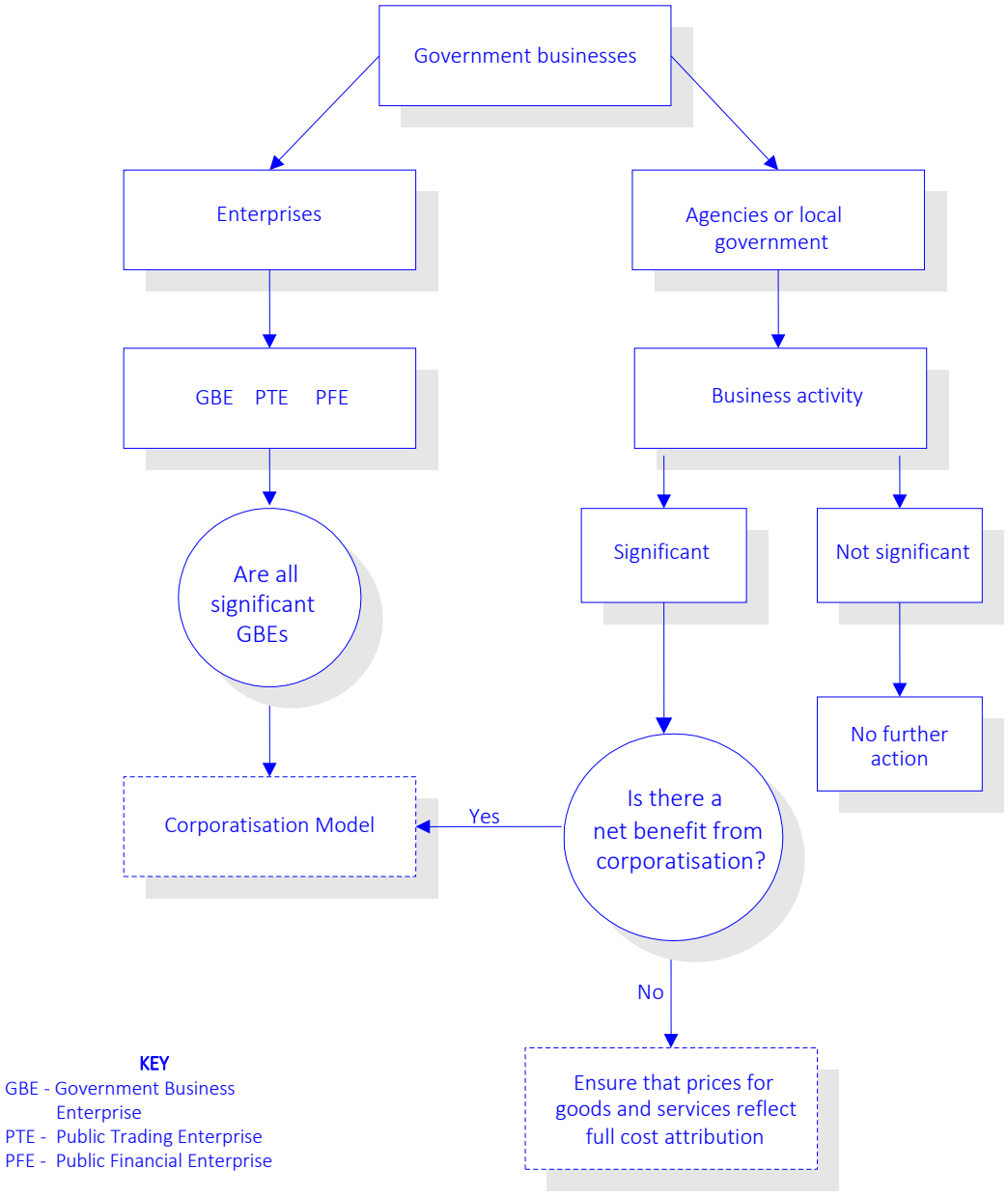
7) Sub-paragraph (4)(b)(iii) shall not be interpreted to require the removal of regulation which applies to a government business enterprise or agency (but which does not apply to the private sector) where the Party responsible for the regulation considers the regulation to be appropriate.

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.

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.

10) Each Party will publish an annual report on the implementation of the principles set out in sub-clauses (1), (4) and (5), including allegations of non-compliance.

APPENDIX 2: APPLYING COMPETITIVE NEUTRALITY PRINCIPLES TO GOVERNMENT BUSINESSES



APPENDIX 3: SIGNIFICANT GOVERNMENT BUSINESSES

	Tax Equivalents[1]	Dividends[1]	Guarantee Fees[2]
Aurora Energy	Yes	Yes	Yes
Sustainable Timber Tasmania	Yes	Yes	Yes
Hydro Tasmania	Yes	Yes	Yes
Metro Tasmania	Yes	No	Yes
Motor Accidents Insurance Board (MAIB)	Yes	Yes	Yes
Port Arthur Historic Site Management Authority	No	No	Yes
The Public Trustee	Yes	Yes	Yes
Tasmanian Irrigation	Yes	Yes	Yes
Tasmanian Ports Corporation	Yes	Yes	Yes
Tasmanian Public Finance Corporation (TasCorp)	Yes	Yes	Yes
TasRail	Yes	Yes	Yes
Tasracing	Yes	No	Yes
TT-Line	Yes	No	Yes
Tasmanian Networks	Yes	Yes	Yes

Notes:

1. The payment of tax equivalents and/or dividends is subject to the GBE or SOC making a tax and/or accounting profit.

APPENDIX 4: EXAMPLE - DETERMINING WHETHER A GOVERNMENT BUSINESS ACTIVITY IS A SIGNIFICANT BUSINESS ACTIVITY

This example is taken from the *National Competition Policy Competitive Neutrality Principles Investigation and Findings – Department of Health and Human Services* ("the Business").

Background

"The Business" is a unit within the Community Population and Rural Health Division of the Department of Health and Human Services (DHHS). The Business provides certain services to both public customers, through the public health system, and private customers, via individual referrals.

Investigation of the complaint

Given that the Business was not a significant government business enterprise, the Commission[19] needed first to determine if the services were a business activity.

Issue: Are the Business' services a business activity?

The Tasmanian Government adopted a broad definition of 'business activity', requiring only that a government agency produce goods and or services in an actually, or potentially, competitive market. The Business services were provided to both public and private hospitals and in competition with the complainant and interstate providers. Accordingly, the Business' services fell within the meaning of business activity for the purpose of the competitive neutrality principles. In its statement of facts, the DHHS did not dispute this assessment on the nature of the Business' services.

Finding:

The Commission found that all of the Business' services were a business activity under the competitive neutrality principles.

[19] Reference to the Commission is a reference to the Government Prices Oversight Commission whose function in relation to investigating competitive neutrality complaints is now undertaken by the Tasmanian Economic Regulator.

Issue: Are the services provided by the Business a significant business activity?

In the case of government business activities, the competitive neutrality principles apply only to significant business activities. The meaning of 'significant' is an issue for the Commission to determine as a matter of fact when investigating government business activities.

In its statement of facts, the DHHS acknowledged that the Business' services are significant as they have a major impact on a specific market across Tasmania, as for much of its history it has been the sole provider of these services in Tasmania. Further, the DHHS went on to state that even in a contested market, it purports to represent itself as a major player through its vision to be "… readily recognised in the Community." However, the DHHS also contended that it was not significant in the context of the amount of revenue raised as a percentage of total expenditure, being approximately only 19 per cent of its total operating budget over the past three financial years.

The relevant factor when determining the significance of a government business activity is the effect of the activity on the relevant market. The Government's Application Statement notes that:[20]

> The NCC considers that the impact of the activity on the relevant market, or across State Governments generally, is a more appropriate indicator.

In determining whether the Business' services were a SBA, the key consideration was the impact of the services on the actual and potential market, not the percentage of revenue raised.

The complainant in his letter of complaint stated that the complainant's business had maintained clinics in Hobart, Launceston and the North-West Region. He also stated that the main, core business was in the manufacture of specified goods for supply to public and private hospitals, nursing homes, for compensable patients and Department of Veterans' Affairs' (DVA) clients. This suggested that the actual market was in relation to the provision of these services in all regions of the State in which the complainant was operating.

The potential market might therefore cover all the Business' services provided state-wide. However, Government and thus DHHS policy requires certain clients are supplied by the Business free of charge (public clients)[21] or are only charged for the cost of the appliance (community referred)[22] ie they are internally funded, in full or in part, by DHHS. Public clients include Health Care Card holders; public hospital inpatients; or clients with referrals from the specialist outpatient clinics who do not have access to compensable funding.

---

[20] Tasmanian Government, *Application of the Competitive Neutrality Principles under National Competition Policy*, June 1996 p.16

[21] A charge will only apply where the client elects to have items of higher quality or more sophisticated devices or services than are offered as standard under the public provision schemes. These items are then provided at the rates listed on the fee schedule, which includes the staff time to do the work plus the cost of the selected item.

[22] Advice from DHHS on 6 June 2005 suggests that only if the community referred client chooses to disclose that they have private means, or health insurance, would they be charged at the full rate.

Community referred clients include those referred from rehabilitation providers in community and rural settings who do not have access to compensable funding. In practice, the competitive market for services was therefore limited to services provided to private fee for service clients.[23]

It was noted that the Application Statement states that services provided and used solely by State Government agencies, whether or not under a tied contract arrangement, will not be subject to competitive neutrality principles. However, the Business' services do not fall within this category, as the services are not used solely by State Government agencies. Therefore, notwithstanding the policy position to provide services free of charge to certain clients, the Business' services are provided on a fee for service basis to external clients and the level of the fees and charges levied by the Business for any of its services could have a significant effect on the actual and potential providers that may operate in competition with the Business.

The DHHS, in its statement of facts, contended that the complainant's business had not been adversely affected to the extent the complainant had claimed. The DHHS considered that the complaint was not justified on these grounds. It also rejected the basis of the evidence presented that the complainant's business had been disadvantaged or that activities of the Business were generally anti-competitive, particularly when the public benefit in its service model and its pricing policy were taken into account.

The Commission's findings

Although the DHHS contended that the complainant's business had not been adversely affected to the extent claimed, given the potential impact of the Business' pricing policies on the services available in the market, the Commission concluded that all of the Business' services were SBAs.

[23] Private clients include compensable clients and those clients that are self-referrals that have the means to pay via private health insurance or personal means.

APPENDIX 5: COMPETITIVE NEUTRALITY COMPLAINT PROCESS