COMPETITIVE NEUTRALITY COMPLAINTS MECHANISM GUIDELINE

Version 2

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VERSION AND EFFECTIVE DATE

Version and effective date

A version number and effective date will identify every version of this Guideline. This version, Version 2, became effective on 1 July 2015.

The Regulator intends to review and revise this Guideline as appropriate and welcomes comment at any time regarding its content.

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. If there is a conflict between the definitions below and the definitions provided in the Act, the definitions provided in the Act prevail.

'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 government 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 government body that would not have been performed, provided or allowed if the government 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 and has the same meaning as in the GBE Act;

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

'government body' means a prescribed body, which is defined in the Act and includes:

(a) an Agency, and

(b) a statutory authority, and

(c) a local government body, and

(d) a Government Business Enterprise, and

(e) a State-owned company;

‘Minister’ means the Minister administering the Act;

'NCC' means the National Competition Council;

'NCP' means National Competition Policy;

'principal officer' means the Secretary of a Government department, Chief Executive Officer of a GBE or statutory authority or General Manager of a local government council;

‘**Portfolio Minister’** has the same meaning as in the Act;

‘Regulator’ has the same meaning as in the Act; and

'Treasury' means the Department of Treasury and Finance.

PURPOSE OF THE GUIDELINES

The Competitive Neutrality Complaints Mechanism Guidelines were first issued by the Government Prices Oversight Commission in 1999. The purpose of those Guidelines was to set out an overview of the processes for the review of complaints from businesses or persons (hereafter referred to as 'persons') about alleged breaches of, and non-compliance with, competitive neutrality principles under the National Competition Policy (NCP) in accordance with the *Government Prices Oversight Act 1995*.

On 1 June 2010 the *Economic Regulator Act 2009* (the Act) replaced the Government Prices Oversight Act. This Guideline, subsequently issued and revised as necessary by the Tasmanian Economic Regulator (Regulator), reflects the process and requirements set down in part 6 of the Act.

The Guideline describes:

- the role of the Regulator as it relates to the review of complaints;
- the procedure to be followed by complainants; and
- the internal review process required of Government bodies (referred to as 'prescribed bodies' in the Act) in relation to complaints made against Government business activities.

However, this Guideline is not intended to be used as a substitute for legislative requirements. The Guideline should be read in conjunction with the Act, the *Government Business Enterprise Act 2005* (GBE Act) and the following publications issued by the Department of Treasury and Finance which are available from the Regulator's website www.economicregulator.tas.gov.au or by contacting the Regulator's office on (03) 6166 4422.

1. Tasmanian Government, *Application of the Competitive Neutrality Principles under National Competition Policy*, June 1996.
2. Department of Treasury and Finance, *Corporatisation Principles for Local Government Business Activities*, December 1998.
3. Department of Treasury and Finance, *Full Cost Attribution Principles for Local Government*, June 1997.
4. Department of Treasury and Finance, *Guidelines for Implementing Full Cost Attribution Principles in Government Agencies*, September 1997.
5. Department of Treasury and Finance, *Costing Fees and Charges: Guidelines for use by Agencies*, December 2006.
6. Department of Treasury and Finance, *National Competition Policy: Applying the Principles to Local Government in Tasmania*, December 2013.

7. Department of Treasury and Finance, *National Competition Policy: Tasmania's Reform Obligations and the New Financial Arrangements*, August 1995.

8. Department of Treasury and Finance, *National Competition Policy: Guidelines for Considering the Public Benefit under the National Competition Policy,* March 1997.

9. Department of Treasury and Finance, *Identification and Management of Significant Business Activities by Local Government in Tasmania to Comply with Competitive Neutrality Principles*, December 2013.

BACKGROUND

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 contained in the Hilmer Report on National Competition Policy, which was released in August 1993.

One of these agreements, the *Competition Principles Agreement* (CPA), requires that Government businesses are to operate within a framework that ensures that they do not enjoy any net competitive advantage simply as a result of their public ownership.[1] This is the concept of competitive neutrality.

Clause (3) of the CPA states the objectives and principles of competitive neutrality. Its primary objective is the elimination of resource allocation distortions arising out of public ownership of significant businesses.

As a general principle, significant government businesses should be corporatised and their costs should reflect[2]:

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.

However, where an agency undertakes significant business activities as part of a broader range of functions and corporatisation is not considered appropriate, it was agreed that in respect of these business activities the relevant party should[3]:

- 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.

The CPA also requires each jurisdiction to have a mechanism to consider complaints relating to the application of the competitive neutrality principles (CNP). Clause 3(1) notes that the principles only apply to the business activities of a government business,

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[1] Sub-clause 3(1)

[2] Sub-clause 3(4)

[3] Sub-clause 3(5)

not to non-business, non-profit activities. Appendix 1 of this Guideline sets out Clause 3 in full.

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

Principles of competitive neutrality

As noted above, the objective of the competitive neutrality policy is the elimination of 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 and/or disciplines than private sector businesses. These differences may provide a government business with competitive advantages or disadvantages that will influence their 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 places government business in two categories, with a different model for applying the principles in each case:

- **Significant government business enterprises**[4] (SGBEs), which are to be subject to the corporatisation model.
- **SBAs undertaken by a government agency as part of a broader range of functions**. These are to be subject to the corporatisation model, where appropriate, or if not appropriate, the full cost attribution (FCA) model is to apply.

The two Application Statements[5], which separately apply to State and local governments, 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.

The corporatisation model

The CPA states that the reform measures, namely tax equivalents, guarantee fees and economic and social regulations that apply in the private sector must be imposed on SGBEs, where appropriate, under a corporatisation model.

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[4] 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.

[5] (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.

This model must also be applied, where appropriate, to significant government business activities (SBAs). If the corporatisation model is not adopted the prices of goods and services produced or provided by the SBA must reflect full cost attribution (FCA).

It is Government policy that, as a general principle, Tasmania will apply the corporatisation model to:

- all its SGBEs. Tasmania defines its SGBEs as all those enterprises classified as public trading enterprises (PTE), public financial enterprises (PFE) and/or Government business enterprises (GBE). A list of Tasmania's SGBEs as at the time of writing the Application Statement was provided in the general Applications Statement.[6] An updated list of significant Government businesses, including SGBEs and State-owned corporations established since the publication of the Applications Statement, is provided in appendix 3 of this Guideline.
- other SBAs that meet the 'where appropriate' test.

The Hilmer Report explained that:

> Full "corporatisation" is a means of converting a public enterprise into a firm which is as similar in terms of its objectives, incentives and sanctions to a private firm as is feasible while retaining the enterprise in Government ownership.[7]

Different ownership structures can be adopted to implement full corporatisation including:

- a statutory authority incorporated under agency specific legislation;
- a statutory authority incorporated under generic corporatisation legislation; or
- a wholly government-owned company incorporated under the Corporations Law.

State government enterprises and corporatisation

In Tasmania, the corporatisation model was applied to State Government enterprises as follows:

- for an SBA being undertaken by an existing statutory authority, that authority was included as a GBE by order under the GBE Act (if not already included)[8]; or
- in any other case, a separate Government business, incorporated under the Corporations Law, or its own enabling legislation was established to undertake the business activity.

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[6] Government of Tasmania, *Application of the Competitive Neutrality Principles under National Competition Policy*, June 1996, page 1, attachment 2.

[7] *The Hilmer Report on National Competition Policy*, Independent Committee of Inquiry into a National Competition Policy for Australia, August 1993, page 300.

[8] Over the period since the GBE Act was established in 1995, a number of GBEs have been sold and are thus no longer in Government ownership and not subject to the requirements of the CPA.

Local government and corporatisation

Broad guidance on applying the competition principles to local government was initially provided in the Government's 1996 policy statement *Application of National Competition Policy to Local Government* (1996 Statement). Part 7 of the 1996 Statement included a requirement for review of all legislation that restricts competition by the year 2000, which was undertaken in consultation with local government. The *National Competition Policy: Applying the Principles to Local Government in Tasmania*[9] (Local Government Application Statement) was developed following that review and has been updated from time to time.

The Local Government Application Statement was prepared to ensure that Tasmania continued to meet its obligations as a part to the National Competition Policy Agreements. It is intended to assist local government in the continued application of competition principles to its activities.

The Local Government Application Statement provides for a staged approach to the introduction of competitive neutrality to local government. This approach involves:

- councils identifying all business activities within their operations;
- councils identifying which of these are SBAs;
- application of FCA to those SBAs, to the extent that it is in the public benefit;
- identification of those SBAs which are potentially suitable for corporatisation;
- undertaking public benefit assessments of the corporatisation of those business activities; and
- corporatisation of those SBAs where a public benefit assessment indicates that the benefits outweigh the costs of doing so.

This staged approach to the implementation of competitive neutrality was developed to assist local government to adjust to the significant changes that were expected to arise from the movement to FCA before embarking on the more involved process of assessing whether to continue to corporatisation.

Councils should refer to the document, *Identification and Management of Significant Business Activities by Local Government in Tasmania to Comply with Competitive Neutrality Principles,* December 2013, which provides guidelines on identifying and reporting on local government SBAs. The document *Corporatisation Principles for Local Government Business Activities*, December 1998, provides a detailed account of the principles underlying corporatisation and its application to local government, and will be useful in determining if corporatisation of a SBA is appropriate.

Where a council has identified a SBA as being suitable for corporatisation, it will be required to undertake a public benefit assessment in relation to applying the corporatisation model to that activity. In undertaking this assessment, issues such as

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[9] Government of Tasmania, *National Competition Policy: Applying the Principles to Local Government in Tasmania*, December 2013.

sustainable development legislation, industrial relations, social welfare and equity are to be taken into account. The Department of Treasury and Finance has published guidelines on the public benefit assessment process.[10]

Corporatisation for local government will involve establishing a separate legal entity to run the business with the relevant council as its sole shareholder or owner. It will not necessarily involve incorporation under Corporations Law. The *Local Government Act 1993* was amended in July 1999 to ensure that councils have adequate powers to incorporate business activities. Prior to 30 June 1999 councils were required to obtain Ministerial approval to establish a joint authority. Councils now have the power to establish single and joint authorities by resolution of an absolute majority.[11] The Local Government Act also imposes obligations on single and joint local government authorities to adhere to competitive neutrality principles, particularly when exercising their powers and functions outside the boundaries of the municipal area.[12]

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'.[13] A preliminary list of SBAs was published on page 18 of the Applications Statement.[14] There is no single criterion that is used to assess whether a business activity is an SBA. Agencies are required to make their own assessment using a range of criteria including: what is the relevant market for the good or service; the barriers to entry in the market; the degree of concentration in the market, including the criticality of the good or service provided; and the potential impact on other markets (eg the loss of efficiency in an upstream or downstream market). However, in the event of a complaint being lodged with the Regulator, the Regulator is required to make its own assessment.

Councils should refer to the document, *Identification and Management of Significant Business Activities by Local Government in Tasmania to Comply with Competitive Neutrality Principles*[15]*,* which provides guidelines on identifying and reporting on local government SBAs. Amongst other things, this document provides that while, in the first

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[10] Department of Treasury and Finance*, Guidelines for Considering the Public Benefit under the National Competition Policy*, March 1997.

[11] See Part 3 of the Local Government Act.

[12] See Sections 21(4), 36(1)(b) and 84(2)(da) of the Local Government Act.

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

[14] *Ibid,* page 18.

[15] Tasmanian Government, December 2013.

instance, councils identify which business activities are significant, the ultimate decision as to what is a business activity and an SBA will be resolved by the Regulator, in the event of a complaint under the Act.

A case raised with the Regulator[16] on 20 May 2003 raised some important issues in regard to the determination of what business activities may be considered SBAs. Subsequently, the Regulator wrote to all councils[17] outlining its approach, consistent with the approach it had previously applied in investigations of complaints against State Government bodies.

In considering whether a Government business activity is 'significant', the approach the Regulator adopts is to look to the influence, or the potential influence, of the Government business activity on the market. In this regard, the factors considered are:

- what is the relevant market for the good or service;
- the barriers to entry in the market;
- the degree of concentration in the market, including the criticality of the good or service provided; and
- the potential impact on other markets (eg the loss of efficiency in an upstream or downstream market).

As markets naturally change over time, whether a business activity is an SBA can only be established by taking into account the facts of each case at the time the complaint arises. Given this, the Regulator also recommends that Government agencies and local government councils should 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 FCA to Government agencies and local government

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 prices charged for goods and services will … reflect full cost attribution …'[18]

Where FCA is to apply, prices for goods and services will also take account of, 'where appropriate', tax equivalents, debt guarantee fees and the application of regulations on an equivalent basis to private sector organisations. 'Appropriateness' is assessed via a public benefit test — the benefits must exceed the costs.

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[16] Reference to the Regulator prior to 1 June 2010 is a reference to the Government Prices Oversight Commission.

[17] A copy of this letter is available at:
http://www.economicregulator.tas.gov.au/domino/otter.nsf/price-v/002

[18] Clause 3(5)b *Competition Principles Agreement*.

The application of FCA means that the total cost of the resources used in providing the activity are to be accounted for by the government 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).

The government body is to adjust the costs that it incurs in undertaking the SBA for any input disabilities arising from public ownership.

For more information on the FCA model refer to the *Guidelines for Implementing Full Cost Attribution Principles in Government Agencies*[19] and *Full Cost Attribution Principles for Local Government.*[20]

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 regulatory advantage over their 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

The competitive neutrality principles do not impose pricing obligations on government bodies. Pricing decisions are dependent on a number of managerial assessments relating to prevailing market prices, the desired profit margin or rate of return, as well as the full cost of providing the good or service. Thus, the requirement that prices 'reflect full cost attribution' will ensure that pricing decisions can be made in full knowledge of all appropriate costs.

[19] Department of Treasury and Finance, September 1997.

[20] Department of Treasury and Finance, June 1997.

THE COMPLAINTS MECHANISM

The CPA requires that the State have in place a complaints mechanism to consider complaints relating to the application of the competitive neutrality principles.

The Tasmanian Government decided that the Government Prices Oversight Commission would be responsible for oversighting the complaints process within Tasmania in addition to its existing functions of oversight of the prices charged by public sector businesses that are monopoly, or near monopoly, suppliers of goods or services. Following enactment of the *Economic Regulator Act 2009*, the Tasmanian Economic Regulator replaced the Commission on 1 June 2010 as the body responsible for the investigation of competitive neutrality complaints.

The Regulator is empowered to administer the complaints mechanism by the inclusion of this function under part 2, section 10 of the Act and by procedures set out under part 6 of the Act.

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

- believes that a government body has contravened any of the national competition policy competitive neutrality principles and that person is adversely affected by that supposed contravention; and
- has discussed that supposed contravention with the government body against which the complaint is made.

Once the investigation is complete, the Regulator is also required report on its findings to the complainant, the government body, the Minister and the Portfolio Minister and, in accordance with part 2, section 22 of the Act, will make its recommendations public in its annual report.

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.[21]

Stage 2 - investigation of the complaint.[22]

Stage 3 - reporting on investigation outcomes.[23]

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

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[21] See sections 48 and 49 of the Act.

[22] See sections 50, 51, 52, 53, 54, 55, 56 and 57 of the Act.

[23] See sections 57, 58 60 and 60A of the Act.

Stage 1 - identification and lodgement of complaint

Potential complainants are required under section 48 of the Act to discuss concerns relating to the application of the competitive neutrality principles with the government body providing the business activity in question. Some complaints may be resolved informally by the complainant obtaining further information about the costing structure and regulatory environment of the government body business activity.

However, where the complainant considers that the complaint remains unresolved the complainant may wish to take the matter further by lodging a formal complaint with the Regulator concerning the manner in which a business activity is undertaken by a government body.

Formal complaints

Section 49 of the Act requires that the complaint must be in writing and contain sufficient details to enable the Regulator to:

- identify the business activity of the government body which is the subject of the complaint;
- provide details of how the complainant believes the principles have been contravened; and
- provide details as to how the complainant has been adversely affected by the failure to apply the competitive neutrality principles.

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 government body and clarify the basis of the complaint. The Regulator may also request, in writing, 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.

Section 48 of the Act limits the potential class of those who may lodge a complaint to a person adversely affected by the government body's supposed contravention of the competitive neutrality principles. To be considered as 'adversely affected' a person must be able to demonstrate that the actions of the government body have been the essential element in causing the detrimental effect upon the complainant.

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

A fee of 110 fee units[24] will be imposed for the registration of a complaint; however, this fee is refundable if the complaint is found to be justified.

Stage 2 - investigation of complaints

Preliminary assessment of the complaint by the Regulator

Within 30 days of receiving a complaint, the Regulator must determine whether or not an investigation of the complaint is deemed necessary or appropriate. As noted above, the Regulator will only accept complaints where it is satisfied that:

- the complaint contains matter to support the allegation that the principles have been contravened;
- the complaint contains matter showing how the complainant has been adversely affected by an act by the government body; and
- the complaint is not vexatious or frivolous.

In accordance with section 50 of the Act, for the purposes of ascertaining whether a complaint should be investigated the Regulator may make any preliminary inquiries it considers necessary or appropriate. This may involve requiring the complainant or government body to provide further information or documents and/or verify any part of the complaint or other information or document by statutory declaration. A penalty applies in the case of a government body refusing to provide information during this preliminary assessment.

Under section 50 the Regulator may resolve the complaint without the complaint being investigated if, having regard to the nature and seriousness of the complaints, the Regulator believes that the complaint may be resolved expeditiously, and the parties to the complaint agree to that resolution.

Under section 51, the Regulator may refuse to investigate, or if it has commenced an investigation, may refuse to continue with the investigation if, in the opinion of the Regulator, the complaint:

- does not contain:
  - an allegation that one or more of the CNPs have been contravened, or
  - matter to support such an allegation, or
  - matter showing how the complainant has been adversely affected; or
- the complaint, or the matter raised in the complaint is vexatious, frivolous or not made in good faith; or

[24] The value of a fee unit is calculated in accordance with Section 5 of the *Fee Units Act 1997*. Under this Act, the Minister must publish the value of a fee unit that is to apply for the following financial year in the *Gazette*. Advice as to the current value of the fee may be obtained by contacting the Office of the Tasmanian Economic Regulator.

- there is no evidence that the complainant has been adversely affected; or
- having regard to all the circumstances of the case, the investigation or continuation of the investigation, is unnecessary or unjustifiable.

If the Regulator does not consider an investigation is necessary or appropriate, the complainant will be advised of the reasons.

If the Regulator determines under section 50 to investigate the complaint the Regulator must provide written notice of the intention to investigate to the complainant, the government body concerned and its Portfolio Minister, and provide the government body concerned and its Portfolio Minister with a copy of the complaint.

Commencing an investigation

Government body review of complaint

Within 30 days of receipt of the complaint the government body that is the subject of the complaint must complete its review and provide the Regulator with a written response to the complaint as outlined below.

Each government body should ensure it has in place procedures which will enable the timely review of any complaint referred to it by the Regulator concerning the operation of a business activity which the government body undertakes. A penalty applies in the case of a government body failing to provide an adequate written response within the prescribed 30-day period.

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

The internal review by a government body will need to consider the material lodged by the complainant, the CPA, the relevant application statement, information relating to the complaint sought by the Regulator, and the guidelines relating to the application of the competitive neutrality principles.

The government body must notify the Regulator in writing of the outcome of the review process and include a ‘statement of facts’.

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

Where the complaint is accepted by the government body as valid, whether in whole or in part, the statement of facts must contain details of the action being undertaken, or planned to be undertaken, by the government body to address the complaint.

The statement of facts will encourage careful, reasoned decisions and act as a check on the exercise of discretion by the government body.

The statement of facts

Section 53 of the Act provides for what information should be included in the statement of facts. The statement of facts should specify the belief of the government body as to whether the complaint is justified, partly justified or not justified.

In the case of a belief that the complaint is justified or partly justified, the statement of facts should specify whether the government body proposes to take any action to stop any ongoing contravention of the competitive neutrality principles which was the subject of the complaint or to ensure that such a contravention does not occur again.

The statement of facts may also include recommendations for the alteration of the application of the competitive neutrality principles and other recommendations that the government body considers appropriate.

In the case of a belief that the complaint or part of the complaint is not justified, the statement of facts should set out the grounds on which that belief is based.

- The findings on material questions of fact:

  The statement of facts should address material questions of fact that were taken into account during the review process. If the statement of facts is silent on certain matters raised by the complainant, it may be inferred that the complainant's interpretation of these matters was an accurate account of the facts.

- The competitive neutrality principles, statements and guidelines:

  The statement of facts should address relevant parts of the competitive neutrality documentation and comply with procedures set out in the Guidelines.

- Conclusions:

  The statement of facts should contain the government body's conclusions in respect of the complaint and all the steps of reasoning linking the facts to its conclusion to enable the complainant to understand the government body's position. 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 valid, whether in whole or in part, the government body must advise the Regulator of the proposed action to be taken by the government body to correct the cause of the complaint. These actions will depend upon the category of the business activity in question. In many instances it is possible that action will already be planned by the government body under its own internal timetable for the application of the competitive neutrality principles to the agency.

Investigation of complaint by the Regulator

Within 45 days of the Regulator receiving the statement of facts from the government body, the Regulator is to undertake its own investigation of the complaint. This investigation will involve consideration of the statement of facts and, if considered

necessary, further discussions with, or provision of information by, the government body or the complainant.

The Regulator's review of the statement of facts may proceed notwithstanding that the government body and the complainant may have reached a mutually agreed position on the complaint in question. Firstly, the Regulator needs to report on the outcome of the complaint process. Secondly, the Regulator needs to determine whether the issues raised by the complaint have general application to other Government business activities. However, as noted above, the Regulator is provided with some discretion under section 50 to refuse to continue with the investigation in certain specified circumstances, but such a decision will only be made having regards to all the circumstances of the case.

If the Regulator is unable to complete the review within the specified period, the Regulator may apply, in writing, to the Minister for one or more extensions of time to complete the review. The Minister may not grant a single extension of more than 30 days; however, the Minister may grant an extension more than once.

Section 54 of the Act empowers the Regulator to conduct an investigation into a complaint in such a manner as it considers appropriate and, in particular, the Regulator may:

- receive written and oral submissions;
- consult with any person;
- hold conferences and seminars; and
- determine whether any person wishing to appear before the Regulator may be represented by another person.

In gathering information, the Regulator may require a person to attend before the Regulator to answer questions, or provide documents or other information relevant to the investigation. The Regulator may prohibit the publication of information arising from an investigation. In the case of a person contravening such a direction, a fine or term of imprisonment applies.

Following receipt of the statement of facts, and conducting an investigation into a complaint, the Regulator will determine whether or not the complaint is justified.

If, in light of the complaint review process, the Regulator determines that the complaint is justified, the Regulator must provide to the Minister, the Portfolio Minister, the government body and the complainant a written report of that determination, recommending:

- that the application of the principles be changed; and/or
- that the government body should be directed to change the manner in which it applies the competitive neutrality principles to the business activity which is the subject of the complaint.

The Act specifies that the Regulator's decision in relation to the complaint will be final. Thus there is no avenue to appeal the decision. The Act also specifies that the

complainant will not be entitled to compensation as a result of the Regulator's decision in relation to the complaint.

Stage 3 - reporting on investigation outcomes

Reporting arrangements of the Regulator

Where a complaint is investigated, the Regulator will provide to the Minister and the Portfolio Minister a written report containing recommendations in regard to:

a) any changes required to the application of the competitive neutrality principles; and/or

b) any actions that should be taken by the government body to properly apply the competitive neutrality principles, in accordance with the relevant Application Statement and associated guidelines, to the business activity which was the subject of the complaint.

The Regulator will also provide the complainant and the government 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 in accordance with section 50, the Regulator must provide a copy of the complaint and the resolution to the government body concerned, the relevant Portfolio Minister and the complainant.

Actions subsequent to the Investigation Report

If the Regulator recommends that the government body should change how it applies the competitive neutrality principles, then:

- the government body must provide the Regulator written notice, within 30 days of receiving the Investigation Report, of any action it has taken or intends to take as a result of receiving that report. If the government body intends to take an action, its notice must also state the period in which that action is intended to be taken;
- the Regulator must then provide a report, to the Minister and the Portfolio Minister within 45 days of receiving the government body's written notice, on the action the government body has taken or intends to take and whether there are any recommendations in the Investigation Report that the government body has neither taken action nor intends to take action; and
- where required, the Minister may, with the agreement of the Portfolio Minister, make such directions to the government body as the Minister considers necessary to ensure the government body implements the Regulator's recommendations.[25]

Additionally, the Regulator will monitor the government body to ensure that any changes to be implemented as a result of the complaint process are put in place. For the purposes of ongoing monitoring, at any time after the Regulator has received the government

[25] See Section 60A of the Act.

body's initial notice following the Investigation Report, the Regulator may require another progress report on action taken by the government body, with that progress report to be provided within the timeframe specified in the Regulator's request. The Regulator will also provide the Minister with any further information requested by the Minister, or provide further information to the Minister at the Regulator's own discretion regarding the government body or the Investigation Report at any time.

Annual report

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

- particulars of any contravention of the principles admitted by a government body in response to a complaint or determined by the Regulator on an investigation;
- particulars of any action taken by a government 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.

Government body records and reporting arrangements

Government bodies should 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 government body review;
- the Regulator's findings in relation to the review; and
- actions taken, if any, by the applicable government body in response to the complaint.

The government body will not be compelled to publish information concerning complaints made against it in its annual report as the Regulator will be publishing full details in the Regulator's Annual Report. However, it is anticipated that a government body will include summary information concerning any complaints lodged against it in its own annual report.

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[26] 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[27]. 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[28] 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:

   a) where appropriate, implement the principles outlined in sub-clause (4); or

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

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

[28] government trading enterprise

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.

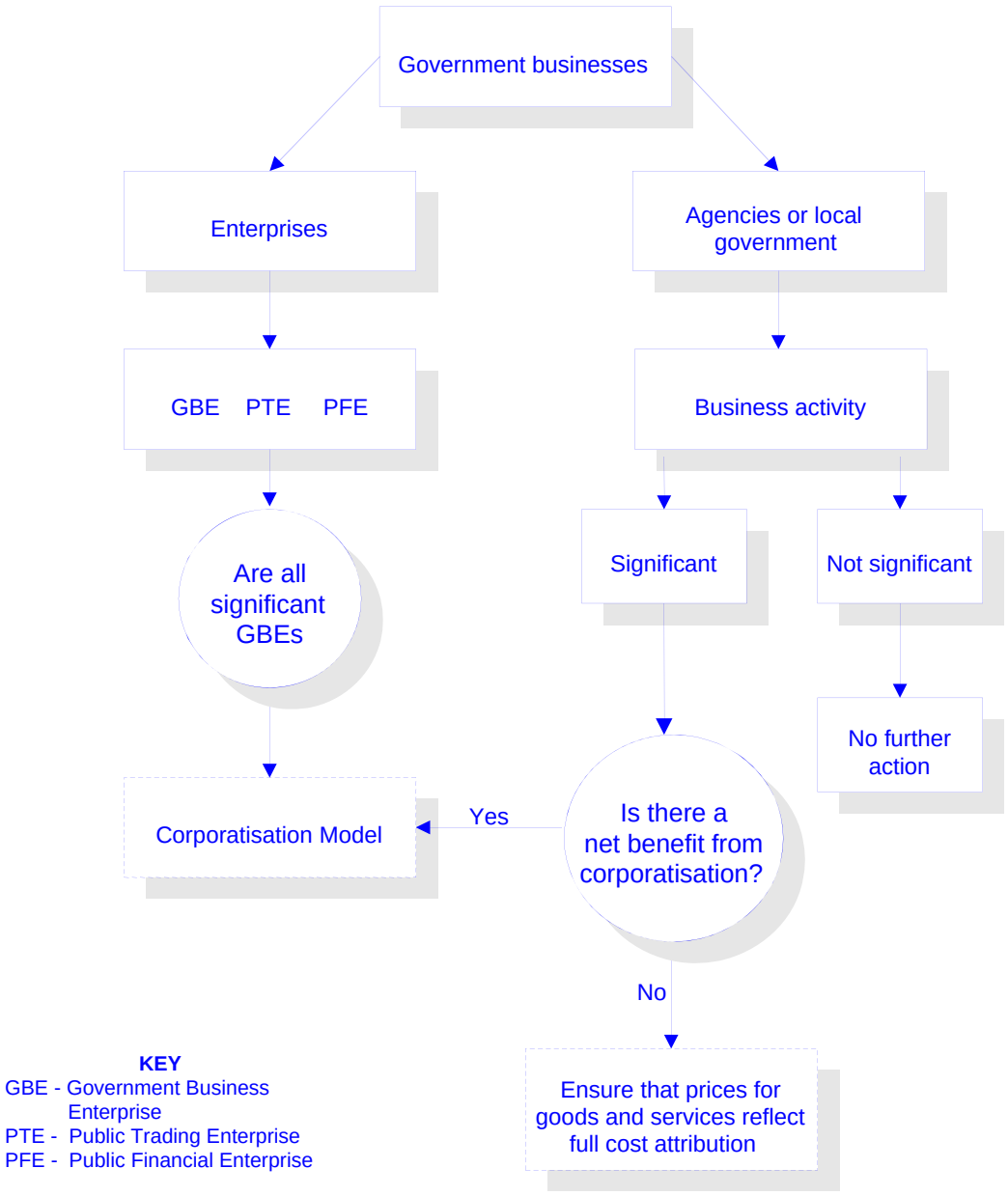
7) Sub-paragraph (4)(b)(iii) shall not be interpreted to require the removal of regulation which applies to a government business enterprise or agency) but which does not apply to the private sector) where the Party responsible for the regulation considers the regulation to be appropriate.

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: APPLICATION OF COMPETITIVE NEUTRALITY PRINCIPLES TO GOVERNMENT BUSINESSES



APPENDIX 3: SIGNIFICANT GOVERNMENT BUSINESSES

	Tax Equivalents[1]	Dividends[1]	Guarantee Fees[2]
Aurora Energy Pty Ltd	Yes	Yes	Yes
Forestry Tasmania	Yes	Yes	Yes
Hydro Tasmania[4]	Yes	Yes	Yes
Metro Tasmania Pty Ltd	Yes	Yes	Yes
Motor Accidents Insurance Board (MAIB)	Yes	Yes	Yes
Port Arthur Historic Site Management Authority	No	No	No
The Public Trustee	Yes	Yes	Yes
Tasmanian Irrigation Pty Ltd	Yes	Yes	Yes
Tasmanian Ports Corporation Pty Ltd[6]	Yes	Yes	Yes
Tasmanian Public Finance Corporation (TasCorp)	Yes	Yes	Yes
Tasmanian Railway Pty Ltd	Yes	Yes	Yes
Tasracing Pty Ltd	Yes	Yes	Yes
TT-Line Company Pty Ltd	Yes	Yes	Yes
Tasmanian Networks Pty Ltd	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.
2. While the MAIB and the Public Trustee are not exempt from paying guarantee fees, actual payments depend on the level of borrowings.
3. Hydro Tasmania's consulting business trades as Entura and its energy retail business trades as Momentum Energy. Hydro Tasmania also owns Aurora Energy (Tamar Valley) Pty Ltd.

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* (Specified Service Tasmania. "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" is not a significant government business enterprise, the Commission[29] needed first to determine if the services are a business activity.

Issue: Are "The Business's" services a business activity?

The Tasmanian Government 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. "The Business's" services were provided to both public and private hospitals and in competition with the complainant and interstate providers. Accordingly, "The Business's" services fell within the meaning of business activity for the purpose of the competitive neutrality principles. In its statement of facts, DHHS did not dispute this assessment on the nature of "The Business's" services.

Finding:

The Commission found that all of "The Business's" services were a business activity for the purposes of the competitive neutrality principles.

[29] 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 the 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 DHHS acknowledged that "The Business's" services are significant as it has 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, 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, 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:[30]

> 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's" 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's" services provided state-wide. However, Government and thus DHHS policy requires certain clients are supplied by "The Business" free of charge (public clients)[31] or are only charged for the

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

[31] 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.

cost of the appliance (community referred)[32], 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. Community referred clients include those referred from rehabilitation providers in community and rural settings who do not have access to compensable funding. Thus in practice the competitive market for services was limited to services provided to private[33] for fee for service clients.

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 CNPs. However, "The Business's" 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 services of "The Business" are provided on a fee for service basis to external clients and the level of the fees and charges levied by the "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".

DHHS, in its statement of facts, contended that the complainant's business had not been adversely affected to the extent the complainant had claimed. Thus DHHS submitted 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 was taken into account.

Finding:

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

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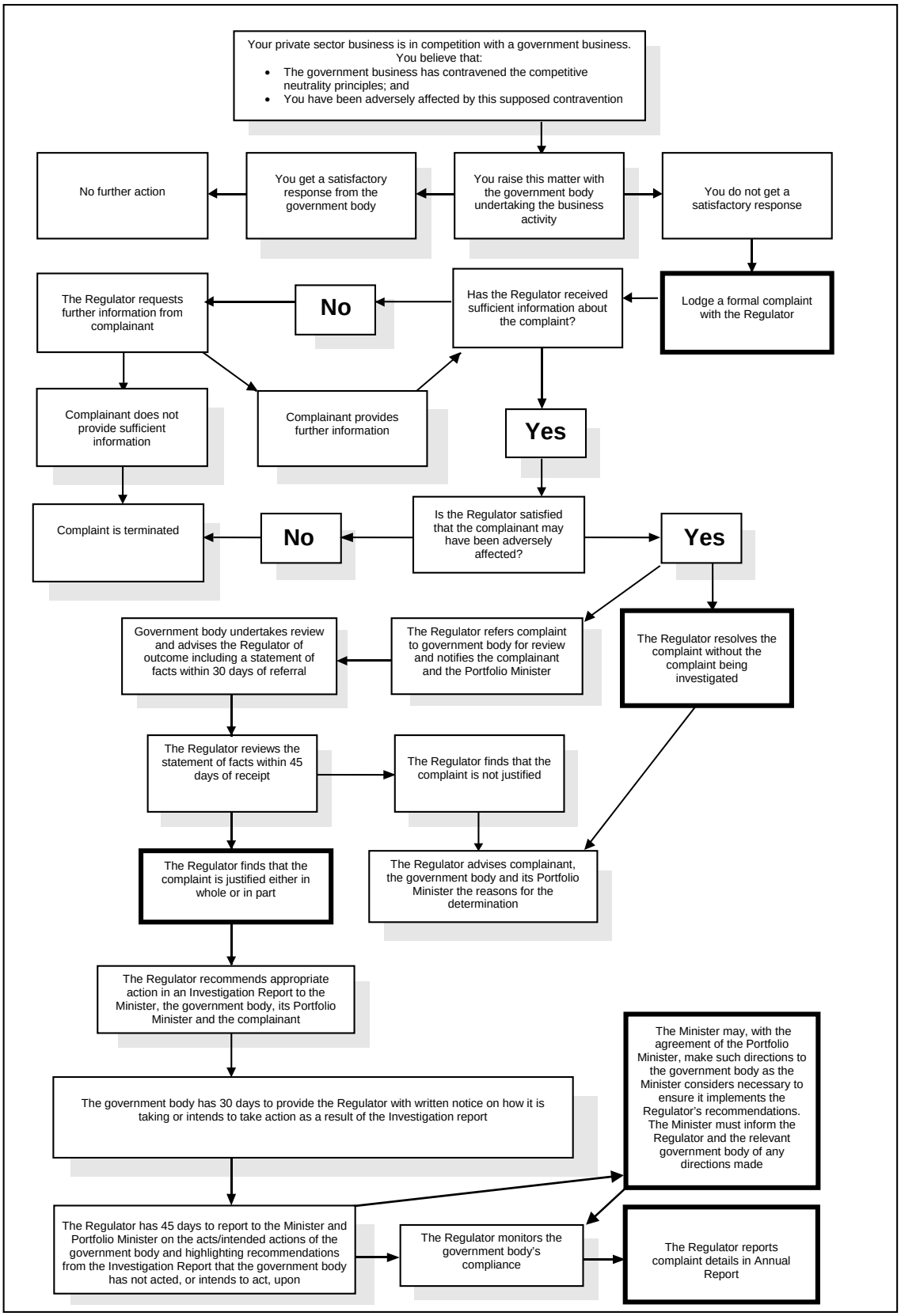
[32] Advice from DHHS on 6 June 2005 suggests that only if the community referred client chooses to disclose that they have private means, or health insurance, would they be charged at the full rate.

[33] 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: THE COMPLAINTS MECHANISM


Your private sector business is in competition with a government business. You believe that:
The government business has contravened the competitive neutrality principles; and
You have been adversely affected by this supposed contravention
You raise this matter with the government body undertaking the business activity
You get a satisfactory response from the government body
No further action
You do not get a satisfactory response
Lodge a formal complaint with the Regulator
Has the Regulator received sufficient information about the complaint?
No
The Regulator requests further information from complainant
Complainant provides further information
Complainant does not provide sufficient information
Yes
Is the Regulator satisfied that the complainant may have been adversely affected?
No
Complaint is terminated
Yes
The Regulator refers complaint to government body for review and notifies the complainant and the Portfolio Minister
Government body undertakes review and advises the Regulator of outcome including a statement of facts within 30 days of referral
The Regulator resolves the complaint without the complaint being investigated
The Regulator reviews the statement of facts within 45 days of receipt
The Regulator finds that the complaint is not justified
The Regulator finds that the complaint is justified either in whole or in part
The Regulator advises complainant, the government body and its Portfolio Minister the reasons for the determination
The Regulator recommends appropriate action in an Investigation Report to the Minister, the government body, its Portfolio Minister and the complainant
The government body has 30 days to provide the Regulator with written notice on how it is taking or intends to take action as a result of the Investigation report
The Minister may, with the agreement of the Portfolio Minister, make such directions to the government body as the Minister considers necessary to ensure it implements the Regulator's recommendations. The Minister must inform the Regulator and the relevant government body of any directions made
The Regulator has 45 days to report to the Minister and Portfolio Minister on the acts/intended actions of the government body and highlighting recommendations from the Investigation Report that the government body has not acted, or intends to act, upon
The Regulator monitors the government body's compliance
The Regulator reports complaint details in Annual Report