



ICRC

independent competition and regulatory commission

Competitive neutrality complaints **Guideline**

August 2015

The Independent Competition and Regulatory Commission is a Territory Authority established under the *Independent Competition and Regulatory Commission Act 1997* (ICRC Act). The Commission is constituted under the ICRC Act by one or more standing commissioners and any associated commissioners appointed for particular purposes. Commissioners are statutory appointments and the current Commissioners are Senior Commissioner Malcolm Gray and Commissioner Mike Buckley. We, the Commissioners who constitute the Commission, take direct responsibility for delivery of the outcomes of the Commission.

We have responsibilities for a broad range of regulatory and utility administrative matters. We have responsibility under the ICRC Act for regulating and advising government about pricing and other matters for monopoly, near-monopoly and ministerially declared regulated industries, providing advice on competitive neutrality complaints and government- regulated activities. We also have responsibility for arbitrating infrastructure access disputes under the ICRC Act. In discharging our objectives and functions, we provide independent robust analysis and advice.

Our objectives are set out in section 7 of the ICRC Act and section 3 of the *Utilities Act 2000*.

Correspondence or other inquiries may be directed to us at the addresses below:

Independent Competition and Regulatory Commission
PO Box 161
Civic Square ACT 2608

Level 8
221 London Circuit
Canberra ACT 2601

We may be contacted at the above addresses, by telephone on (02) 6205 0799, or by fax on (02) 6207 5887. Our website is at www.icrc.act.gov.au and our email address is icrc@act.gov.au.

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1 Introduction

Competitive neutrality is about removing the actual or potential advantages that government-owned businesses might have when they compete with the private sector by virtue of their public sector ownership.

In 1995, the ACT, along with the other states, the Northern Territory and the Commonwealth, signed the Competition Principles Agreement (CPA). The CPA is part of the suite of agreements commonly called the National Competition Policy.¹ The CPA refers to the issues that comprise the competition policy and microeconomic reform agenda. It outlines the elements of a competitive neutrality policy and identifies competitive neutrality principles. The CPA states that:

The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out 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.²

Under clause 3 of the CPA, Australian governments agreed to implement competitive neutrality principles for government-owned businesses, and to establish a complaints mechanism. In 1996, the ACT Government published its competitive neutrality policy (CNP) titled *Competitive Neutrality in the ACT*. The CNP was further updated in 2010, and is the current policy in effect at the time of drafting this guideline.³ The CNP established the ACT Government's policy on competitive neutrality and set out basic principles applying to a complaints mechanism.⁴ These basic principles to be considered in dealing with complaints include:

- independence;
- ease of access;
- expeditious consideration and resolution of complaints;
- public process; and
- publication of decisions and availability of relevant information.

The complaints mechanism, administered by the Independent Competition and Regulatory Commission (Commission), is now formally set out in Division 3.2 of the

¹ See <http://ncp.ncc.gov.au/pages/home> for more detail.

² CPA clause 3(1).

³ Available at http://treasury.act.gov.au/documents/Policy%20-%20Competitive%20neutrality%20in%20the%20ACT%20_2.pdf

⁴ CNP clause 7.

*Independent Competition and Regulatory Commission Act 1996 (ICRC Act or the Act).*⁵

2 What is a competitive neutrality complaint?

The ICRC Act defines a competitive neutrality complaint as:

a complaint that the conduct of a government business activity is not consistent with the competitive neutrality principles.⁶

Competitive neutrality principles are defined in the ICRC Act as the ‘competitive neutrality policy and principles under the competition principles agreement’.⁷ The *competition principles agreement* is defined in the Act as the ‘agreement made on 11 April 1995 by the Commonwealth, Territories and the States’.⁸

Aside from the general requirement that complaints should be about matters referred to in the CPA, a complaint might be about any aspect of government businesses where there is an advantage conferred by government ownership alone. Complaints in the ACT have focussed on matters such as public swimming and fitness facilities, and the government-owned linen service. Elsewhere, complaints have ranged across a number of issues, from public facilities such as pools owned by municipal councils, to child care facilities and cemeteries.

3 Which businesses are subject to competitive neutrality principles?

The CPA refers to competitive neutrality principles being applied to ‘significant’ government businesses. Under the CPA, individual jurisdictions can decide what ‘significant’ means having regard to their own circumstances. Market scale has been determined by the value of the business, its market share, or the impact of its underperformance on the economy.

⁵ Note: all legislative references in this guideline refer to the *Independent Competition and Regulatory Commission Act 1996* unless otherwise stated.

⁶ ICRC Act dictionary.

⁷ Schedule 1 and ICRC Act dictionary.

⁸ ICRC Act dictionary.

The ACT Government, through the CNP, has chosen to apply competitive neutrality principles to all government businesses, where it is considered to be in the public interest, without reference to a threshold such as market share or annual expenditure. The application of the Territory's CNP does distinguish between Territory Owned Corporations and business activities which operate within government agencies.

The CNP establishes that corporatised entities subject to the provisions of the *Territory Owned Corporations Act 1990* are subject to specific competitive neutrality principles. Businesses which operate as semi-autonomous business units within a government agency are required to meet performance reporting requirements of the *Financial Management Act 1996*. Specifically, these businesses are required to adopt full cost accounting and to disclose the real cost to the consumer of providing their service.

4 Who can make a complaint?

Anyone can make a complaint by issuing a reference to the Commission. The person who makes the complaint is a 'referring authority'. Section 3A(2) of the ICRC Act states that a referring authority for a regulatory reference may be any of the following:

- the Minister responsible for the relevant government activity;
- a member of the Legislative Assembly;
- the Commission; or
- any other person.

A referring authority must pay the reasonable costs of an investigation as determined by the Commission.⁹ If the reference has originated from a self-funding referring authority the Commission will need to determine up front whether the person or group has the capacity to bear the cost of the investigation.¹⁰ The cost of an inquiry can be significant, particularly if the complaint is complex and the investigation correspondingly lengthy. It would be unusual for sole members of the community to have the resources to issue a reference on their own. If a reference is initiated from the community, it is likely that this will be from a group of people rather than an individual.

⁹ Section 19K (Costs for regulatory reference investigations) of the ICRC Act sets out the provisions for meeting the costs of an investigation, including of a competitive neutrality complaint. The ACT Government (the 'Territory') must pay the reasonable costs of an investigation if the referring authority is a Minister, or is a member of the Legislative Assembly sponsored by the Minister with portfolio responsibility for the Act. In the latter case, the Minister may decide that it is in the public interest to sponsor the reference.

¹⁰ Section 19B(2)(c).

To ensure, however, that genuine complainants are not excluded from raising issues for investigation, there is provision in the ICRC Act for a person to approach one of the other potential referring authorities to issue a reference on their behalf, in pursuit of the public good. A Minister or member of the Legislative Assembly can issue a reference on behalf of a person or group of people, and accept responsibility for the cost of the reference. In some cases, the Government may agree to meet the cost of a reference proposed by a member of the Legislative Assembly.

The ICRC Act also provides that the Commission can ‘self-reference’, at its own cost, where it is of the view that an investigation is in the public interest. This provision ensures that matters of public interest are not prevented from being openly examined due to unwillingness or lack of financial capacity.

5 How are complaints investigated?

Under the ICRC Act, a competitive neutrality complaint is referred to as a ‘regulatory reference’. Division 3.2 of the ICRC Act sets out the basis upon which the Commission may accept and investigate a competitive neutrality complaint.

Before making a formal complaint, potential complainants are encouraged to discuss their concerns with the government business involved and/or the Commission. This will help to clarify the issues and to determine whether the concerns fall within the scope of the competitive neutrality policy. It may also allow for the matters to be resolved without the need for a formal investigation.

If the complainant decides to proceed with a formal complaint, it must be in writing. Under the ICRC Act, the Commission can only accept the reference if:

- it considers that there are legitimate grounds for the complaint;
- it considers that the proposed investigation would be in the public interest, taking into account the competition policy considerations (as set out in schedule 1); and
- if the reference is from a self-funding referring authority—the referring authority has the capacity to bear the cost of the investigation.

This means that Commission will only accept references where the complaint is consistent with the competitive neutrality principles in clause 3 of the CPA and involves actual or potential competition between the government business and a competitor in a market, and the competitor does or could suffer a disadvantage directly attributable to the exercise of a competitive advantage by the government arising solely from the business’s ownership.

The Commission is not obliged to inquire into circumstances where competitive advantages exist as a result of the exercise of superior skill or judgement, technical

expertise or innovation or efficiency arising from management competence. The premise is that competition between government and other businesses will promote greater efficiency. The premise is not that government businesses should not operate in competition with private enterprises.

As indicated above, anyone can raise a complaint if certain conditions are met. A threshold set of questions must be asked to establish whether a complaint should be pursued:

- Is the complaint legitimate? This means, is it a genuine situation where an enterprise is being disadvantaged in a market where one or more of the alleged ‘offending’ competitors is a government-owned businesses, and the government-owned business is benefiting from competitive advantages that arise from its government ownership rather than from superior capacity, economies of scale, skill, technology, quality etc?
- Does the complaint involve a matter of public interest? This recognises that there are issues that, while of some interest, would not be of significant benefit to the community to warrant a formal investigation. If the weight of public benefit outweighs the public cost or detriment then it is a stronger case for investigation.
- Can the complainant meet the cost of the investigation? The answer to this question may be no. In these circumstances, and where the complaint is legitimate and involves a matter of public interest, the complainant may seek assistance from the government or a member of the Legislative Assembly. The Commission may also self-reference on the basis of the complaint.¹¹

If the Commission accepts a reference, it must prepare a written notice of acceptance that sets out the terms of reference for the investigation. The notice must be notified through the ACT Legislation Register (notifiable instrument). A copy of the notice will be given to the referring authority. The Commission may also publish information on the complaint on its website or in a newspaper.¹²

The terms of reference provided by the referring authority will generally set out the matters the Commission is being asked to investigate and an indication of any time constraints of which the Commission should be aware. Reports of investigations are provided to the referring authority, published and made available on the Commission website (www.icrc.act.gov.au).

Investigations can be undertaken by a number of methods. These may include interviews, public hearings, public submissions or simply data gathering and analysis. The complexity of issues being investigated and the availability of information will determine the length of time taken to complete an investigation. Some investigations

¹¹ Section 19K.

¹² Section 19B(3)-(6).

may be assisted by consultants or people with particular expertise, under the supervision of the Commission. Other investigations may not require extensive resources, or the acquisition of specialist knowledge or experience. Each case will be investigated on its merits. All investigations will be comprehensive and thorough.

The matters that the Commission is obliged to consider in any investigation are extensive and include the public interest, economic issues including such matters as employment impacts, environmental issues, social welfare and community issues, and matters that might have an effect on the Territory and national economies.

6 What happens to the Commission's report?

When the Commission has completed its final report, it will give a copy to the referring authority. If the referring authority is not a Minister, it will also give a copy to the responsible Minister.¹³ A copy of the report must also be given to the Legislative Assembly.¹⁴ The ICRC Act requires that a government response must be provided to the Legislative Assembly on the report of an investigation within three months.¹⁵

As the report to the referring authority and the Minister provides recommendations about actions to address matters uncovered by the investigation into a complaint, there is no appeal. The ACT Government is responsible for deciding how to respond to the Commission's recommendations and is not required under the Act to implement any recommendations.

7 Contacting the Commission

Inquiries may be directed to the Commission at:

Independent Competition and Regulatory Commission
GPO Box 296
Canberra City ACT 2601

Level 2, 12 Moore Street
Canberra City ACT 2601

¹³ Section 21 (Final reports).

¹⁴ Section 24 (Presenting of reports to the Legislative Assembly).

¹⁵ Section 24A (Response by Minister to report on competitive neutrality complaint).

The Commission can be contacted by telephone on (02) 6205 0799, or by fax on (02) 6207 5887. The Commission's website is at www.icrc.act.gov.au and its email address is icrc@act.gov.au.

For further information on these guidelines or about making a competitive neutrality complaint please contact the Chief Executive Officer on (02) 6205 0799.

Appendix 1 Online resources

Independent Competition and Regulatory Commission:

- **Home page:** <http://www.icrc.act.gov.au>
- **Competitive neutrality page:** <http://www.icrc.act.gov.au/competition-issues/competitive-neutrality-government-regulated-activities/>
- **ICRC Act:** <http://www.legislation.act.gov.au/a/1997-77/default.asp>

See:

- Part 3, Division 3.2 Regulatory references.
- Schedule 1: Competition principles agreement extracts.
- Dictionary: *competition principles agreement, competitive neutrality complaint* and *competitive neutrality principles*.

ACT Government:

- **Treasury home page:** <http://www.treasury.act.gov.au>
- **ACT Government competitive neutrality policy (CNP):**
http://treasury.act.gov.au/documents/Policy%20-%20Competitive%20neutrality%20in%20the%20ACT%20_2.pdf
- **Legislation register:** <http://www.legislation.act.gov.au/>

Commonwealth:

- **National Competition Policy website:** <http://ncp.ncc.gov.au/pages/home>
- **Competition Principles Agreement (CPA):** <https://www.coag.gov.au/node/52>

Appendix 2 Variations

Date	Name	Clause/s amended	Reason for variation
December 2010	Guideline on making a competitive neutrality complaint in the ACT	N/A – original draft	N/A
August 2015	Competitive neutrality complaints - Guideline	All	Contemporise document