
C Competitive neutrality complaints

The Productivity Commission Act and the Australian Government's Competitive Neutrality Policy Statement require the Commission to report annually on the number of complaints it receives about the practices of government businesses and business activities and the outcomes of its investigations into those complaints. The Australian Government Competitive Neutrality Complaints Office (AGCNCO) received four formal complaints in 2011-12. Details of the investigation and action taken in relation to these complaints are summarised in this appendix.

The AGCNCO received four formal written complaints in 2011-12. The complaints were in relation to:

- PETNET Australia Pty Limited
- the Personal Properties Securities Register (PPSR)
- cemeteries operated by Penrith City Council
- Tasmania's Department of Infrastructure Energy and Resources License Test Centre.

After preliminary investigations, the AGCNCO decided to formally investigate the complaint against PETNET Australia. The complaints against PPSR, Penrith City Council and Tasmania's Department of Infrastructure, Energy and Resources did not proceed past the preliminary investigation stage as they did not relate to an Australian government business activity.

During 2011-12, the AGCNCO also finalised its formal investigation into the application of competitive neutrality policy by NBN Co. Preliminary investigations conducted during 2010-11 into a complaint from Office Data System about a partnership arrangement between OfficeMax and Australia Post did not proceed to a formal investigation as Australia Post was found to be complying with competitive neutrality policy.

Formal investigations 2011-12

NBN Co

The AGCNCO finalised its formal investigation into the application of competitive neutrality policy by NBN Co. The investigation report was released on 8 December 2011 (AGCNCO 2011).

The AGCNCO received three complaints concerning the activities of NBN Co from wholesale providers of greenfields telecommunication infrastructure:

- Opennetworks (complaint lodged 13 April 2011)
- Converge Network (lodged on 5 May 2011)
- Service Elements (lodged on 1 June 2011).

The complainants raised a number of concerns.

- NBN Co was announced as a provider of last resort to greenfield developments (where no commercial operator would operate) but was also actively seeking business in commercially viable developments.
- NBN Co's pricing of infrastructure in greenfield developments is contrary to competitive neutrality principles. NBN Co is claimed to be providing infrastructure (fibre and active equipment) and connections in new developments at no charge to the developers. Private providers must charge developers for the capital costs (which are passed on to land buyers), as they are unable to recoup capital costs from retail service providers.
- Related to pricing in new developments, as NBN Co will not be charging developers, the announced rate of return of 7 per cent (allowing for the cost of commercially raising debt), is not possible.
- Regulatory neutrality breaches relating to Ministerial determinations of technical specifications. Currently, providers operate under industry codes of practice. It is argued that Ministerial determinations will favour NBN Co as they will increase the cost of private production making them an unviable option for developers (irrespective of pricing concerns).
- NBN Co is using its position as a government business enterprise to promote itself to the development industry as the only option for fibre to the home network provision is in new greenfield developments.
- NBN Co negotiations with Telstra for the transfer of existing and new networks is putting other smaller players at a significant disadvantage.

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- Operational standards of NBN Co are presented as new industry standards to which other operators must adhere.

In conducting the investigation, the AGCNCO held discussions with the three complainants and with the Department of Broadband, Communications and the Digital Economy (DBCDE), NBN Co, the Department of Finance and Deregulation and the Australian Government Treasury. Written submissions were received from the DBCDE and from NBN Co. A draft of the report was provided to DBCDE and NBN Co for their comments on any matters of fact.

The NBN Co investigation was of a government business activity in its infancy. The business model had not been sufficiently implemented to yield data on what would be viewed as ‘normal’ costs and revenues. As such, the AGCNCO looked at whether NBN Co’s business model would place it in breach of competitive neutrality policy.

The AGCNCO found that NBN Co was in ex ante breach of its competitive neutrality requirements — that is, its business model as outlined in its business case would not generate a commercial rate of return. NBN Co’s expected (after tax) internal rate of return of 7 per cent from building the national broadband network is below all risk broad-banding estimates of commercial rates of return (which range from 8.4 per cent for low risk to 12.4 per cent for high risk).

The AGCNCO recommended that:

- the Australian Government arrange for an analysis of the nature and magnitude of the non-commercial benefits required to be delivered by the NBN Co. Also, based on this analysis, the Australian Government should put in place accountable and transparent community service obligation funding.
- to comply with competitive neutrality policy, NBN Co would need to adjust its pricing model by taking into account funding by the Australian Government for its community service obligations and would need to demonstrate that the adjusted pricing model is expected to achieve a commercial rate of return that reflects its risk profile.

After the report was release, the Minister for Broadband, Communications and the Digital Economy announced that no action would be taken in relation to the findings.

PETNET Australia

The AGCNCO received a complaint from Emil Ford and Co Lawyers on behalf of Cyclopharm Limited on 9 August 2011. Cyclopharm Limited alleged that PETNET Australia Pty Limited (hereafter PETNET Australia), a wholly owned subsidiary of the Australian Nuclear Science and Technology Organisation (ANSTO), was not complying with competitive neutrality policy.

Cyclopharm Limited is an Australian company. Through its wholly owned subsidiary, CycloPet Pty Limited, it manufactures positron emission tomography (PET) radiopharmaceuticals. The radiopharmaceuticals are used to detect and determine the location, extent and stage of cancer, neurological disorders and cardiac disease.

PETNET Australia manufactures and sells the most common PET radiopharmaceutical, fluoro-deoxy glucose (FDG). PETNET Australia (trading as PETNET Solutions) began its operations in August 2009. It operates two medical cyclotrons for radiopharmaceutical production at Lucas Heights. PETNET Australia currently provides FDG to Nepean Hospital, Royal North Shore (on a shared basis with Cyclopharm), and two private departments located at Sydney Adventist Hospital and PRP's Gosford imaging centre.

Cyclopharm claimed that:

- ANSTO's decision to enter into a franchise style arrangement with Siemens was approved without a public review process or tender
- ANSTO was charging prices that did not fully reflect costs and because of subsidised prices, PETNET Australia was able to secure a New South Wales tender to supply FDG to the public hospital sector
- ANSTO was not applying commercial rates of interest on loans made to PETNET Australia
- PETNET Australia could not achieve a commercial rate of return in the timeframe (10 years) set out by ANSTO.

As PETNET Australia had only begun operating in 2009, the investigation conducted by the AGCNCO related to a government business enterprise that was still operating in its start-up stage. As such, the AGCNCO looked at whether PETNET Australia was pursuing a business model that could place it in breach of competitive neutrality policy.

In conducting the investigation, the AGCNCO held discussions with the complainant and ANSTO. A written submission was received from ANSTO and a

draft investigation report was provided to ANSTO for comments on any matters of fact. The investigation report was released on 4 April 2012 (AGCNCO 2012).

The investigation's findings were that:

- ANSTO's process for selecting a commercial partner to re-enter the PET radiopharmaceuticals market was not a breach of competitive neutrality policy
- ANSTO's approach to apportioning and charging centrally provided services satisfied the requirements for competitive neutrality policy
- PETNET Australia had converted outstanding loans to equity and, as such, it could not be found in breach of the debt neutrality provision of competitive neutrality policy
- based on revenue and expenditure forecasts (provided by ANSTO), PETNET Australia's commercial operations were unlikely to achieve a commercial rate of return on the equity invested over either 10 or 15 years. This represented an ex ante breach of competitive neutrality policy.

The AGCNCO found that for ANSTO to comply with competitive neutrality policy, it would need to adjust PETNET Australia's business model such that it could be expected to achieve a commercial rate of return that reflected its risk profile and the full investment made by ANSTO.

ANSTO also argued that PETNET Australia faces more stringent regulatory requirements than its competitors by virtue of its Australian Government ownership. A comparison of the fees that PETNET Australia faces under the Australian Government regulatory environment and those it would face operating under the New South Wales regulatory regime revealed that the costs under the Australian Government regulatory framework and the ongoing fees for licencing and registration were higher.

If PETNET Australia was a private business only servicing state based hospitals and medical facilities (as is currently the case), it would only be subject to state based regulations. The Office recommended that the cost disadvantage resulting from the more stringent regulations applying to PETNET Australia should be neutralised in its cost base.

Complaints received but not formally investigated

Three complaints received during 2011-12 were not formally investigated.

Personal Properties Securities Register

A complaint was received from the Information Brokers & Law Stationers Association (IBLSA) on 23 August 2011 regarding potential pricing of searches to be conducted on the Personal Properties Securities Register (PPSR).

The PPSR is a new register established as part of the Council of Australian Governments (COAG) Reform Agenda under the Seamless National Economy National Partnership. The PPSR is a publically searchable register of security interests in personal property. The register has been established under the *Personal Properties Securities Act 2009*. It replaces a number of State and Australian Government based registers.

At the time of the complaint the register had not begun operation (nor had fees been set) and members of the IBLSA had ‘wholesale’ access to a number of registers through licensing arrangements. The IBLSA alleged that the proposed single pricing policy for the PPSR was a breach of competitive neutrality policy.

In assessing the activities of the PPSR, the AGCNCO held discussions with the Attorney General’s Departments and reviewed the relevant legislation and policy announcements surrounding the development of the PPSR. The AGCNCO concluded that the PPSR failed to meet the ‘business test’ and subsequently was not required to apply competitive neutrality policy.

There were two reasons for this conclusion.

- The PPSR does not have independence in its pricing sufficient for it to set prices that would allow it to earn a commercial rate of return. The PPSR has been given binding policy guidance over its pricing to the effect that it is to operate under the Australian Government Cost Recovery Policy (as set out in the Explanatory Memorandum supporting the *Personal Properties Securities Act 2009*). Agencies operating under cost recovery arrangements are specifically restricted to only recover those costs that are integral to the provision of products or services. By extension, this prevents the PPSR setting prices which incorporate an appropriate margin to generate a commercial return (as such a margin is not ‘directly related or integral to the provision of the product or service’ offered).
- As the *Personal Properties Securities Act 2009* establishes a unique feature which can only be ascribed to the PPSR — that of the ‘perfection’ of a security

— it has no actual or potential competitors. No other register, privately developed or otherwise, can confer perfection to the holder of a security. In this sense, law prevents users from choosing an alternative register for security holders seeking legal surety over their interest in personal property.

The complainant was advised that the potential pricing of the PPSR fell outside the purview of the AGCNCO.

Cemeteries operated by Penrith City Council

In January 2012, the AGCNCO received a complaint from Personal Services Australia regarding the cemeteries department of the Penrith City Council and compliance with competitive neutrality policy.

The AGCNCO informed the complainant that as a local government issue the complaint fell outside matters that the AGCNCO could investigate. The Office suggested that as the issue of concern related to compliance with competitive neutrality policy by local government in New South Wales that the complaint be taken to New South Wales Treasury.

Department of Infrastructure and Energy and Resources Licence Test Centre

The AGCNCO received a complaint from Elite Driving in September 2011 regarding changes made by Tasmania's Department of Infrastructure and Energy and Resources to their Licence Test Centres and possible competitive advantages to the RACT Driving School.

The complainant was informed that as the complaint did not relate to an Australian Government business, it fell outside matters that the AGCNCO could investigate.