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## D 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 competitive neutrality of government businesses and business activities and the outcomes of its investigations into those complaints. The Australian Government Competitive Neutrality Complaints Office (AGCNCO) received six formal complaints in 2010-11. Details of the investigation and action taken in relation to these complaints are summarised in this appendix.**

### **Formal investigations commenced in 2010-11**

The AGCNCO received six formal written complaints in 2010-11. Three were in relation to NBN Co. The others were in relation to Australia Post, the Australian Maritime Safety Authority (AMSA) and the Australian Securities and Investments Commission (ASIC).

After preliminary investigations, the AGCNCO decided to formally investigate the complaints against NBN Co. This investigation is ongoing. The complaint against Australia Post is the subject of an ongoing preliminary investigation. The complaints against AMSA and ASIC did not proceed past a preliminary investigation as there was no evidence of prima facie breach of competitive neutrality policy.

#### **NBN Co**

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

- Opennetworks lodged a complaint on 13 April 2011
- Converge Networks lodged a complaint on 5 May 2011
- Service Elements lodged a complaint on 1 June 2011.

The complainants raised a number of concerns that, they alleged, represented breaches of competitive neutrality policy:

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- While the Minister for Broadband, Communications and the Digital Economy announced NBN Co as a provider of last resort (where no commercial operator would operate) in greenfield developments, it has actively sought 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 developers. Private providers must charge developers their capital costs (which are passed on to land buyers) as they are unable to recoup capital costs from retail service providers.
  - As NBN Co will not be charging developers, the announced rate of return of 7 per cent can not be achieved, and even if it were, it would not represent a commercial rate of return.
  - The operational standards of NBN Co are being presented as new industry standards by NBN Co to which other private operators must also adhere.
  - NBN Co had breached the regulatory neutrality provisions under proposed laws that allow Ministerial determinations of technical specifications to be made. 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 provision making private providers an unviable option for developers.
  - NBN Co is using its position as a government business enterprise to promote itself as the only option to build fibre to the home networks in greenfield developments.
  - NBN Co negotiations with Telstra for the transfer of existing and new networks are putting other smaller players at a significant disadvantage.

The Office finalised stakeholder consultations within the 2010-11 financial year and was awaiting formal responses from NBN Co and the Department of Broadband and the Digital Economy early in the 2011-12 financial year. After the formal responses have been received and further consultations undertaken, the AGCNCO will publicly release a final investigation report.

## **Other complaints received in 2010-11**

Three complaints received during 2010-11 had not been formally investigated by year's end. The complaint relating to Australia Post is the subject of an ongoing preliminary investigation. The other two complaints were subject to initial investigations which subsequently found no prima facie evidence of a breach of competitive neutrality policy.

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## **Australia Post**

A complaint was received by the AGCNCO from Office Data Systems, a business that supplies office products, through their local member of parliament in December 2010. The complaint was in relation to the establishment of an online office supplies site which sold products by OfficeMax that were delivered by Australia Post.

The issues raised by the complainant related to alleged:

- advantages to Australia Post from exploiting its distribution network in its agreement with OfficeMax
- price discrimination by a government business enterprise — through this price discrimination, OfficeMax was advantaged due to discounted access to Australia Post's distribution network.

Australia Post was approached with separate requests on two occasions and asked to respond to the complaints put forward by Office Data Systems. At the end of the 2010-11 financial year, the AGCNCO was waiting for a further response from Australia Post in relation to the issues raised. Whether a formal investigation is warranted will be decided following the receipt of the additional information from Australia Post.

## **Australian Maritime Safety Authority**

In November 2010, the AGCNCO was approached by Dr Kent Morison about the then proposed changes, by AMSA, to medical checks conducted by health professionals for maritime workers.

Prevailing arrangements were that suitably qualified medical practitioners could apply to AMSA to be able to conduct medical checks and were appointed (without charge) subject to meeting AMSA approval. The medical practitioners could then charge a fee that they set.

However, given a number of complaints from industry participations, and a lack of accountability of health professionals, AMSA sought to implement a national system for health checks which could be subject to audit.

Dr Morison's complaint suggested that such a change would remove some of the benefits of the current system by reducing competition. In particular, he suggested that the shift would reduce:

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- choice of practitioner and access to AMSA medical examination (including, for example, for maritime workers requiring a medical in remote and rural locations of Australia)
  - price competition between medical practitioners performing AMSA medicals.

Dr Morison asked the AGCNCO to examine the issue on the grounds that the shift in supply was anti-competitive.

The AGCNCO provided an initial response stating that decisions made by government agencies on the ‘choice of suppliers’ were not subject to competitive neutrality policy. Therefore the issue fell outside the purview of the Office.

After this initial response from the AGCNCO, Dr Morison pursued other avenues to have his complaint heard. After exhausting these, in late March 2011 he contacted the AGCNCO and asked that the matter be reviewed a second time.

At this time, Dr Morison informed the AGCNCO that the bulk supplier of medicals was to be Medibank Health Solutions (a government business) and that details of the pricing arrangements between AMSA and Medibank Health Solutions would not be released citing ‘commercial in-confidence’.

In response to a preliminary investigation by the AGCNCO, AMSA advised that the decision to enter into a commercial relationship with Medibank Health Solutions was arrived at after they sought expressions of interest from health professionals and undertook extensive consultation. The new system became operational on 1 March 2011.

While the original advice concerning the administrative decision by AMSA to change the way they purchased medical checks remained valid, the Office sought information from Medibank Health Solutions in relation to their commercial arrangement with AMSA.

As Medibank had recently been converted into a ‘for-profit’ entity, they were required to pay tax, earn a commercial rate of return (and were doing so) and make dividend payments to shareholders (the Australian Government). Such arrangements were being conducted in a manner consistent with a similar private firm and in adherence to competitive neutrality principles. For the particular contract at issue, Medibank also provided information that verified that no government funding was being used to subsidise the commercial relationship with AMSA.

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The complainant was subsequently informed that as Medibank was applying competitive neutrality policy correctly, the matter would not proceed to formal investigation.

### **Australian Securities and Investments Commission**

In April 2011, the AGCNCO received a complaint in relation to ASIC's decision to provide 'direct-to-the-public' company extracts which had previously only been supplied over-the-counter or 'wholesale' to information brokers. The Information Brokers & Law Stationers Association (IBLSA), who lodged the complaint, suggested that a number of brokers had worked with ASIC to provide this information to the public since the mid-1990s.

The IBLSA believed that ASIC's pricing intentions for the direct-to-the-public service were contrary to the principles of competitive neutrality policy. In particular, IBLSA believed that the intended prices were not set on a comparable basis to private sector organisations and would not allow for a suitable rate of return to be earned.

After preliminary investigations it was found that ASIC's price setting was restricted by regulation — they had no independence in pricing and therefore failed the business test. ASIC's prices are mandated by the *Corporations (Fees) Regulation 2001*, schedule 1 items 29, 30, 31 and 32. The complainant was informed that, as ASIC failed the business test, competitive neutrality policy did not apply and the matter would not be formally investigated.

