# The Commissioner for Better Regulation and Competitive Neutrality

## Introduction

The objective of competitive neutrality (CN) policy is to promote fair and equitable competition between government and private businesses.

Clause 3(1) of the intergovernmental *Competition Principles Agreement*, to which Victoria is a party, describes the purpose of CN as:

… the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government business 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.

The aim of this document is to provide clarity about how the Commissioner — supported by the Office of the Commissioner for Better Regulation (OCBR) — implements the CN function.

## The overarching framework

The instrument of appointment for the Commissioner states that:

The Commissioner for Better Regulation (Commissioner) will be responsible for:

1(g) providing education so as to ensure compliance with the competitive neutrality policy of the Victorian Government

1(h) investigating competitive neutrality complaints.

Victoria’s current CN policy, and the way in which it is to be applied, is detailed in the following documents:

* *Competitive Neutrality Policy (*DTF 2012) [[1]](#footnote-1)
* *Competitive Neutrality Guide to Implementation (*DTF 2000).
* *Amendment to Competitive Neutrality Policy Application of CN Policy to Council owned Aquatic and Leisure Centres* (DTF 2003)

The Commissioner is responsible for achieving awareness of, and compliance with, the CN policy currently in force, and for conducting CN investigations. The OCBR advises the Commissioner on CN issues and undertakes CN-related activities under the Commissioner’s oversight and direction.

## The scope of the CN role

The CN Policy states:

[The Commissioner] is responsible for achieving awareness of and compliance with competitive neutrality policy, including its interpretation and application. (DTF 2012, p. 3)

Reflecting this, the Commissioner and the OCBR undertake activities to achieve compliance with CN policy by:

* investigating complaints by a directly-affected person or business, or by industry or community groups, about a government business that may not be complying with CN policy
* providing advice to departments, agencies and local governments at their request to determine whether their business activities fall within the scope of CN policy and/or which measures need to be considered to apply CN
* responding to inquiries from potential complainants about the application of CN to particular government entities and about the complaint process
* undertaking other education activities to ensure that the Government complies with CN policy.

## Competitive Neutrality complaints

The CN policy provides for a complaints-based system, with an underlying presumption of ‘assumed compliance’ rather than non-compliance with the policy (DTF 2012, p. 11). The policy notes that individual departments, agencies and local governments are responsible for:

* identifying the activities to which CN policy applies
* taking the necessary actions to comply with CN policy

documenting the decisions they have taken and making the material available to the public on request (DTF 2012, p. 11).

## The complaints process

The CN complaints process is set out in the CN Policy, the CN Guide to Implementation and the instrument of appointment for the Commissioner.

In considering CN complaints, the Commissioner is required to apply the CN policy currently in force and must also give:

*… particular regard to the interests of the users of the goods and services provided by the particular State or local government business or through the particular State or local government business activity (para 3 b)*

*… particular consideration to the public interest requirements in clause 1 of the Competition Principles Agreement signed by all jurisdictions in 1995 (para 3 c). (Government of Victoria 2015)*

The CN Policy also states that the Commissioner cannot initiate own-motion investigations (DTF 2012, p. 12).

### The pre-investigation phase

Upon receiving a complaint, the OCBR undertakes a preliminary analysis to advise the Commissioner whether to accept the complaint for investigation.

The Commissioner accepts a complaint for investigation if it is considered that the complainant has sufficient relevant interest in the matter, the information provided suggests that CN policy applies and there may be a breach of the policy, and an investigation is a proportionate response to the complaint.

Specific considerations include whether:

* the activity subject to complaint could be a ‘significant government business’ — if an activity is assessed as clearly not clearly not being a ‘business’ and not ‘significant’ the Commissioner does not commence an investigation
* there is sufficient evidence or information to suggest a possible breach of CN policy by the relevant government entity
* the annual turnover of the government activity is above $500 000, which provides evidence about whether a full investigation is a proportionate approach given the size of the government activity and possible alternative means to resolve the complaint:
  + a government business activity with annual revenue above $500 000 will be in scope of the investigation process while those with revenue below $500 000 will be addressed through a non-investigation approach (see below).
  + in limited circumstances an investigation may be warranted for activities below $500 000 — for example, where a new government activity is expected to grow rapidly.
* the complaint is from a directly affected person or business, or from an interested industry or community group
* the complainanthas taken steps to resolve the concern independently, such as through discussing the concerns with the government entity.

If the OCBR requires more information to assess a complaint we may request further information from the complainant, undertake research and/or seek information from relevant government agencies, including from the agency subject to the complaint to verify its compliance with CN policy.

The Commissioner does not accept a complaint if:

* it relates to past issues
* it is frivolous or vexatious or not made in good faith
* an investigation is not warranted having regard to all the relevant circumstances.

If the Commissioner does not accept a complaint, the complainant is informed of that decision, and the reasons for it, in writing.

In cases where the Commissioner does not accept a complaint but considers that, for example, CN issues might arise in the future or compliance with CN policy could be enhanced, we will advise the government business on how to address these issues.

### The non-investigation-based approach

The OCBR may suggest a non-investigation-based approach be used to resolve the concerns of the complainant if it determines that a complaint — or part of a complaint — is within the scope of CN policy, but an investigation is not the most effective or proportionate way to resolve the issue/s raised.

The purpose of a non-investigation approach is to improve the understanding of CN policy by private and government businesses, and to ensure compliance with CN policy in a simpler, faster and proportionate way than would be possible with an investigation.

The approach adopted depends on the specific circumstances, but could include a meeting between the complainant, relevant government entity and the OCBR to discuss the CN concerns and/or specific advice from the OCBR to a government business on how best to apply CN policy.

If the OCBR considers this approach may be appropriate, we discuss this with the complainant. If the complainant agrees to proceed with this approach, a complaint will be placed in abeyance. However, if the complainant’s concerns are not resolved, they can choose to proceed with the complaint, and the OCBR will commence an investigation, where this is warranted.

### The complaints investigation approach

In investigating complaints, the OCBR abides by principles of procedural fairness, investigating all complaints fairly, independently and rigorously, and basing its findings and recommendations on the best available information. The OCBR’s investigation is subject to oversight and review by the Commissioner.

A complainant may request that the OCBR keep their identity confidential. The OCBR will agree to this request as far as possible. However, in some cases, the government entity may seek and be entitled to know the identity of the complainant to ensure procedural fairness — for example, to enable it to respond effectively to the claims made against it. In other cases, the government entity may seek and be entitled, under the *Freedom of Information Act 1982* (Vic), to access documents that disclose the identity of the complainant.

Once a complaint is accepted for investigation, the complainant, government entity subject to the complaint and relevant government department/s are notified by letter. The letter to the government entity includes requests for information that will allow the OCBR to progress the investigation.

The CN Implementation Guide states that:

*Relevant documentation must be made available to the [OCBR], to either verify or assess the extent to which the government business has complied with CN Policy’ (DTF 2000, p. 7).*

To ensure that the investigation does not impose an unnecessary burden, the OCBR will generally only request key information, which should be readily available to the entity that is the subject of the complaint.

The OCBR prepares a draft report for the Commissioner’s review. The draft report (excluding any commercially sensitive information) is then provided on a confidential basis to the complainant, government entity subject to the complaint, and relevant government department/s for comment. Based on the comments received, the OCBR prepares a final investigation report for the Commissioner’s consideration and decision.

The final report is provided to the complainant, government entity subject to the complaint, relevant government department and Treasurer (as Minister responsible for CN policy). The final report remains confidential for approximately one month after its finalisation, at which time it is published on the OCBR’s website.

Where the investigation concludes that the government entity subject to the complaint has not fully complied with CN policy, the Commissioner makes recommendations designed to enable the government entity to become fully compliant.

### Post-investigation follow-up

The OCBR follows up with the government entity, usually within three months of completing the investigation, to check on progress in implementing the recommendations. The OCBR may decide to conduct this follow-up more than three months after completing its investigation if we consider that the government entity would reasonably require more than three months to implement the recommendations fully and effectively.

The Commissioner informs the complainant in writing of the outcomes of its follow-up with the government entity — specifically of the entity’s progress in implementing the report’s recommendations. This approach aims to provide, in a timely manner, information to the complainant about developments that might influence their business and business decision-making. The OCBR also reports annually on the implementation of recommendations to the Treasurer.

As set out in the CN policy, the Commissioner’s recommendations are not legally enforceable. However, should the Commissioner have concerns with the implementation of CN investigation recommendations, the Commissioner will write to the government entity subject to the complaint, the Secretary of the relevant department and the Treasurer with recommended actions to achieve compliance.

Given the role specified in the CN policy, it is outside the Commissioner’s scope to:

* assess anti-competitive behaviour that is covered by the *Competition and Consumer Act 2010* (Cth) or the *Competition Policy Reform (Victoria) Act 1995*
* deal with probity issues arising from tendering processes of government agencies or local governments
* recommend any compensation or termination of contractual arrangements.

## Achieving awareness of CN policy

The Commissioner — supported by the OCBR — is required to ensure that government departments and agencies and local governments are aware of CN policy. This is done by:

* giving presentations/training to government agencies and local government about CN issues that are particularly relevant to them
* providing information on CN policy, including publishing guidance notes
* responding to specific queries of government agencies and local government about how to implement various aspects of CN policy
* promoting outcomes of particular investigations to organisations that are similar to the one investigated, by writing to these entities to advise them of the publication of the final investigation report
* publishing articles in external publications, where relevant.

**Anna Cronin**

**Commissioner for Better Regulation**

16 September 2016

## References

## (available on the OCBR’s website)

DTF (Department of Treasury and Finance) 2012, *Competitive Neutrality Policy*, Melbourne.

—— 2000, *Competitive Neutrality Guide to Implementation*, Melbourne.

—— 2003, *Amendment to Competitive Neutrality Policy Application of CN Policy to Council owned Aquatic and Leisure Centres*, Melbourne, July.

Government of Victoria 2015, *Instrument to Create the Office of the Commissioner for Better Regulation*, Melbourne, September

1. The Competitive Neutrality Policy (2012) refers to the role of the Victorian Competition and Efficiency Commission (VCEC) in respect of CN issues. With effect from 22 September 2015, the Commissioner for Better Regulation became responsible for administering the Victorian Government’s CN Policy. All references to VCEC should now be read as the Commissioner for Better Regulation or the OCBR until the Policy is updated. [↑](#footnote-ref-1)