



**COMPETITIVE NEUTRALITY COMPLAINT AGAINST THE PASSENGER
TRANSPORT BOARD**

under the Government Business Enterprises (Competition) Act 1996

REPORT SUMMARY

being a summary of the contents of the report on the outcomes of the
Competition Commissioner's investigation

March 2002

COMPETITIVE NEUTRALITY COMPLAINT AGAINST THE PASSENGER TRANSPORT BOARD

REPORT SUMMARY

1. Investigation background

1.1 Terms of reference

Private operators in South Australia's bus tour and charter industry have complained for some years about activities of the Passenger Transport Board (PTB) in its management and regulation of public transport. The Premier formally referred their complaints to the Competition Commissioner in August 2000 for investigation and report as to whether principles of competitive neutrality had been infringed and, if so, recommendation of policies and practices to be implemented to avoid further infringements of the same kind.

Correspondence forwarded with the reference related particularly to:

- the PTB's role in transport arrangements for school students attending two major events, one organised by the Catholic Education Office on 31 May 2000 and World Environment Day on 5 June in the same year, regarding which the Bus & Coach Association (SA) Incorporated (BCA) complained that the PTB had preferred to use Metropolitan Route Service operators; and
- the PTB's management of its regulatory responsibilities with regard to safety matters, tendering processes and the activities of contracted public transport providers in competition with private tour and charter businesses.

1.2 Policy guidelines

The guiding framework for the investigation has been the Government's Competitive Neutrality Policy Statement (the Policy Statement), a document specifically published for the purposes of Part 4 of the Government Business Enterprises (Competition) Act 1996 (the GBE Act), which contains provisions related to competitive neutrality.

The Policy Statement commits the Government to the application of competitive neutrality principles described in Clause 16(1) of the GBE Act as:

" ... designed to neutralise any net competitive advantages that a government or local government agency engaged in significant business activities would otherwise have, by virtue of its control by the government or local government, over private business operating in the same market."

Investigation process

The Commissioner met the complainant group and PTB representatives separately to explain the proposed investigation process. The BCA accepted responsibility for the preparation of a central submission on behalf of the bus and coach tour and charter industry, to be supported by submissions from any individual operators who wished to present detailed information on specific issues. The PTB also promised its full cooperation in the inquiry.

All parties sought repeated extensions of time for their responses because of the number and complexity of issues raised. The Commissioner accepted all such requests to allow full opportunity for the preparation and presentation of submissions.

A draft report was provided to the parties in December 2001 for comment or further submissions before preparation of the final report. Neither the BCA nor individual operators had responded before completion of this report.

1.3 PTB charter

The Passenger Transport Board's charter requires it to plan, regulate and fund South Australia's land-based passenger transport services within the requirements of the Passenger Transport Act 1994 to:

- oversee the creation and maintenance of an integrated network of services;
- foster and promote efficient and effective services;
- determine, monitor and review services and fares, and administer fare subsidies and concessions;
- accredit operators, drivers and centralised booking services for taxis;
- establish, audit and, if necessary, endorse safety, service, equipment and comfort standards;
- facilitate the use of services by people with disabilities;
- provide information about services to the public;
- establish a centralised system for receiving and dealing with complaints and compliments;
- initiate, undertake, support and promote programs for the development and improvement of services; and
- establish and maintain transport infrastructure and facilities.

The Passenger Transport Act initiated changes in public passenger transport services that included the contracting of Adelaide metropolitan bus services. Private contractors now operate all Metroticket bus services. Only companies holding service contracts awarded by the PTB following open tenders may

provide regular metropolitan bus services, commonly known as 'Adelaide Metro' or 'Metroticket'.

There has been no limit on the number of operators who might provide tour and charter services in South Australia since restrictions on entry to the tour and charter industry were lifted in 1987. However, all bus and coach operators require accreditation under the Passenger Transport Act, which defines standards regarding vehicle and driver requirements. Those processes and compliance requirements are administered by the PTB.

2. Submissions received

Complaints presented to the investigation related principally to either:

- the PTB's role in the coordination of tour and charter bus services involving Adelaide Metro operators; or
- its actions in monitoring compliance with the Passenger Transport Act.

The main arguments presented by the parties are summarised below.

2.1 Co-ordination of tour and charter bus services

The BCA said that the role of the PTB should be as a regulator and not a broker. Private operators were concerned at the method of selection and criteria used by the PTB for tour and charter work, believing that 'the obvious avowed intent of the ... Board is to use the metropolitan fleet first and foremost.' The BCA added:

"How is it that the Passenger Transport Board are acting as a broker in setting up the requirements for major event public transport by choosing the operators they wish to use when their role should be to ensure that all operators be performing to the standards set? If they are actually setting rates and making such choices how can they be seen as impartial?"

It said that government statements showed that the 'privately operated, but government owned' city fleet was not fully self-funded, and the advantage this gave should not be used against private operators through the direction and control of a government entity.

The PTB replied that it was expected to have a limited role in the coordination of charter bus and coach services. It was only involved in the charter market when there was a public policy outcome, and acting in accordance with the objectives of the Passenger Transport Act in the provision of services for major government subsidised activities or activities of a charitable or educational benefit and run or supported by the government on public policy grounds.

The PTB said that, depending on the scope and nature of services to be provided, it might have a role as facilitator or coordinator in arranging charter services, sometimes as a customer seeking a supplier or as required by government to support a major event or government initiative. It saw such a role to be facilitation to ensure the provision of efficient passenger transport services and not a business activity.

2.2 Transport for major events

Letters initially referred to the Commissioner related particularly to the PTB's role in transport for school students attending the two major Adelaide events already noted. The BCA claimed that a private operator who regularly serviced a particular school was contacted by the school and made arrangements for the transportation of students. Ten days before the event he was advised by the school that his services would not be required because the school had been informed that the PTB would handle all transport arrangements for the day.

The BCA said:

“It appears that the PTB took upon itself to make arrangements for conveying passengers including negotiating, contracting and supply of buses for each event. Many operators were totally unaware of any special events taking place until advised by other operators, as the main suppliers were taken from the ranks of the Metropolitan Route Service Operators.

“... Recognising the requirement for competitive neutrality, is it proper that the contracted metropolitan bus fleet be used as the first provider for major public event passenger transport without a publicly advertised call for expressions of interest for potential tenderers in the private sector?

“... Another aspect of the event of 31 May was that a train from Victoria was hired by the PTB to carry passengers from Port Pirie and adjacent areas to Adelaide. What was the cost of hiring the train and why were local resources not utilised? Amongst other things, it meant that some country operators were directed to drive to meet the train at a total cost higher than providing a direct service to the city.”

The PTB said that the Catholic Education Office had asked for Board assistance for its Jubilee Event after recognising the scale of transport requirements. There had not been enough vehicles available in the private bus sector to meet those requirements, and trains and trams would also be needed if the event were to proceed. The PTB said it did not commit to assisting the Catholic Education Office until it had evaluated vehicle requirements and received an indication on vehicle availability from the private tour and charter industry.

On the basis of the information then provided, the PTB had agreed to assist with transport planning, identifying school locations, proximity to train/tram,

shuttle requirements, and numbers of students by age or class profile. Information was provided to the BCA to advise members who may have been interested in providing buses. All members who applied for the opportunity to provide buses were engaged at rates negotiated with each operator.

Adelaide Metro Service contractors (Torrens Transit, Serco, Southlink, Transitplus, TransAdelaide Rail and Tram) were then allocated to service particular schools and requested to assist to their maximum capacity.

The PTB said that it had advised the BCA of the situation but some BCA members had claimed that information on the events and the opportunity to be involved in the provision of services had not been forwarded to them. One private operator who did agree to participate in providing transport had withdrawn his services the night before the event and replacement services had to be arranged from another provider at very short notice.

The PTB said that a train was hired from Victoria to transport passengers from Port Pirie to Adelaide for the Catholic Jubilee Event. This was a choice by the Catholic Education Board and paid for by that organisation. The PTB said the choice to opt for unusual transport options was seen to contribute to the special nature of the event, both for participants and for promotion and recognition of the event.

2.3 Metroticket operator involvement in tour and charter operations

The BCA challenged the involvement of Metroticket operators in tour and charter operations. It said that private operators had registered documented complaints with the PTB and the Minister on many occasions, with little result. The BCA said that as early as 1995 TransAdelaide was using a modern taxpayer-funded bus fleet in direct competition with private tour and charter operators and offering rates that were neither commercial nor viable for private operators.

It claimed also that because such vehicles had extremely limited luggage storage facilities, TransAdelaide's use of metropolitan route service buses on charter journeys in some situations breached regulations for storing and carriage of luggage, and compromised children's safety.

The BCA said that by 1998 TransAdelaide had secured 75% of the total bus market, alongside its train and tram operations. In that year the TransAdelaide (Corporate Structure) Bill 1998 separated TransAdelaide from the scope of the Passenger Transport Act, and TransAdelaide had since failed to secure any contracts in public tendering processes for Adelaide metropolitan bus services.

The BCA's submission said:

“The intention of the Bill was to establish TransAdelaide as a public corporation under its own legislation. The move was designed to ensure that TransAdelaide be viewed as an independent operator in a

competitive market and to separate the policy development and contracting role of the Passenger Transport Board and the service delivery role of TransAdelaide as well as producing a commercially viable operation within TransAdelaide.”

The BCA said that figures released by the Minister for Transport for 1999/2000 suggested that fare revenue of \$45 million was \$180 million short of costs to operate the Metropolitan Route Service. It had asked how much of this subsidy contributed to the tour and charter operations of TransAdelaide but had not been able to obtain the information. It said that in the same period, private operators did not receive a subsidy or any other form of rebate from the SA Government for tour and charter operations, and were at a substantial disadvantage. The BCA concluded:

“It is our assertion that TransAdelaide under the direct control of the Passenger Transport Board not only operated at the expense of private operators, who have experienced the full impact of TransAdelaide’s assault on the tour and charter market, but also at the expense of the South Australian taxpayer who has been misled into believing that the taxpayer funding was provided to support the metropolitan route services, not to subsidise TransAdelaide’s tour and charter operations in direct and unfair competition with private operators.”

The PTB said that the figures provided by the BCA on the extent of subsidy were essentially correct, with approximately 80% of the funding for public transport supplied by Government and only 20% received from passengers. This was the reality of all metropolitan public transport services in Australian cities.

However, it said that none of the funding for Metroticket public transport services was contributed directly to tour and charter services by contracted service providers. While infrastructure costs (eg. administration, wages and maintenance costs) might as a consequence be seen to have been shared across a broader operation base, ‘this would be the same for any business.’

The PTB said that Government contracts for passenger transport services were open to all accredited bus and coach operators. There was a competitive tendering process to select operators paid by the government for providing the service. The holder of a government contract should not be restricted in the services it could provide simply because it had been successful in obtaining a contract for services from the State Government. The additional services provided did not impact on the contracted services or add to the cost to government or the taxpayer.

Provided their contract commitments were given absolute priority, current providers of Metroticket services were able to provide chartered services using Adelaide Metro buses. They were required to keep records of all their tour and charter work and the PTB was able to obtain reports on the extent of such work. The PTB said it had provided the BCA with details of charter kilometres undertaken by Metroticket operators that confirmed that such

activities constituted a very small proportion of total distances travelled by their buses.

The PTB denied claims that vehicles were set aside for contractors to provide tour and charter services. It said contractors were required to provide the level of service identified in the contract and would only be provided with sufficient vehicles to meet the terms of the contract. Contractors were only permitted to engage in other services if they had a capacity to provide services outside of that level and this would normally only occur in off-peak periods. The PTB did not allow a Metroticket operator to miss public transport trips in order to undertake other work with the bus.

2.4 Links between TransAdelaide and the PTB

The BCA suggested in its submission that close links between the Passenger Transport Board and TransAdelaide had led to favoured treatment for the latter.

The PTB responded that it was difficult to understand this suggestion, given that the BCA itself had noted that TransAdelaide failed to secure any Metroticket bus services in its own right and since April 2000 had not provided Metroticket bus services except as a 50% partner of Transitplus. However, it had failed to draw the reasonable conclusion that the declining role of TransAdelaide in the provision of these services did not support any conclusion that the PTB was undermining the private tour and charter industry by unfair support for TransAdelaide.

The Board said that tendering for Metroticket services for Adelaide had always been subject to stringent audit procedures. A Probity Advisor had been appointed by the PTB to ensure its process complied with government requirements for tendering.

2.5 Competition between tour and charter operators and route service contractors

The BCA questioned the equity of allowing regular public passenger service contractors to compete with tour and charter operators when the latter were not allowed to compete on regular routes. It asked why Adelaide Metro service contractors should be allowed to use subsidised government-owned buses to compete against private charter operators.

The PTB commented:

“Given the unrestricted entry requirements for the bus and coach industry (subject to accreditation standards), it would be inappropriate to impose restrictions on accredited operators to provide services in the passenger transport industry just because they operate regular

passenger services (eg Adelaide Metro, country area/route service or school bus service)."

The PTB said that tour and charter operators had for some time asked that entry to that market be restricted to existing operators to enable improved standards and greater certainty for investment. There had been many discussions about the implications of national competition policy for such a request.

Similarly, any decision to restrict the use of Adelaide Metro buses for charter services would need to consider the implications for national competition policy and restriction on trade in conjunction with the associated public benefit evaluation. In addition, train and tram services would need to be treated in the same way as buses.

The PTB said buses used for Adelaide Metro services were owned by Transport SA and leased to service contractors. Use of the buses for tour and charter services beyond the scope of the regular passenger service contract was at a rate specified in the contract and independently assessed by KPMG.

The PTB also commented on what it saw to be an inference throughout the BCA submission that contracted service providers were not private companies but tour and charter operators were. The PTB said that current Metroticket bus contractors, Southlink (Australian Transit Enterprises Pty Ltd), Torrens Transit Pty Ltd, Transitplus Pty Ltd and Serco Pty Ltd were all private companies who operated for a contracted service fee paid by the government.

The PTB added:

"The perception promoted in the BCA submission that an operator who wins a government contract is no longer a private operator, is clearly wrong. The government is a customer for bus services, whether they be Metroticket, intertown route services, major events or school bus contracts. Success in obtaining a contract with government does not change the reality that they continue to be private operators who should be entitled to operate so that they provide a return to the business owners."

2.6 Other PTB regulatory functions

Submissions by the BCA and individual operators also challenged the PTB's application of some of its other regulatory responsibilities under the Passenger Transport Act.

2.7 Safety requirements

The BCA claimed that some PTB officers had encouraged public transport operators to disregard safety requirements with regard to passenger numbers

and mandatory equipment requirements when providing charter services. It said:

“It also emerged that operators involved in the conveying of passengers were instructed by PTB officers, in direct contravention of regulations, to load as many passengers on board as possible, regardless of licensed seating regulation. When operators questioned the legal implications, the PTB officers advised that operators would be indemnified by the Government for this particular day.

The PTB said it refuted suggestions that it would endorse any operator to provide services in breach of the provisions of the Act. It insisted at all times on operators meeting appropriate standards (including vehicle and accreditation standards) and complying with all legislative requirements.

Noting its responsibility for ensuring compliance with the Passenger Transport Act, the Board said it had encouraged the BCA to lodge complaints for investigation by the PTB of any perceived breaches of the legislation. The BCA was aware of special compliance initiatives implemented in direct response to its concerns over unsecured luggage on buses in connection with special events.

The BCA said it believed also that service contractors were:

- not required to comply with Australian Design Rules; and
- permitted to conduct their own vehicle safety inspections instead of taking vehicles to the central inspection authority.

The PTB said that authorised Transport SA inspectors conducted vehicle safety inspections at depots operated by the service contractors. This was done for practical purposes, given the number of vehicles involved, and standards were not compromised.

The PTB said that Australian Design Rules (ADRS) were national standards for road vehicles determined under the Motor Vehicles Standards Act and administered by the Federal Office of Road Safety. The standards varied depending on the type of vehicle. Private tour and charter operators frequently chose to own vehicles such as long distance tour coaches that were required to meet different ADRS to those for metropolitan bus services (eg with regard to seat belt requirements).

The PTB said it did not accept any claims that it supported lower standards for Metroticket service buses. All vehicles must meet all legal requirements to be used as a public passenger vehicle. The government would not support the introduction of vehicle standards that compromised the safety of public passenger transport. All vehicles, regardless of their amenities and features, must meet regulated accreditation standards.

The Board added that the marketplace should determine amenity features that it wanted in vehicles for tour and charter, based on value for money. The nature of this competition involved a range of issues, including the total cost of

the service. Larger operators might have more diversified fleets and their economies of scale might create difficult competition for smaller operators.

2.8 Use of commercially confidential information

The BCA submission suggested that the PTB had used its powers under the Passenger Transport Act to seek commercially sensitive information related to school services from client providers. Some operators had feared this might be turned to commercial advantage for their competitors.

The PTB said that its research into compliance with Regulation 4A exemptions under the Passenger Transport (General) Regulations may have caused some operators to believe there was an attempt to seek out confidential information related to school services. This was not the case. Schools had been contacted in relation to school services to assess compliance with the provisions for regular passenger services and the need for service contracts or an exemption under Regulation 4a Passenger Transport (General) Regulations 1994.

2.9 Private school runs

Responding to claims that public transport services had been deliberately extended to crowd out private operators from the provision of school transport, the PTB said that demand for public transport services was increasing. The 'public' referred to in the submission had sought continued improvement to existing services and the introduction of new services. The call for change and improvement was most noticeable in areas on the fringes of existing services.

The PTB said that suggestions by the BCA that private schools should not be given the opportunity to access public transport was not an issue for PTB transport policy, but a broader social issue for State and Federal Government. Private schools received funding from government and it was not unreasonable to expect that students should be able to use public transport if it was available in the area. Students from private schools were members of the public and could not be excluded from using public transport.

2.10 TransAdelaide and PTB advertising

The BCA submission asked why government funds should be used for PTB advertising on behalf of contracted passenger transport services. It quoted as an example a 'Your Guide to Ride' advertisement for TransAdelaide in a local paper. The PTB said that Metroticket operators were responsible for local advertising. It said that TransAdelaide paid for the example submitted by the BCA. Current advertisements by Serco in other local papers were paid for by Serco.

The Board said it provided a range of general advertising on Metroticket services in relation to using the transport system (eg, routes, fare systems and ticket systems), special promotions (eg Skyshow, Schutzenfest, New Year Eve and the Christmas Pageant), and system changes (eg timetable changes).

The PTB said that the Passenger Transport InfoLine was used to promote and provide information on Metroticket services and State regional services. It was appropriate to publicise special events because they normally involved timetable changes or special services. It would be inappropriate to implement changes to services to support special events without providing information to the public. Furthermore, the Passenger Transport Act stated that the PTB will 'provide information to the public on passenger transport services.'

The PTB said that at this stage the Board's website was primarily for the promotion of Metroticket services. Promotion of special events referred to in the BCA submission was related to the Metroticket services for those special events.

It said also that the Board was currently working on a marketing program with country bus operators, using funding to be provided from the Passenger Transport Research and Development (PTRD) fund. This was available for the passenger transport industry and the bus and coach tour and charter industry could make application for the use of the PTRD fund for an appropriate project.

3. Discussion and conclusions

While the complaints formally referred to the Commissioner emphasised transport activities around two significant special events in Adelaide during 2000, subsequent submissions also addressed other grievances. Submissions by bus and coach tour and charter operators addressed the outcomes of their dealings with the Passenger Transport Board over an extended period.

The underlying issues and the nature of the PTB's responses appear to have remained essentially similar through numerous separate incidents. The complainants interpret that consistent pattern as a bias in favour of businesses that provide regular passenger route services in the public transport system. They feel aggrieved at what they see to be unfair treatment, or at least unreasonable dismissal of their complaints.

Since 1995, following the establishment of the Passenger Transport Board, the rights to provide passenger route services have been awarded by open competitive tender. Successful tenderers use buses owned by the SA Government and managed by Transport SA. Provided they can so without detriment to their commitments to provide route services in accordance with their contract, they may also compete for tour and charter work using the same buses.

There are several themes in the complaints presented to the Commissioner:

- Bus and coach tour and charter operators identify themselves as private sector businesses in competition with government activities, despite the fact that the operators of passenger route services are also private companies.
- They believe those route service operators have been given favourable treatment in the provision of transport for special events, school services and general charter work.
- They suggest that the PTB is less stringent in its enforcement of bus loading and safety requirements for regular route operators.
- They believe that the PTB has confirmed its bias through its dismissal of their repeated letters of protest.

The Commissioner does not challenge the sincerity of those who have lodged the complaints. They perceive that a government agency has competed unfairly against their business interests and believe that redress should be available under competitive neutrality legislation.

The Commissioner notes that, while the PTB is not at present identified as a significant government business activity, submissions from the BCA and individual tour and charter operators suggest they have accepted without argument that the PTB should comply with competitive neutrality requirements.

For its part, the PTB categorically states that it does not see itself to be a government business activity, but rather an instrumentality charged with administrative and policy functions on behalf of government, concerned with public interest and community service.

The PTB said it was:

“ ... keen to ensure that it does not act in breach of competitive neutrality principles. The ultimate question to be addressed is whether the activities in which the PTB engages, firstly, fall within its role as regulator, facilitator and coordinator of passenger transport services in the State, and secondly, can be characterised as predominantly governmental activities rather than business activities.”

The Board said that its own consideration of the GBE Act, legal advice it had sought and the Policy Statement all supported a view that the PTB was not involved in a ‘significant business activity’ as defined for the application of competitive neutrality principles.

Functions ascribed to it by the PTA principally involved:

- oversight of the creation and maintenance of a network of passenger transport services in the State;

- determining, encouraging and overseeing the provision of those services; and
- administering fare subsidies.

Those functions did not include the operation of passenger transport services, but were concerned with public interest, community service and social justice, which were administrative and governmental functions, not business activities.

The PTB maintained that tour and charter services provided by Metroticket service operators were also not significant government business activities:

- the service providers were private companies, not government agencies;
- PTB contracts did not preclude operators from providing tour and charter services in addition to regular route services in the interests of enhancing competition;
- rates that contracted Metroticket service operators paid for the use of the vehicles for tour and charter were not subject to the principle of competitive neutrality; and
- in any event, the rates for those services were not set by the PTB.

TransAdelaide is identified in the SA Government's Competitive Neutrality Policy Statement as a Category 1 government business activity and is therefore obliged to observe appropriate principles of competitive neutrality. Neither the PTB nor the BCA presented arguments regarding TransAdelaide's activities in that context.

The complainants believe that they are facing unfair competition from a government business activity. They look for the application of competitive neutrality principles to the PTB's activities to provide a 'level playing field' for their private sector business enterprises. However, the Commissioner concludes that the GBE Act and the Policy Statement do not require that to be done:

- (i) The obligation to apply competitive neutrality principles applies to significant government business activities, and not to all or any activities of government agencies. The PTB has not yet been identified as a government business activity.
- (ii) While it is open to the Commissioner to recommend that the PTB should be identified in that way, the Board is not engaged in significant business activity according to the definitions in the GBE Act and the Policy Statement.
- (iii) Its Act and charter require the PTB as a government instrumentality to maintain, regulate and administer public transport in South Australia as a community service and in the public interest. These are not business activities.

To the extent that the complaints arise from activities of private companies under contract to the PTB following competitive tender processes, they relate to private sector business activities not subject to competitive neutrality requirements.

The Commissioner's recommendations in this investigation cannot directly address the concerns of the complainants regarding the role of the PTB in the coordination of transport requirements for special events in South Australia. In general, the terms of reference require findings only as to whether:

- the PTB is a significant government business activity subject to competitive neutrality requirements;
- any of the principles of competitive neutrality have been breached by PTB actions; and
- if so, recommendation of the policies and practices to be implemented to avoid further infringements of the same kind.

The Commissioner is neither specifically required by the terms of reference, nor empowered by the GBE Act under which the investigation was conducted, to recommend actions that could address the complainants' concerns should the application of competitive neutrality requirements not be appropriate.

4. Findings and recommendations

After consideration of the initial complaint and further submissions from the parties involved, the Commissioner finds that:

- (i) The Government's Competitive Neutrality Policy Statement published in May 2000 did not identify the Passenger Transport Board as either a Category 1 or Category 2 significant government business activity subject to competitive neutrality requirements.
- (ii) Part 4 of the Government Business Enterprises (Competition) Act 1996 and the Government's Competitive Neutrality Policy Statement published in May 2000 do not require the Passenger Transport Board now to be identified as a significant government business activity.
- (iii) Because the Passenger Transport Board is not a significant government business activity subject to competitive neutrality requirements, the actions that were the subject of the complaint did not infringe any of the principles of competitive neutrality.

The Commissioner did not find the Passenger Transport Board to be in breach of the principles of competitive neutrality, and therefore makes no recommendations for actions to avoid future breaches by the Board.