



**COMPETITIVE NEUTRALITY COMPLAINT AGAINST NATIONAL PARKS
AND WILDLIFE SA**

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

DECEMBER 2002

COMPETITIVE NEUTRALITY COMPLAINT REGARDING PENGUIN TOUR ACTIVITIES AT KINGSCOTE, KANGAROO ISLAND BY NATIONAL PARKS AND WILDLIFE SA

REPORT SUMMARY

1. Investigation background

1.1 Terms of Reference

A private operator of penguin tours at Kingscote, Kangaroo Island, complained that similar activities undertaken by National Parks and Wildlife SA (NP&WSA) compete unfairly with its business. The Premier referred the complaint to the Competition Commissioner in January 2002 for investigation and report as to whether any of the 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.

The letter of reference included copies of correspondence from the complainant and a response prepared by NP&WSA's parent Department of Environment and Heritage (DEH) as a Minute to the Department of Premier and Cabinet.

1.2 Policy guidelines

The guiding framework for the investigation has been the Government's Competitive Neutrality Policy Statement (the Policy Statement), specifically published for the purposes of Part 4 of the Government Business Enterprises (Competition) Act 1996 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.”

1.3 Investigation process

The Commissioner wrote to DEH and the complainant explaining the process to be followed for the investigation, and invited further submissions on any relevant matters. Both replied that the correspondence forwarded to the Commissioner by the Premier adequately outlined their respective positions

and that they preferred to respond to any specific questions from the Commissioner rather than prepare further submissions at that time.

The Commissioner sought additional information from both parties several times during the investigation and, under ordinary tour conditions, visited both activities in Kingscote and another penguin tours operation on Granite Island for comparison purposes. After the draft report was circulated to the parties for comment, an extensive submission then presented on behalf of DEH was released to the complainant for response.

1.4 Activities involved in the complaint

The Little Penguin is widely distributed along the south and lower eastern coastline of Australia. During their breeding season, the birds spend most of the day at sea, fishing for food. Around dusk they return to burrows or nests close to the water on the mainland and offshore islands. Unless threatened, during their time on land they take little notice of people. Those who wish to observe them at close range can readily approach their colonies.

There are three penguin tour operations on Kangaroo Island. NP&WSA conducts one of two Kingscote operations in competition with a private operator. Both are based on the same penguin colony on the seafront bordering the central town area. Another private operator runs tours in Penneshaw, about 60km from Kingscote.

DEH said that official statistics indicated approximately 135,000 visitors to Kangaroo Island in the year 2000. While 77% of visitors to Kangaroo Island also visited Kingscote township and 81% saw wildlife observation as their main tourist activity, less than 12% of visitors to Kingscote actually attended its penguin tours.

NP&WSA's nightly guided 'Discovering Penguins' tours began in 1991. Its tour base since 1996 has been the Ozone Seafront Hotel, which provides a booking facility and an assembly and briefing room (the 'Penguin Burrow') in its basement. The private operator's tours, begun in November 2000, start from premises about 200 metres from the hotel.

At the time of the complaint, prices (including GST) charged by NP&WSA were \$7.00 for adults, \$5.50 concession, \$20.00 for families, and \$6.20 for commercial tour operators. The private operator charged \$10 for a full adult ticket and \$20 for a family ticket.

NP&WSA informed the Commissioner during the investigation that it had increased its prices for the 2002/2003 season. Noting that it had not increased its prices in 2001/2002, NP&WSA said its new charges would be \$7.50 for a full adult ticket, \$6 for a child or concession ticket, and \$22 for a family ticket. NP&WSA said the increase was in line with a 4.2% Consumer Price Index movement and with Department of Treasury and Finance recommendations.

2. Submissions

2.1 Complainant's submissions

The complainant implicitly assumed that NP&WSA tours constitute a significant government business activity required to observe appropriate principles of competitive neutrality.

It claimed that NP&WSA is not required to recover the full capital costs and administrative overheads of its tour activities through prices charged to visitors. Estimates of costs that a private operator would incur were presented to support a claim that NP&WSA is operating the tours at a loss.

The complainant claims rent paid by NP&WSA is below commercial rates and that the hotel location favours NP&WSA in competition for tourist visitors through foyer displays and booking facilities not available to its private operation.

The private operator said that DEH appears to operate under 'the blanket cover of the government' with regard to public liability insurance while its competitor had to meet both the cost of its premiums and 'the very real and high cost of avoiding having a claim'.

It said NP&WSA is permitted to operate in premises that are unsuitable on public health and safety grounds, with local government 'turning a blind eye' to deficiencies in the premises because it is dealing with a government agency. There is no access for disabled persons and an undertaking for installation of a stair lifter had not yet been fulfilled. Further, ignoring established local government planning requirements, Kangaroo Island District (KIDC) allowed the auditorium to operate without provision of the public toilet facilities required in such a facility.

The complainant said that it is directly hindered in its marketing activities by DEH, which was 'arrogant and anti-competitive.' While the majority of tourism-related businesses provided space for brochures that visitors could browse, DEH would not allow the private operator to display its brochures promoting penguin tours in NP&WSA buildings on Kangaroo Island.

2.2 DEH responses

DEH said that it does not regard the penguin tours as a business but rather an activity within its broad-ranging responsibilities for the State's wildlife. Nor was it a particularly significant activity, because of both its small turnover that basically covered the direct costs of the tour operation and the relatively small proportion of visitors to Kangaroo Island taking its Kingscote tours.

It said NP&WSA gains no particular advantages because of its government ownership. Accommodation for its tour base in the hotel was leased on

standard commercial terms and, to its knowledge, use of the premises did not breach any State or local government regulations.

NP&WSA expenditure had been limited to minor plant and equipment items required for fit out and day-to-day operation, and no NP&WSA expenditure had been incurred on its capital development.

DEH said that the Discovering Penguins program in Kingscote was budgeted to return an operating surplus in the 2001/2002 financial year. It operated as an independent business with its own business centre and 'as far as practicable all expenses associated with delivering this program are assigned to this business centre.'

DEH said that indirect administration costs are considered to be minimal because of the low complexity of the operation, and not to have any significant impact on the existing pricing structure.

DEH said its public liability cover is contracted in line with government policy, with premiums for each agency calculated on its asset values and risks associated with all aspects of its activities. Although a pro-rata amount is not attributed directly to the penguin tours program, it would be unlikely to impact significantly on the current price structure, given the immaterial amount involved.

DEH said KIDC levies licensing fees of \$300 per year on commercial operators for the right to conduct tours in the penguin viewing area managed and maintained by the council. NP&WSA paid this fee, which was reflected in the program's operating budget. In the past, the council had refunded the fee in recognition of capital provided by NP&WSA to develop the penguin viewing area and its ongoing work to maintain and enhance the penguin habitat, but it had not been refunded in the current year.

DEH said that all commercial tour operators are not allowed to display their brochures in NP&WSA offices, in line with a policy not to display any except its own brochures to avoid possible accusations of favouritism between the large number of commercial operators on Kangaroo Island.

3. Tasks for the investigation

Essential tasks for the investigation centre on consideration of issues raised by three questions:

- Should DEH's penguin tours be identified as a business activity?
- If so, is that activity significant in the context of the market in which it operates?
- Does it set prices based on recovery of the costs of operating the tours?

3.1 Identification of business activity

DEH said that while Discovering Penguins was not initially intended to operate a business as defined in the Competitive Neutrality Policy Statement, it is arguable that it may have become so over the years.

The program operated for many years at a loss, sometimes considerable. As it began to return an operating surplus and its scope grew with the opening of the Penguin Burrow, the focus of the program changed from being purely a community service activity to a commercial activity.

The Commissioner considers that NP&WSA's penguin tours activity qualifies as a business activity under the Policy Statement's guidelines because it:

- is primarily involved in providing services for sale in the market; and
- has a commercial or profit making focus; and
- there is user charging for the services.

In the Commissioner's view, the tours do not qualify for possible exemption on the grounds set out in the Policy Statement's section 5.1:

“ where ... it is clear that the intention of government is that the activity's predominant role is regulatory or policy-making, or where the achievement of public policy outcomes is the main priority of the activity.”

3.2 Significance of the business activity

If NP&WSA's penguin tours constitute a business activity, the second key task for the investigation is consideration of whether that activity is significant in the context of the market in which it operates. The test for significance in a competitive neutrality context is based on the ability of a business to exert a substantial influence on the relevant market.

DEH's response to the draft report modified its initial rejection of the possibility that the tours might be significant in a competitive neutrality context. It said that, because of its location in a small regional town (population approximately 1,500) on an island, the answer 'has the potential to be different' even though 'NP&WSA would not necessarily agree with such a conclusion.'

DEH said that the determination of whether a business is significant requires first the delineation of a market by examination of substitution possibilities within both its product and geographic dimensions, taking account also of any temporal considerations. DEH acknowledged that 'in the end, a decision on the boundaries of substitutability is a matter for judgment; there is no sure science.'

3.3 Defining the market

3.3.1 The product

DEH suggests that the appropriate product is not ‘penguin tours’ as such:

“Tourists did not go to Kangaroo Island just to see penguins, but for an entire Kangaroo Island experience that included the scenery, the history, the national parks, the wild-life (including seals, penguins, and land-based fauna), as well as the ambience of the island and of its resorts, including its cuisine, etc. As a whole, this might be described as an ‘eco-tour’ experience.

DEH suggests that the penguin experience could be considered a sub-market – that is, part of a larger market for ‘eco-tour’ experiences that it implicitly defines to include:

“ ... the scenery, the history, the national parks, the wild-life (including seals, penguins, and land-based fauna), as well as the ambience of the island and of its resorts, including its cuisine, etc.”

In the Commissioner’s view, ‘eco-tours’ implies an emphasis on biological relationships between fauna and/or flora and their environment because of its derivation from ‘ecology’. DEH’s suggestion that it also includes scenery, history, resorts and cuisine reduces its value in describing the market to be considered in this investigation:

- It would imply that such activities are essentially substitutable for penguin tours in the perception of buyers in the suggested eco-tours market, but DEH adduces no supporting evidence for that proposition.
- The definition of sellers in such a market would potentially include most businesses that supply goods and services to visitors to Kangaroo Island. While in the final analysis they may be competitors for the same consumer dollar, the usefulness of attempting to define the product in that way for competitive neutrality purposes is limited.

As an associated proposition, DEH also asserted:

“Sub-markets are not markets in their own right, simply convenient tools for examining the appropriate substitution possibilities to determine the extent of a market (and markets, of course, have fuzzy boundaries).”

Except by labelling penguin tours as a ‘sub-market’ of eco-tours, DEH offers little comment on how sub-markets might be identified. The Commissioner doubts the value of the term to this investigation, particularly if the intention were to increase the perceived size of the ‘relevant market’ in a bid to suggest that NP&WSA’s apparent size and influence within it is limited.

Unless for a similar reason, it is not clear why DEH also proposes that if the product market were to be defined as penguin tours, then the geographic market would have to be at least the whole of the south eastern part of

Australia, particularly when it acknowledges that 'it is doubtful that any but marginal consumers would pay the costs of travelling to distant locations for the sole purpose of experiencing penguins.'

The Commissioner believes that the product in the relevant market served by NP&WSA and KIMC is penguin tours, and not an amalgam of other activities that visitors to Kangaroo Island may also undertake.

3.3.2 Geographical considerations

The three penguin tours and other tourist activities on Kangaroo Island share the same geographical characteristic – they are available only to visitors prepared to travel to the island by air or sea.

Other penguin tour activities on Granite Island, at Victor Harbour, are within relatively short travel time and distance from Adelaide. They are more readily accessible to Adelaide residents and visitors to the city who may not wish to travel to Kangaroo Island specifically to see penguins.

Consideration of whether the Granite Island tours should be seen as direct competition for those on Kangaroo Island cannot ignore possible barriers presented by the costs and time required for travel. The time of presentation of the Kingscote tours essentially requires that those taking part must afterwards stay overnight in the town.

Taking a provisional view that the relevant market participant base for the Kingscote penguin tours is comprised essentially of people on, or intending to travel to, Kangaroo Island, the Commissioner then considered whether the market area for the Kingscote operators would also embrace Penneshaw.

Many visitors to Kangaroo Island move around its length and breadth by car or bus for wildlife experiences and scenic attractions. Those determined to see penguins might be presumed to be unlikely to regard travel between Kingscote and Penneshaw as a deterrent.

However, both Kingscote operators agreed that visitors to the island would be most likely to take the tour closest to their holiday accommodation. They said potential visitors to the Kingscote tour would be informed when numbers there were low, and might be told there were more penguins to be seen in Penneshaw if they had time for travel there. DEH added that 'anecdotally, no-one staying overnight at Kingscote would travel to Penneshaw that evening to partake of its penguin tour.'

Taking account of indications that tourists appeared generally not prepared to travel between Kingscote and Penneshaw to visit a penguin tour, the Commissioner suggested in the draft report that Kingscote be identified as the relevant geographical market for the tour activities involved in the complaint. On balance, subsequent comments by the parties did not support a wider definition.

3.3.3 Time considerations

Time-related considerations factors may affect the potential availability of potential substitute products that need to be considered in defining markets and the extent of potential competition.

Even given time to establish their operations, there would in practice be limited opportunity for new entrants into the market(s) for Kangaroo Island penguin tours. They would need to base their operations on the same penguin colonies as existing tour providers because there are relatively few shoreline sites where penguins can be conveniently seen.

As another potential time impact, those wanting a penguin tour in either Kingscote or Penneshaw need to visit during the evening, when transport services are not available for immediate return to the mainland.

In that respect, the nature of the market on Kangaroo Island differs significantly from that based on Granite Island at Victor Harbour. There, visitors do not need to rely on transport across the causeway to the island. After participating in one of several evening tours, they can walk back to the mainland and, if they wish, readily return to the Adelaide area.

In practice, time considerations therefore reinforce the suggestion of a limited local market for Kangaroo Island's penguin tours.

3.3.4 Conclusions on market definition

In the Commissioner's view, the geographical and time dimensions of the market suggest that it is neither large in area nor in the numbers of people potentially available to participate. Comments by the parties can be seen to support that view, despite DEH's preference for a definition that would embrace a wider market.

The specific and limited time span within which tours can be undertaken also limits potential substitutes for the suggested definition of penguin tours as the product. Many of the products embraced by DEH's proposed 'eco-tour' market are either not available or unattractive destinations at night.

The Commissioner concludes that it is reasonable to define the market as penguin tours in Kingscote. Whilst this is a small market in area, there is little support from either party for a larger area to embrace Penneshaw or the next closest penguin tours on Granite Island.

In any event, as discussed below, the Commissioner believes that defining a small market in this investigation has limited consequences in considering NP&WSA's market significance for competitive neutrality purposes.

3.4 Market significance

The test for significance in a competitive neutrality context requires an assessment of the ability of a business to exert a substantial influence on the relevant market.

NP&WSA's wider wildlife responsibilities include general monitoring of the welfare of the two colonies and maintenance activities in penguin habitats. The extent to which it supports and cooperates with the two private operators of penguin tours on Kangaroo Island can clearly exert a substantial indirect influence on their profitability.

However, the relevant test in this investigation is the NP&WSA tour activity's direct influence as an active competitor for private operators.

DEH agrees that NP&WSA holds about 60% of the local penguin tour business in Kingscote. On-site observations of both activities in Kingscote by the Commissioner confirm that NP&WSA attracts more visitors than the private operator. Such a market share clearly gives NP&WSA an ability to exert a substantial influence.

Even if the market were to be defined to include both Kingscote and Penneshaw, the NP&WSA operation would still be the largest of the three on the island, and the Commissioner would hold it to be significant in that wider context also.

DEH suggested that the definition of the market underlying that conclusion is too narrow and that the penguin tours should be identified as a sub-market of a larger market for eco-tour products. The Commissioner notes that NP&WSA has an inevitable involvement in tourism activities within national parks and those involving the State's wildlife, both of which are prominent destinations for Kangaroo Island visitors.

- To the extent that it charges for any of its services in those activities, NP&WSA would be likely to be identified as a major operator in a Kangaroo Island 'eco-tours' product market; and
- if the geographical market definition were to be widened beyond Kangaroo Island, NP&WSA might still have a significant market presence.

In all, the Commissioner concludes that NP&WSA exercises a substantial influence on the market as defined in this investigation. It holds a dominant position in terms of profile and share of customers, reinforced by lower admission charges. NP&WSA should therefore be identified as a significant government business activity for competitive neutrality purposes.

3.5 Cost recovery

DEH appears to date to have wished to identify NP&WSA essentially as a community service and its pricing strategy does not require it to recover all of its costs (including a share of DEH's corporate overheads and capital costs related to NP&WSA assets). While DEH says these costs are low, the Commissioner believes that the application of competitive neutrality principles requires identification of all costs associated with government businesses required to adopt such principles.

3.5.1 Capital costs and overheads

DEH claims that its capital costs and overheads are small and their omission from the cost base used to determine its operating margin is of little consequence. The Commissioner does not agree with that claim in respect of two items on which DEH submitted detailed information in its comments on the draft report.

3.5.2 Public liability insurance

DEH provided information on the cost of public liability insurance for its activities, based on a front-end deductible of \$20,000 per claim. It noted that there had been no claims during more than ten years of operation of the program.

The Commissioner discussed with insurance brokers the public liability insurance arrangements likely to be available to private operators of activities such as the Kangaroo Island penguin tours. They suggested that the minimum likely annual premium would be close to 20 times that available to NP&WSA, with a front-end deductible of \$1,000 per claim. Furthermore, a front-end deductible of \$20,000 would be likely to be considered prohibitive if a small private operator contemplated the possibility of multiple claims in one year.

NP&WSA therefore gains a substantial advantage in the cost of its public liability insurance because of its government ownership.

3.5.3 Motor vehicle costs

DEH claims that NP&WSA's penguin tours staff makes very little use of motor vehicles, incurring miniscule costs for use of cars provided by Fleet SA. The Commissioner's inquiries showed that costs to a private business of leasing a comparable vehicle would be significantly higher than those under such a government arrangement.

The Commissioner asked Fleet SA whether it can offer private sector businesses access to its leasing arrangements and was told that it dealt only with government agencies. Enquiries from commercial leasing companies

regarding the cost to a small business operator using a leased vehicle identical to that quoted by DEH indicated a range of lease charges, but even the lowest was substantially above those available from Fleet SA, which they said gains a cost advantage by not having to pay GST.

If the estimate of very low vehicle usage in DEH's submission were to be accepted, the cost advantage to NP&WSA's penguin tours would not be substantial in money terms. However, the Commissioner is concerned by a question of principle; government businesses are required to adopt a tax equivalent regime and NP&WSA does not appear to be doing that.

4. Other complaints

The complainant referred to a number of other matters that do not relate directly to competitive neutrality requirements, but to suggestions that NP&WSA's government ownership may have influenced local government and regulatory bodies to ignore what are claimed to be breaches of regulations.

Those claims are denied by DEH. Except as discussed below, the Commissioner did not seek to extend the scope of the investigation to confirm or disprove them, taking the view that to do so would have exceeded the terms of reference and tasks required for a competitive neutrality investigation. They would need to be examined by authorities responsible for the observance of any regulations that might relate to the specific matters raised by the complainant.

4.1 Access for disabled people

NP&WSA's Penguin Burrow does not have appropriate access facilities for disabled people. The complainant said that a private operator would not have been allowed to continue in such circumstances and claimed that KIDC had failed to have the situation corrected because of what was interpreted as more favourable treatment of a government activity.

The Commissioner understands that, following a complaint against the standard of access into its Penguin Burrow facility, NP&WSA reached an agreement late in 2001 (facilitated by the Department of Human Services) with the Disability Complaints Service (DCS) on interim arrangements that would allow it to continue to operate tours from the facility while access arrangements were improved.

NP&WSA advised DCS late in September this year that it had worked with the Ozone Hotel to implement those interim arrangements and obtain detailed quotations for a roll on - roll off chairlift and necessary structural alterations at a total cost estimated at \$50,000. It said that in the process of procuring the equipment, NP&WSA had been advised that the lift did not comply with the Disability Discrimination Act. Investigation of alternatives was continuing, but

the schedule for full compliance could not be met because of this late information.

NP&WSA pointed out to DCS that:

“ ... the program only just covers its operating costs now, and any significant increases in rent will make the program unviable. Should either of these solutions not be achieved, then NP&WSA will be forced to seriously consider ceasing the operation of the program.”

5. Compliance with competitive neutrality principles

Cost and pricing information provided by DEH confirms that NP&WSA is not recovering the full costs of some inputs through its prices. While claiming that the activity returns ‘a small operating surplus’, DEH admits that all of its overheads are not brought to account.

Cost reflective pricing should make adequate allowance for the costs of capital employed in the business and, in the case of a business operating within a larger organisation, for the indirect costs of management and services provided by that organisation. For government business activities subject to competitive neutrality principles, it must also include the equivalent of any taxes paid by private competitors.

DEH said that officers based in Kingscote travelled twice a year to Granite Island to assist with a penguin census but did not seek to recover their costs from that activity. NP&WSA’s allocation of its costs between activities is clearly not accurate.

The Commissioner has concluded that penguin tours activity conducted by NP&WSA at Kingscote constitute a significant government business activity that is not operating within the principles of competitive neutrality because it:

- has not been identified as such by DEH; and
- is not charging cost reflective prices for the tours.

6. Community benefit considerations

Competitive neutrality obligations may not be placed on government business activities if, as a consequence, there would be likely to be a net cost to the community. The Commissioner is therefore required to consider whether a requirement for NP&WSA to implement cost reflective pricing would be likely to leave the community worse off.

On the information made available to the Commissioner, it is not clear by how much its prices might rise if it were to be required to implement cost-reflective pricing. In the draft report, to illustrate possible community implications, the

Commissioner suggested that the cost of tickets for Kingscote tours conducted by NP&WSA might rise by as much as 20%.

In terms of the general community, this would represent a transfer from those visiting the facility to taxpayers at large. The overall amount for a price increases of around 20% could be of the order of \$12,000, in favour of taxpayers generally. There would be no net loss to the community, but an application of the 'user pays' principle.

In its comments on this section of the draft report, DEH said:

“NP&WSA considers that the price illustration contained in the Competition Commissioner’s Report, which pre-empts the analysis that needs to be done by NP&WSA, is very dangerous.

“Only NP&WSA has, or has access to, the necessary information upon which an accurate full cost attribution exercise can be carried out. Even then, for some of the more obscure ‘administrative overheads’, it is very difficult to determine an appropriate cost.

The Commissioner does not agree with the contention that the price illustration

'pre-empts the analysis that needs to be done by NP&WSA' and that the words in the draft report would encourage a belief that the illustration should be regarded as an appropriate price. It was made clear that the illustration produced a 'price' that was still below that already being charged by the complainant, who would therefore hardly embrace it with enthusiasm as 'an appropriate price'.

The Commissioner is more concerned with DEH's admission that 'only NP&WSA has, or has access to, the necessary information upon which an accurate full cost attribution exercise can be carried out'. Such comments, at a late stage in the investigation and only after presentation of a draft report hampered by a lack of accurate and detailed information, illustrate the difficulties in determining the potential costs and benefits to the community of changes that might occur if cost reflective pricing were to be implemented.

7. Appropriate competitive neutrality measure

Because NP&WSA penguin tours have not been declared to be a significant business activity, DEH has not yet identified the competitive neutrality principles that it should observe. The Commissioner suggests that:

- because of its annual turnover, the activity would appropriately be regarded as a Category 2 business for competitive neutrality purposes; and
- again reflecting the size of the business and the costs of implementing alternative measures, NP&WSA should then follow cost reflective pricing practices.

DEH's comments on the draft report included the following observations on the nature of competitive neutrality requirements that would be appropriate for the penguin tours:

"If the Final Report finds that the business is significant, NP&WSA agree that the appropriate measure to be implemented is 'Cost Reflective Pricing'.

"While DEH did not provide a comprehensive analysis of their cost base in their initial submission, it did assert that the Discovering Penguins program 'operates as an independent business with its own business centre; and as far as practicable, all expenses associated with delivering this program are assignable to this business centre'.

"...DEH now intends to provide a full cost-recovery analysis to the Department of Treasury and Finance for audit.

"It will take some time to carry out this exercise, but it is assumed that both the analysis, and the audit by the Department of Treasury and Finance, can be completed by the end of February 2003 (allowing for the Christmas/January holiday period)."

The Commissioner welcomes this undertaking by DEH, believing that it is important for government agencies to recognise that, with budget stringencies encouraging cost recovery where achievable from users of goods and services they may provide, some activities may become businesses. Their evolution may be gradual enough to obscure the consequences for cost accounting appropriate to their 'new' status and for observance of the obligations placed on government businesses within the National Competition Policy.

8. Findings and recommendations

The Premier on 14 January 2002 referred to the Competition Commissioner, as a competitive neutrality complaint for formal investigation under the Government Business Enterprises (Competition) Act 1996, claims regarding penguin tours conducted at Kingscote by National Parks and Wildlife SA (NP&WSA)

In referring the complaint for investigation and report, the Premier added:

"I refer the attached complaint and the response prepared by the Department of Environment and Heritage for your investigation and report. DEH contends that the National Parks and Wildlife penguin tours are not a significant business activity. I would appreciate your advice as to whether any of the principles of competitive neutrality have been infringed and, if so, recommendation of the policies and practices to be implemented to avoid further infringements of the same kind."

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

- (i) the NP&WSA penguin tours constitute a significant government business activity for competitive neutrality purposes; and
- (ii) DEH should therefore be required to apply competitive neutrality principles as appropriate, in accordance with the Government's Competitive Neutrality Policy Statement.

The Commissioner further concludes that:

- the principle of cost reflective pricing would appear to be sufficient and appropriate, given the annual turnover of NP&WSA's penguin tours, but
- to this stage NP&WSA appears not to have fully complied with that principle in its pricing of the penguin tours conducted in competition with privately owned penguin tour operators.

The Commissioner draws attention to:

- DEH's intention to commission an independent audit and calculation of the costs attributable to its NP&WSA penguin tours activities; and
- delays in the provision of access for disabled persons to the tour briefing facility and its potential significance for NP&WSA's costs.