COMPETITIVE NEUTRALITY COMPLAINT AGAINST ADELAIDE FESTIVAL CENTRE TRUST AND BASS TICKETING

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

SEPTEMBER 2005

COMPETITIVE NEUTRALITY COMPLAINT REGARDING ACTIVITIES OF THE ADELAIDE FESTIVAL CENTRE TRUST AND BASS TICKETING

REPORT SUMMARY

1 Investigation origins and background

1.1 Nature of the complaint

A privately owned and operated ticket-selling agency (the complainant) claimed that the Adelaide Festival Centre Trust (AFCT) and its BASS ticketing service (BASS) did not apply cost reflective pricing principles to BASS business activities and that ticketing for events organised by Australian Major Events was automatically given to BASS. The Premier referred the complaint to the Competition Commissioner on 5 July 2004 for investigation under the *Government Business Enterprises (Competition) Act 1996.*

The Premier's letter referring the complaint included these comments:

> *"The procurement aspects of the complaint were determined to be beyond the scope of the competitive neutrality complaints mechanism and were referred to the State Supply Board for investigation. This position was supported by Crown Law advice provided to the Competitive Neutrality Complaints Secretariat…;*
>
> *"The AFCT engaged private consultants … to undertake a review of BASS' pricing structure to determine whether it complies with competitive neutrality principles (and) the consultancy report concluded that BASS' revenue covers its fully distributed cost base and therefore its prices are cost reflective;*
>
> *"The Department of Treasury and Finance subsequently undertook a review of the costs associated with BASS and was satisfied that they appeared reasonable and include both direct costs, a share of the overhead costs and notional costs that would reasonably be incurred by an entity in the same business that was not government owned; and*
>
> *"The Department of the Premier and Cabinet considers that it has complied with its obligations pursuant to the State Government's competitive neutrality policy statement."*

1.2 Activities involved in the complaint

The complainant claims to account for around 35 to 40 per cent of all sporting and entertainment tickets sold in South Australia. It is part of a group of companies with operations in entertainment and sporting events, including the provision of security,

casual and event management staff, software technology for electronic ticketing and theatre operation.

1.3 Background and history

The complainant said that it had first presented its concerns about BASS to the State Government in 1995. It provided extensive details of dealings with government since that time and provided examples of what it presented as anti-competitive behaviour. It said that it had written several times since its first complaint to reinforce its concerns and in 2000 had expressed interest in either buying BASS or merging with the operation.

After a newspaper report in July 2001 indicated that BASS had received $200,000 in government funding to subsidise its operations as part of a $2 million rescue package for the AFCT, the complainant had been advised in a letter from the Premier that:

- BASS was operated by the AFCT with tickets sold on behalf of clients in order to maximize the return from the market place;
- it was not in the interests of BASS to undermine pricing and service charges and neither would BASS be sold;
- it would not be in the best interests of the public for competition to be eliminated in the area; and
- Government venues were not compelled to use the services of BASS.

The complainant said that in 2003, following a change of government, it had written to the new Premier to repeat its complaint regarding "ongoing anti-competitive behaviour by several State Government-owned entertainment and sporting entities." It had sought an independent investigation into BASS and its ticketing operations, particularly the absence of any competitive tendering.

This correspondence appeared to have prompted internal reviews by the State Supply Board, which formed a view that the procurement practices of the entities were "appropriate". The complainant had decided to renew its request for an independent inquiry, and the Premier had responded with a reference to the Competition Commissioner.

2 Legislation and policy guidelines

2.1 South Australian framework

The GBE Act under which the complaint was referred is part of the legislation and policy framework established in South Australia following Commonwealth, State and local government agreement to pursue national competition reforms.

Other key documents guiding both the implementation of competitive neutrality requirements and the conduct of investigation of complaints under the GBE Act are:

- the SA Government's Competitive Neutrality Policy Statement (the Policy Statement), as updated in July 2002; and
- a supporting paper from the SA Department of Treasury and Finance, 'A Guide to the Implementation of Cost Reflective Pricing' (the Guide to Implementation).

Key government agencies involved in this investigation, including AFCT, BASS, the Adelaide Entertainment Centre (AEC) and Adelaide Convention Centre (ACC) have been listed in the Policy Statement as Category 1 significant government business activities.

3 Submissions to the investigation

3.1 Investigation process

As well as a submission from the complainant outlining its claims, the Premier's letter included detailed financial information on BASS direct costs and allocations of indirect costs within AFCT.

BASS said that information adequately outlined its position, but it would respond further to any specific questions from the Commissioner during the investigation. The complainant said it would submit a detailed initial submission and any additional information as required.

In the Commissioner's view, the information on AFCT and BASS forwarded with the reference contained extensive financial detail that warranted identification as commercial-in-confidence. Both parties were informed of that fact and advised that the Commissioner therefore intended not to proceed with a proposed exchange of submissions.

The parties were advised that a draft report setting out the Commissioner's findings and supporting arguments would be circulated to them for any further comments they might wish to make before preparation of the report to the Premier.

3.2 Complainant submissions

In detailed submissions to this investigation, the complainant said:

> *"Essentially, our competitive neutrality/anti-competitive behaviour complaint against the State Government of South Australia is focused on the absence of tendering by State Government-owned entertainment and sporting entities for ticketing services …*
>
> *These contracts instead are automatically awarded to the BASS Ticketing Service operation within the Adelaide Festival Centre Trust.*
>
> *We regard the cost reflective pricing structure used by BASS to determine its ticketing prices to be of secondary importance and request that it not take the*

highest priority during the impendent inquiry. We do, however, draw the Commissioner's attention to statements by the AFCT that the business activities of BASS are 'ring-fenced' ...

We formally request the Commissioner to investigate how organizations such as the Adelaide Festival Centre Trust, SA Motor Sport Board and Adelaide Entertainment Centre can automatically award contracts worth millions of dollars to BASS without calling for tenders, either closed or open.

It is our considered opinion that this clearly is in breach of the principles of the National Competition Policy, particularly regarding competitive neutrality ... and the Government's own legislation ..."

3.3 AFCT submissions

The initial reference to the Commissioner said that AFCT believed that BASS had complied with its obligations under the State Government's competitive neutrality policy. Copies of reports supporting AFCT's claims were forwarded to the Commissioner with the initial reference.

After reviewing submissions from both parties, the Commissioner suggested to AFCT that, while the detailed financial information it had provided appeared relevant to whether BASS ticketing prices reflected the full costs of its business activities, it was less useful in addressing whether BASS achieved a competitive advantage over private sector operators arising from its government ownership.

AFCT said that BASS had provided exclusive ticketing arrangements for the Adelaide Entertainment Centre (AEC) since it commenced operations in 1991 and for AAMI Stadium under a contract with the South Australian National Football League:

- The current AEC agreement had followed a competitive tender process in August 2000 which had been extended to October 2005 while AEC completed a new competitive tender process for exclusive ticketing services, and BASS had submitted a tender for those services after that extension expired; and
- BASS provided turnstile-based access control facilities at the stadium in return for exclusive rights to issue tickets for football matches played there.

BASS also exclusively sold tickets for SANFL and Adelaide Football Club memberships and match day tickets, and Port Adelaide Football Club match tickets.

AFCT said that its theatre hire contracts required ticketing services for events at its venues to be provided through BASS as its business unit. For the year ended 30 June 2004, after covering all its salaries and operating costs, BASS had made a contribution of more than $1 million to AFCT overheads.

4 Consideration of main issues

The main thrust of the complaint related to the claim that the complainant had been excluded from provision of ticketing services for government-supported entertainment events, and was less concerned to with the question of whether BASS prices were fully cost reflective.

4.1 Competitive neutrality obligations

South Australia's GBE Act provides the direct legislative basis for this investigation:

- Section 17(1) provides that a complaint may be lodged with the Minister alleging an infringement of the principles of competitive neutrality by a government or local government complainant.
- The principles of competitive neutrality are described in section 16(2) as "principles identified in policies published by the Minister from time to time", that under section 16(4) (a) "… may include provisions which define or limit the scope of the application of principles of competitive neutrality under this Act."

The detailed policy framework is provided in the South Australian Government Competitive Neutrality Policy Statement of July 2002 (the Policy Statement), which opens with these words:

> *"Competitive neutrality policy is based upon the principle that significant government businesses should not enjoy any net competitive advantages over private businesses operating in the same market simply as a result of their public sector ownership".*

The SA Government's Guide to Implementation provides further information to assist the practical application of the Policy Statement:

> *"The basic concept underlying competitive neutrality is that the market competitiveness of an enterprise should not be enhanced or impaired by virtue of its ownership arrangements. Competitive neutrality policy measures deal with such distortions to achieve a situation where government or private ownership is neutral in its effect on competition.*
>
> *Whether issues of competitive neutrality exist depends on the potential for competitive advantage or disadvantage arising solely from the type of ownership. Competitive neutrality concerns exist where all of the following conditions apply:*
>
> - *a difference exists between a public sector business and a private sector business providing a particular good or service; and*
> - *the difference (for example exemption from certain taxes) is due solely to the government ownership of the public sector organisation; and*
> - *the difference constitutes an advantage or disadvantage for the public sector organisation in providing the good or service in the market.*

Some competitive advantages or disadvantages exist between public and private sector organisations that are not attributable to the type of ownership. Differences in workforce skills, equipment and managerial competence, which contribute to differing efficiency across organisations, are not the concern of competitive neutrality policies."

4.2 The 'level playing field'

Submissions to the Commissioner in several investigations have shown that the GBE Act's statement of principle noted above often raises high expectations of what might appropriately be addressed by competitive neutrality legislation. Private sector business managers continue to press for a 'level playing field' so that their government-owned business competitor does not enjoy a competitive advantage.

The term 'level playing field' has been invoked as if it provides reliable guidelines as to what would be required of such a government business, and at times in a context suggesting a perception that claimed difficulties facing the private business in themselves demonstrate that the playing field is not 'level'.

The Commissioner does not know the origins of the application of the sporting analogy in the context of competitive neutrality requirements but is disinclined to use it because its apparent simplicity can be misleading in practical business situations. As the Hilmer Report observed:

"Competition policy does not require that all firms compete on an equal footing; indeed, differences in size, assets, skills, experience and culture underpin each firm's unique set of competitive advantages and disadvantages. Differences of these kinds are the hallmark of a competitive market economy".[1]

Such words, and the Guide to Implementation's similar comments, suggest that the GBE Act is not the great levelling influence that some private businesses complaining about government activities might like it to be. Businesses, whether private or government-owned, are likely to achieve their position in a market through a 'unique set of competitive advantages and disadvantages' that are quite different to those presented by their competitors, even if they were to have comparable market shares and reputation. A firm's particular set of advantages and disadvantages is likely to include even its customers and their preferences, as well as its own intrinsic 'size, assets, skills, experience and culture' as described by Hilmer.

The Commissioner prefers such a view of the nature of markets but acknowledges that complainants using the 'level playing field' analogy are seeking to express significant concerns that their business 'game' is slanted against them.

In that context, the complaint might be viewed as a claim that the private firm is disadvantaged in not being allowed even to be on the 'playing field' against BASS. That interpretation appears to be confirmed by the complainant's request when the

---

[1] Report by the Independent Committee of Inquiry, *National Competition Policy*, (Hilmer Report) August 1993, AGPS, Canberra, p. 293.

draft report was circulated, that the Commissioner "… make further comment and observation on whether he believes (our firm) has been given the opportunity to compete against BASS on a 'level playing field', particularly regarding competitive tendering …"

Section 5 of this report considers whether AFCT is required to adopt competitive tendering practices in the management of its ticketing services.

As noted earlier, the Premier's letter referring the complaint included these comments:

> *"The procurement aspects of the complaint were determined to be beyond the scope of the competitive neutrality complaints mechanism and were referred to the State Supply Board for investigation. This position was supported by Crown Law advice provided to the Competitive Neutrality Complaints Secretariat."*

Nevertheless, because of the complainant's obvious focus on this aspect of its claims, the Commissioner sought to confirm the scope of both the State's competitive neutrality legislation and the policy framework established by the SA Government for all of its business activities.

4.3 Legal aspects

The Commissioner has seen advice from the Crown Solicitor that relates to concerns presented by the complainant.

4.3.1 Competitive neutrality obligations

The advice suggests that:

- references noted in section 4.1 of this report regarding objectives of competitive neutrality are essentially introductory, presenting the philosophical basis of competitive neutrality policy before subsequently setting out operational requirements of the SA Policy;
- later sections of the SA Policy provide place specific obligations upon the SA Government and provide details necessary for the practical application of competitive neutrality requirements;
- the obligations defined in that way are similar to those applied by other government signatories to the CPA;
- in practice, their definition effectively limits the potential scope suggested by the Clause 3 statements noted above; and
- such a firm set of detailed obligations, rather than a broad philosophical statement, is essential as a proper basis for the National Competition Council's assessment of the SA Government's compliance with its competitive neutrality undertakings.

On the basis of such advice, the implementation of competitive neutrality by a government business would require:

- adoption of one of three business models – corporatisation, commercialisation or cost reflective pricing – depending on which was appropriate to the scale of its operations and costs of implementation; and
- the removal of any regulatory advantages because of government ownership, including tax equivalent accounting, debt guarantee fees and the application of legislation normally applied to the private sector.

Recommendations based on an attempt to interpret what the advice suggests is the broad philosophical base of competitive neutrality rather than the specific principles also enunciated in the SA Policy would be open to challenge as outside the Commissioner's jurisdiction.

4.3.2 State Supply Board policies

The Commissioner understands that State Supply Board policies do not require agencies to invite private sector providers to enter into a competitive tender process for the provision of services that can be sourced within government. It appears that agencies are free to use 'in-house' providers, and AFCT would therefore not be constrained from using BASS for its ticketing services.

The Board may establish whole of government or period contracts which agencies that have joined the arrangement are required to use. Such arrangements aside, the Board's procurement policies apparently do not include specific directions on the methods of procurement to be adopted by SA Government agencies.

Competitive tender, expressions of interest or direct procurement after market testing may all be used. It is nevertheless suggested that a competitive process is likely to yield best results in purchases from the private sector, depending on supply conditions in the market. A specific Board policy provides agencies with guidance on when a competitive assessment or approach to the market may not be the most appropriate strategy.

4.3.3 Trade Practices Act

Government business activities are subject to the Trade Practices Act 1974, which prohibits restrictive business behaviour. Their activities are therefore open to challenge within the provisions of that Act.

The complainant claimed that a number of key government agencies engage in procurement preference conduct favouring BASS. All are ultimately part of public corporations or a body corporate established by specific legislation, and therefore subject to the Trade Practices Act, They are:

- Adelaide Entertainment Centre, operated by the Adelaide Entertainments Corporation;

- South Australian Motor Sport Board;
- Adelaide Festival Centre Trust; and
- Australian Major Events, a division of the South Australian Tourism Commission.

The Commissioner has no involvement or authority with regard to possible trade practices implications of the complaints made in this investigation and considers it inappropriate to comment on those matters beyond the discussion in section 5.2.

5 Conclusions

The complaint lodged pursuant to Section 17 of the Act alleged that BASS does not apply cost reflective pricing principles to its business activities and that ticketing for events organised by Australian Major Events is automatically given to BASS.

5.1 BASS pricing

Category 1 business activities have annual revenue in excess of $2 million or employ assets with a value in excess of $20 million. BASS revenue for the year ended 30 June 2004 exceeded $5 million. Detailed financial information disclosed in an independent consultant's report provided to the Commissioner during the investigation shows that BASS did not receive any grant funding in that year, and has received no such support other than $200,000 in 2002.

Analysis of the consultant's report, and a separate review by the Department of Treasury and Finance, do not suggest that BASS is failing to meet its obligations to apply cost reflective pricing to its activities.

The Commissioner would not expect the margins earned to be uniform. They would be likely to vary between specific venues and events, and over time due to competition between providers of ticketing services. BASS is not fully insulated from competition. The outcome of AEC's recent tender for its ticketing business was that BASS failed to retain a contract it had held exclusively since 1991, losing to an interstate competitor.

5.2 Tying arrangement claims

Throughout the investigation, the complainant vigorously pursued its claim that AFCT established tying arrangements precluding private sector competitors from bidding for major entertainment and sporting events in South Australia. AFCT confirmed that its theatre hire contracts required ticketing services for events held at its venues to be provided through BASS as one of its business units.

The complainant said that substantial government contracts were usually open to competitive tender, and similar processes were common within the private sector.

There was wide acceptance of the benefits of tendering to both suppliers and customers.

The complainant suggested that AFCT's insistence that its venue clients had also to use its BASS ticketing services was sustainable only because both were government-owned businesses taking advantage of their ownership. It believed that comparable behaviour by private businesses would be open to challenge under Commonwealth trade practices legislation and indicated that it was considering such action.

The Commissioner suggests that those claims raise issues beyond the scope of a competitive neutrality investigation, because:

- State obligations with regard to competitive neutrality are contained in the GBE Act, which, as noted in section 2.1, relate particularly to the pricing behaviour of government-owned businesses, their corporate structures and governance arrangements;
- general business conduct and behaviour are not specifically prescribed in the GBE Act and similar legislation in other states and the Commonwealth. Under the CPA government-owned business activities are now, along with private sector businesses, subject to the Commonwealth Trade Practices Act (the TPA); and
- the GBE Act does not replace other state legislation and policies, but operates alongside them. The overall policy and guidance framework for government businesses in South Australia therefore remains relevant.

As noted in section 4.3, the Commissioner has no authority with regard to the TPA and can make no comment on the appropriateness or otherwise of the complainant's claim regarding its possible relevance to AFCT and BASS actions.

Because South Australia's competitive neutrality principles do not preclude such actions by government businesses, the Commissioner concludes that AFCT's insistence that BASS be engaged for events in its venues does not breach its competitive neutrality obligations as a Category 1 significant government business activity.

5.3 Further comments

The Commissioner remains concerned that the GBE Act and its supporting policy framework appear to raise expectations that government business activities in SA are without exception obliged to operate within commercial disciplines commonly adopted by efficient private businesses. Those expectations are clear from repeated claims that government activities do not observe principles enunciated within the CPA and are allowed to abandon accepted sound commercial practices to gain advantages over private competitors.

In the belief that those claims are outside the scope of the GBE Act under which this investigation was conducted, the Commissioner intends to make no recommendations from the discussion below.

5.3.1 CPA principles

Section 4.3.1 notes a frequent issue in competitive neutrality investigations conducted in this State since the GBE Act was introduced. Some complainants seek to give the Act's statement of broad principle an intention and force that they see to be at odds with relatively limited changes made by government-owned businesses required to implement competitive neutrality.

The Commissioner has noted the Crown Solicitor's advice in relation to this matter but believes it is unfortunate if the GBE Act, without intention, raises expectations of more extensive changes in the practices of government business activities within its scope.

5.3.2 Competitive tendering

Section 5.2 of this report considers the suggestion by the complainant that sound business practice and competitive neutrality obligations should encourage AFCT to adopt competitive tendering processes for its procurement of ticketing and other support services.

The National Competition Council (NCC) identified competitive tendering and contracting amongst issues in the implementation of competitive neutrality provisions of the CPA with these comments:[2]

> *"Provision of goods and/or services by government agencies through a competitive tendering process may or may not involve bids from an in-house provider. Whether or not a competitive tendering and contracting process is employed, and whether or not in-house bids are considered, is a policy decision for governments. Competitive tendering and contracting is not a requirement under the CPA.*
>
> *"One consideration for governments is the potential for improvements in the delivery of goods and services. This may be encouraged through the range of criteria used to determine successful tenderers including price, service or product quality, timeliness, efficiency and use of local materials or labour.*
>
> *"While recognizing that competitive tendering is not required under the CPA, the process nonetheless involves some important competitive neutrality considerations.*
>
> *"First, where a robust tender process results in a tender being awarded to an external party, any net competitive advantage associated with public ownership is necessarily eliminated in relation to the tendered activity.*
>
> *Second, where an in-house team participates in the tender process, maximization of potential benefits relies on the application of competitive neutrality. In essence, competitive neutrality does not preclude bidding by in-*

[2] NCC publication, *Competitive neutrality reform; issues in implementing clause 3 of the Competition Principles Agreement,* January 1997

house providers, but it does require that the in-house bidder does not have an unfairly advantaged position relative to its external competitors. In practice, it will require the in-house bidder to apply (at a minimum) the full cost attribution model. It is also likely to involve the creation of physical and informational barriers separating the bidding team from those responsible for purchasing services. Such barriers aim to place the in-house bidder in a position equivalent to external parties in terms of access to information and influence over the tender process and on-going project management."

The NCC thus confirms that competitive tendering and contracting is not a requirement under the CPA but clearly sees advantages in the application of competitive tendering and contracting processes.

South Australia's Guide to Implementation also appears to recognise the value of competitive tendering in government businesses:

"In a competitive tender situation, any net competitive advantage arising from government ownership should be eliminated in relation to the tendered activity and, specifically, an in-house bidder should not be unfairly advantaged relative to its external competitors.

There are issues in both the tender process (regarding access to information, influence over tender evaluation and contract management) and the in-house bid (full cost attribution and competitive neutrality adjustments) that need to be addressed to achieve competitive neutrality.

The equity objective is to achieve a consistent basis of competition across the two ownership sectors, without interfering with those differences in size, assets, skills and organisational culture which are inherent in the competitive process."

Policy encouragement for wider adoption of competitive tendering by government businesses would improve the transparency with which they operate and provide feedback to better assess the efficiency of both suppliers and buyers. AFCT's insistence that BASS be employed as ticketing agent when its venues are used leaves room for a perception that competitive tendering is feared because of the potential for loss of income for AFCT. (See section 5.1).

The Commissioner notes the recent decision by the Adelaide Entertainment Centre to contract its ticketing business to a new private company, following a tendering process that replaced BASS as its long-term provider of such services.

6 Findings and recommendations

A complaint regarding activities of the Adelaide Festival Centre Trust (AFCT) and BASS ticketing was referred to the Competition Commissioner by the Premier on 5 July 2004 for investigation under the *Government Business Enterprises (Competition) Act 1996*. The complaint was lodged pursuant to Section 17 of the Act, alleging that BASS does not apply cost reflective pricing principles to its business activities and that ticketing for events organised by Australian Major Events is automatically given to BASS.

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

(i) Detailed financial information on BASS costs supports AFCT's contention that BASS is setting prices within the requirements of competitive neutrality principles and SA Government policy;

(ii) AFCT contracts for use of its venues specify the engagement of BASS for ticketing services, but such actions are not constrained by the competitive neutrality obligations of both entities.

The Commissioner believes that the complaint regarding AFCT "tying" arrangements is not appropriately addressed under the provisions of the GBE Act but draws attention to comments in this report related to the use of competitive tendering processes by government-owned businesses.