

## **Preliminary AGCNCO Advice on Applicability of Competitive Neutrality to the Australian Business Growth Fund**

In response to the Committee Secretary's request for advice on how the Business Growth Fund (BGF) is placed in respect to any possible impingement on competitive neutrality, the Australian Government Competitive Neutrality Complaints Office (AGCNCO) provides the following, which should be viewed as preliminary advice.

In essence, this is a question about whether the BGF is subject to the Australian Government's competitive neutrality policy and, as a consequence, subject to the Government's competitive neutrality complaints process.

The Government's 1996 Commonwealth Competitive Neutrality Policy Statement (p. 7) states that competitive neutrality policy will apply to significant government business activities.

The policy goes on to describe what would constitute a significant government business activity. This description takes two forms.

One is the specific listing of Australian Government organisations that have been identified as conducting significant business activities and are deemed to be automatically subject to competitive neutrality. These deemed activities are listed in an Appendix to the statement. Clearly the BGF is not on this list as it did not exist in 1996.

The other is to set out the characteristics of Government organisations performing business activities that would qualify them as significant government business activities. It does this by reference to what constitutes a business, what constitutes a significant activity, and what constitutes a government activity.

With regard to the first — what is a business — the policy notes that:

*For the purposes of competitive neutrality in the Commonwealth sector, to be considered a "business activity" the following criteria must be met:*

- *there must be user-charging for goods or services (the user may be in the private sector or public sector);*
- *there must be an actual or potential competitor (either in the private or public sector) ie users are not restricted by law or policy from choosing alternative sources of supply; and*
- *managers of the activity have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.*

On the basis of information we have to date, it would appear that the BGF would meet each and all of these necessary criteria. Accordingly, the preliminary view of the AGCNCO is that it would qualify as a 'business' for the purpose of being subject to competitive neutrality policy.

With regard to the 'significant' test, the policy notes that particular organisational forms would qualify as 'significant' business activities. These include organisations that have been specifically structured to operate along commercial lines, which include:

- *all Government Business Enterprises (GBEs) and their subsidiaries;*
- *other share-limited trading companies; and*
- *all designated business units.*

The first reading of the Australian Business Growth Fund Bill 2019, indicates that the BGF is a Corporations Act company. This, together with the Treasurer's Media Release on the BGF on 28 November 2019 that stated the BGF will operate commercially (see [here](#)), indicates that the legal form of the BGF is one structured along commercial lines. On this basis, the BGF would qualify as a 'significant' activity for the purpose of being subject to competitive neutrality policy.

The policy statement also provides for other activities that operate in accordance with the definition of a business and have commercial receipts exceeding \$10 million per year will be assessed for significance on a case-by-case basis. Given the apparent scale of the intended operations of the BGF (with an initial funding pool of \$540 million) the AGCNCO considers that a case-by-case assessment would also deem it to be a significant activity for the purpose of competitive neutrality policy.

Finally, while the policy does not specifically address the issue of what constitutes a 'government' business activity, the 1996 policy statement indicates that certain legal forms of government activity qualify as 'government' activities for the purpose of being subject to competitive neutrality. In particular, the policy lists organisations that are legally separate from the Australian Government like Government Business Enterprises (GBE) and non-GBE companies, including share-limited companies (which we understand is the legal form of the BGF).

On this matter, the policy states (p. 10):

*Share-limited companies are established when an activity is intended to operate as a commercial business. ... Commonwealth share-limited companies are generally expected to comply with all competitive neutrality requirements ...*

There is nothing in the 1996 policy statement to suggest that the application of competitive neutrality policy or the competitive neutrality complaints mechanism is restricted to those business that are wholly owned by government. Indeed, given the intent of the policy is to ensure that businesses do not enjoy any competitive advantages arising from government ownership, it could be argued that any level of government ownership that results in a competitive advantage is sufficient to render such a business subject to competitive neutrality policy and the competitive neutrality complaints mechanism.

Accordingly, it has been the AGCNCO's position that any level of Australian Government ownership in a significant business activity is sufficient to render it subject to competitive neutrality policy and the complaints mechanism.

On this basis, the AGCNCO's preliminary view is that the Australian Government's near 20 per cent share of the BGF would mean that this is a government business for the purpose of being subject to competitive neutrality policy. This means that the BGF would be subject to the competitive neutrality requirements for tax, debt and regulatory neutrality, for full cost pricing and for earning a commercial rate of return. It also means the business would also be subject to the competitive neutrality complaints mechanism.

Subject to the preliminary assessment above that BGF would be subject to competitive neutrality policy, the second step for a valid complaint would be whether and to what degree BGF would be afforded an advantage through its treatment with regard to prudential regulations. At this stage it would be premature to reach a provisional conclusion. In a full assessment of any competitive neutrality complaint, the AGCNCO would hear from all parties and consider all the evidence in coming to a judgment.