

South Australia



GOVERNMENT BUSINESS ENTERPRISES (COMPETITION) ACT 1996

No. 56 of 1996

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ELIZABETHAE II REGINAE

A.D. 1996

No. 56 of 1996

An Act to provide for oversight of the prices charged by government business enterprises; and for other purposes.

[Assented to 8 August 1996]

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Government Business Enterprises (Competition) Act 1996*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. In this Act—

"**declared GBE**" means a GBE declared to be subject to prices oversight under Part 3;¹

"**declared market**" means a market in which a declared GBE is subject to prices oversight;²

"**documentary material**" includes a computer disk, tape or other medium in which information is recorded;

"**GBE**" means a government agency that carries on commercial operations;

"**government agency**" means a Minister, agency or instrumentality of the Crown (and includes a department or administrative unit of the Public Service);

"**portfolio Minister**", in relation to a GBE, means the Minister to which the GBE is responsible;

¹ See section 8(1).

² See section 8(3)(a).

"pricing recommendation" — *See section 4;*

"principles of competitive neutrality" — *See section 16(2);*

"services" includes the supply of goods.

Examples—

- water reticulation;
- sewerage services;
- electricity supply.

Pricing recommendation

4. (1) A pricing recommendation—

(a) may contain recommendations about pricing principles;

Examples—

For example, a pricing recommendation may recommend price setting by reference to—

- the location, quantity, or period of supply of the services; or
 - a general price index, the cost of production, revenue, rate of return on assets, or any other factor;
or
- (b) may recommend price limitations.

Examples—

For example, a pricing recommendation may contain recommendations about—

- maximum prices, or the maximum rate of increase or the minimum rate of decrease, in maximum prices;
- average prices or average rates of increase or decrease in average prices.

(2) A pricing recommendation remains current until—

- (a) superseded by a later pricing recommendation; or
- (b) if not superseded during a term (which cannot exceed 5 years) stated in the recommendation—the end of that term.

(3) A pricing recommendation is only advisory and does not bind the GBE to which it relates.

PART 2
COMPETITION COMMISSIONERS

Appointment of Commissioners

5. (1) The Governor may appoint Commissioners.

(2) The basis of appointment is to be as specified in the instrument of appointment.

Examples—

- a person might be appointed for a specified term and on specified terms and conditions;
- a person might be appointed on specified terms and conditions to carry out a specified investigation.

(3) However, an appointment cannot be made or renewed for more than 2 years (although the aggregate of the initial term and one or more renewals may be more than 2 years).

(4) A Commissioner cannot be removed from office except for—

- (a) mental or physical incapacity to carry out official duties satisfactorily; or
- (b) misconduct.

(5) A Commissioner is not, as such, a member of the Public Service of the State.

Independence of the Commissioners

6. (1) A Commissioner is not subject to Ministerial direction about a recommendation, finding or report.

(2) However, the Minister may, by written direction given to a Commissioner, require the Commissioner to take into account specified facts, policies or issues in a particular investigation.

Power to require attendance of witness or production of documents

7. (1) For the purposes of an investigation, a Commissioner may issue a summons—

- (a) requiring a person to attend before the Commissioner at a specified time and place to give evidence; or
- (b) requiring a person to produce specified documentary material to the Commissioner within a specified period.

(2) A person who fails, without reasonable excuse, to comply with a summons under this section is guilty of an offence.

Maximum penalty: \$1 000.

**PART 3
PRICES OVERSIGHT****DIVISION 1—GBE SUBJECT TO PRICES OVERSIGHT****Liability to prices oversight**

8. (1) The Governor may, by proclamation, declare a GBE to be subject to prices oversight.

(2) A declaration may only be made under this section if the Governor is satisfied that the GBE has the market power of a monopoly or near monopoly in one or more markets.

(3) A declaration under this section—

(a) must identify the market or markets in relation to which the GBE is subject to prices oversight; and

(b) must fix the period for which the declaration is to be effective.

(4) The Governor may, by proclamation—

(a) amend a declaration under this section; or

(b) extend the period for which a declaration under this section is to be effective; or

(c) revoke a declaration under this section.

DIVISION 2—INVESTIGATION**Requirement to make investigation and make pricing recommendation**

9. (1) The Minister may assign a Commissioner to carry out an investigation into the prices charged by a declared GBE in a declared market—whether or not a pricing recommendation relevant to those prices is current.

(2) If a declared GBE notifies its portfolio Minister of an intention to increase prices for services provided in a declared market and there is no current pricing recommendation relevant to those prices, the Minister must, at the request of the portfolio Minister, assign a Commissioner to carry out an investigation into the prices charged by the GBE in the declared market.

(3) A Commissioner cannot be assigned to carry out an investigation into the prices charged by a GBE in a declared market if—

(a) the Commissioner has a business or commercial relationship with the GBE (other than a relationship of a kind that is common to a substantial section of the public); or

(b) the Commissioner is, for some other reason, subject to influence or control by the GBE.

(4) A Commissioner assigned to carry out an investigation under this section must—

(a) carry out an investigation to enable the Commissioner to make a pricing recommendation about the prices to be charged by a declared GBE for services provided in the declared market; and

(b) provide a report on the investigation (including a pricing recommendation) within a period fixed by the Minister.

Budget for carrying out investigation

10. (1) Before a Commissioner begins an investigation, the Commissioner must—

- (a) prepare a budget setting out the estimated costs of the proposed investigation; and
- (b) discuss the budget with the GBE and the GBE's portfolio Minister; and
- (c) submit the budget to the Minister for approval.

(2) The Minister may approve a budget submitted under this section with or without amendment.

(3) The GBE must, if the Minister directs, pay to the Minister the cost of carrying out the investigation, as disclosed in an approved budget, or a proportion of that cost decided by the Minister.

Public notice of investigation

11. (1) When a Commissioner begins an investigation, the Commissioner must give public notice of the investigation in a newspaper circulating generally in the State inviting interested persons to make written representations on the subject matter of the investigation within a reasonable period stated in the notice.

(2) The Commissioner must consider all representations made in response to the notice.

Matters to be considered by Commissioner in carrying out investigation

12. (1) The prime objective of a Commissioner in carrying out an investigation and making a pricing recommendation is—

- (a) to achieve prices that reflect, in the Commissioner's opinion, the cost of efficient production and supply; and
- (b) through that means to achieve efficient resource allocation,

so far as that objective is consistent with explicitly identified and defined community service obligations imposed on the relevant GBE by Act of Parliament or by the Government.

(2) In the furtherance of that objective, the Commissioner must have regard to—

- (a) the need to protect consumers from abuse of market power; and
- (b) the costs of efficient production and supply; and
- (c) the costs of complying with government policies and Ministerial directions and, in particular the costs of carrying out community service obligations, to the extent the relevant costs are not reimbursed; and

Examples—

For example—

- if it is government policy that services should be available to metropolitan and country users at the same price even though it is more costly to provide the services in the country, the costs of complying with that policy are to be considered by the Commissioner in arriving at the pricing recommendation;

- if it is government policy that services are to be provided to pensioners at a reduced price, the cost of giving that concession (to the extent the cost is not reimbursed out of the general revenue of the State) must be considered by the Commissioner in arriving at the pricing recommendation.
- (d) the provisions of any relevant intergovernmental agreement or understanding; and
- (e) the efficiency of the GBE's operations and the targets for efficient delivery of the relevant services that should reasonably be met by the GBE; and
- (f) the quality of the relevant services and the possible effect implementation of the proposed pricing recommendation would have on the quality of services; and
- (g) the need for sufficient revenue to defray outgoings and achieve a reasonable return on assets; and
- (h) the cost of complying with statutory and other legal obligations; and
- (i) matters the Minister directs the Commissioner to take into account; and
- (j) other relevant matters.

Draft report and pricing recommendation

13. (1) When a Commissioner completes an investigation, the Commissioner must prepare a draft report setting out the findings made on the investigation, the proposed pricing recommendation and the reasons for it.

(2) The report must also contain—

- (a) a list of the persons who gave evidence or made submissions to the Commissioner; and
- (b) a list of persons who prepared expert reports for the purposes of the investigation and the topics of the various reports; and
- (c) a statement of the cost of the investigation.

(3) The Commissioner must submit a copy of the draft report for comment to—

- (a) the Minister; and
- (b) the GBE; and
- (c) other person to whom the Minister directs that a copy of the draft report is to be given.

(4) The Commissioner must allow the persons to whom the draft report is submitted for comment a reasonable time to comment on the draft report.

Final report

14. (1) As soon as practicable after the time allowed for comment on the draft report has passed, the Commissioner must—

- (a) consider any comments made on the draft report; and

- (b) make any amendments to the report and the pricing recommendation the Commissioner considers appropriate in the light of the comments; and
- (c) issue the report as a final report.

(2) When the Commissioner issues a report as a final report, the Commissioner must give a copy of the report to the Minister.

(3) The Minister must—

- (a) have the final report published in the *Gazette* as soon as practicable after receiving it; and
- (b) have copies of the final report laid before both Houses of Parliament within 6 sitting days after receiving it.

DIVISION 3—LIMITATION ON GBE'S POWER

Increase of prices

15. A declared GBE cannot increase the price of services provided in a declared market unless a pricing recommendation dealing with prices in the relevant market has been published in the *Gazette* and remains current.

PART 4
PRINCIPLES OF COMPETITIVE NEUTRALITY

Principles of competitive neutrality

16. (1) **Principles of competitive neutrality** are principles designed to neutralise any net competitive advantage that a government or local government agency engaged in significant business activities would otherwise have, by virtue of its relationship with the government or local government, over private business operating in the same market.

(2) The principles of competitive neutrality may include provisions defining the scope of their application.

(3) The Governor may, by proclamation—

- (a) establish the principles of competitive neutrality; or
- (b) amend or revoke principles of competitive neutrality previously established under this section.

(4) A proclamation establishing principles of competitive neutrality may incorporate, or operate by reference to, materials referred to in the proclamation.

Complaints

17. (1) A person that competes, or seeks to compete, in a particular market may make a complaint to the Minister alleging an infringement of the principles of competitive neutrality by a government or local government agency.

(2) A complaint—

- (a) must be in writing; and
- (b) must contain full details of the alleged infringement; and
- (c) must contain any further information required under the regulations.

Investigation of complaints

18. (1) The Minister may assign a Commissioner to investigate complaints of infringements of the principles of competitive neutrality.

(2) However, there need be no investigation if, in the Minister's opinion, the complaint is frivolous or vexatious.

Investigation of complaint

19. (1) A Commissioner assigned to investigate a complaint of infringement of the principles of competitive neutrality must investigate the complaint.

(2) A Commissioner may, if appropriate, delegate any aspect of the investigation to another person.

(3) The Commissioner must report the result of an investigation to—

- (a) the Minister; and
- (b) the complainant; and

(c) the government or local government agency alleged to have infringed the principles of competitive neutrality.

(4) If the Commissioner finds that the principles of competitive neutrality have been infringed by a government or local government agency, the Commissioner may recommend the implementation of policies and practices to avoid further infringements of the same kind.

**PART 5
MISCELLANEOUS**

Confidentiality

20. (1) A person who is, or has been, engaged in work related to an investigation under this Act must not disclose confidential information obtained in the course of that work except—

- (a) in the course of carrying out official duties; or
- (b) as authorised by the person who is entitled to benefit of the duty of confidentiality; or
- (c) as authorised or required by law.

Maximum penalty: \$10,000.

(2) In proceedings for an offence against this section, commercially sensitive information obtained in the course of work related to an investigation under this Act is presumed, in the absence of proof to the contrary, to be subject to a duty of confidentiality.

Annual report

21. The Chief Executive Officer of the Department of the Premier and Cabinet must include in each annual report of the Department a report on the investigations carried out under this Act for the relevant financial year.

Regulations

- 22.** (1) The Governor may make regulations for the purposes of this Act.
- (2) The regulations may impose a penalty, not exceeding \$1 000 for breach of a regulation.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

E. J. NEAL Governor