



Australian Government
Productivity Commission

Defence Housing Australia

Australian Government
Competitive Neutrality
Complaints Office

Investigation No. 13

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The Australian Government Competitive Neutrality Complaints Office

The Australian Government Competitive Neutrality Complaints Office is an autonomous unit within the Productivity Commission. It was established under the Productivity Commission Act 1998 to receive complaints, undertake complaint investigations and advise the Treasurer on the application of competitive neutrality to Australian Government business activities.

Information on the Productivity Commission, its publications and its current work program can be found on the World Wide Web at www.pc.gov.au or by contacting Media and Publications on (03) 9653 2244.



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16 April 2008

The Hon. Chris Bowen MP
Assistant Treasurer and Minister for Competition Policy and Consumer Affairs
Parliament House
Canberra ACT 2600

Dear Assistant Treasurer

In accordance with section 21 of the *Productivity Commission Act 1998* and the Commonwealth Competitive Neutrality Policy Statement, I have pleasure in submitting the results of the Australian Government Competitive Neutrality Complaints Office's investigation of Defence Housing Australia.

Yours sincerely

A handwritten signature in black ink, appearing to read "Mike Woods".

Mike Woods
Commissioner

Competitive neutrality policy

Competitive neutrality is a policy which aims to promote efficient competition between public and private businesses. It seeks to ensure that significant government businesses do not have net competitive advantages over their competitors simply by virtue of their government ownership. The Australian, State and Territory Governments have implemented this policy as part of their commitment to the National Competition Policy Reform Package.

The Australian Government's approach is outlined in its 1996 Competitive Neutrality Policy Statement. The publication, Australian Government Competitive Neutrality - Guidelines for Managers (available from the Department of Finance and Deregulation) provides further implementation details.

Competitive neutrality requirements automatically apply to Australian Government Business Enterprises, designated business units of budget sector agencies and all inhouse units that tender for competitive contracts. It may apply to other businesses if the benefits outweigh the costs.

The Australian Government's competitive neutrality arrangements require that its designated government business activities:

- charge prices that fully reflect costs;
- pay, or include an allowance for, government taxes and charges such as payroll tax, the goods and services tax and local government rates;
- pay commercial rates of interest on borrowings (or include an allowance equal to the benefit of any government guarantee);
- generate commercially acceptable profits; and
- comply with the same regulations that apply to private businesses (such as the Trade Practices Act and planning and environmental laws).

The Australian Government Competitive Neutrality Complaints Office is located within the Productivity Commission and is responsible for administering the Australian Government's competitive neutrality complaint mechanism. The Office can receive complaints from individuals, private businesses and other interested parties that:

- an exposed government business is not applying competitive neutrality requirements;
- those arrangements are ineffective in removing competitive advantages arising from government ownership; or
- a particular government activity which has not been exposed to competitive neutrality should be.

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1 The complaint

1.1 Nature of the complaint

On 15 May 2007, the Australian Government Competitive Neutrality Complaints Office (AGCNCO) received a competitive neutrality complaint from the Real Estate Institute of Australia (REIA) regarding Defence Housing Australia's (DHA) exemptions from licensing requirements for the provision of property sales and management services. The REIA alleged that DHA acts as a real estate agent in the sale of its properties and the lease back arrangements it has with private investors. As such, the REIA claimed that DHA's exemption from licensing and other subsequent regulatory requirements is 'anti-competitive, providing a more favourable business environment for DHA than for private sector real estate business'.

In particular, the REIA considered that DHA was advantaged as a result of it being exempt from having to employ licensed real estate agents and the subsequent requirements placed on businesses employing licensed agents, including:

- continued professional development for agents (mandated in some jurisdictions);
- maintaining a registered office; and
- complying with prudential requirements such as trust accounts for bonds paid by customers and insurances, including professional indemnity and fidelity insurance.

1.2 About Defence Housing Australia

DHA, formerly known as the Defence Housing Authority, is an Australian Government statutory authority established under the *Defence Housing Australia Act 1987* to provide housing for members of the Australian Defence Force and their families (DHA 2007). Recent amendments to the Act allow the Minister to authorise DHA to provide housing and housing related services to officers and employees of other government agencies (agencies defined under the *Financial Management and Accountability Act 1997*) and persons contracted to provide goods or services to those agencies.

DHA currently manages around 17 000 residences. Of these, close to 62 per cent are owned by private investors and leased back to DHA through its ‘Sale and Leaseback’ program (DHA 2006). Most of the remaining residences are owned by DHA itself. DHA employs around 690 staff and operates over 30 offices throughout Australia.

Competitive neutrality status of DHA

The Australian Government’s *Competitive Neutrality Policy Statement* (CoA 1996, p. 27) identifies DHA as a government business activity subject to competitive neutrality. DHA’s operating revenue exceeded \$800 million in 2005-06 — 51 per cent (over \$439 million) accruing from housing and relocation services (DHA 2006). This is well above the \$10 million revenue threshold for the automatic application of competitive neutrality. As such, the complaint and investigation is primarily about whether Competitive Neutrality requirements have been applied effectively by DHA, and not as to whether they should be applied.

1.3 Conduct of the investigation

In deciding to investigate this complaint, the AGCNCO is satisfied that the complaint falls within the purview of the Australian Government’s competitive neutrality complaints process and:

- is not better handled by another body;
- does not relate to competitive neutrality policies that are being finalised or are the subject of review by government; and
- is neither trivial nor vexatious.

In conducting the investigation, the AGCNCO held discussions with the REIA and DHA. Written submissions were received from both parties.

2 Assessment of issues

At the centre of the REIA complaint is the allegation that DHA does not face the costs of complying with State and Territory government legislation applying to private sector real estate agents and businesses and, as such, is afforded a cost advantage over these businesses in some activities in which they compete. The REIA said:

As a result of its public ownership qualifying it for exemptions from registration and licensing requirements, DHA has cost and labour advantages not enjoyed by the private sector.

In investigating this claim, the AGCNCO considered whether DHA could be viewed as operating a real estate business and, hence, should be subject to the same regulatory requirements that apply to real estate businesses.

2.1 Regulatory requirements placed on real estate agents

Legislation to regulate real estate agents was initially introduced to provide safeguards for individuals in their dealings with property agents who act as an intermediary between a seller and buyer. For example, as stated in Queensland's *Property Agents and Motor Dealers Act 2000*, the main objective of this Act is to:

... provide a system for licensing and regulating persons as restricted letting agents, real estate agents, pastoral houses, auctioneers, property developers, motor dealers and commercial agents, and for registering and regulating persons as registered employees, that achieves an appropriate balance between —

- the need to regulate for the protection of consumers; and
- the need to promote freedom of enterprise in the market place. (*Property Agents and Motor Dealers Act 2000*, pp 34-5).

This is achieved through establishing processes in which only 'suitable persons' with appropriate qualifications can act as agents, and through the establishment of certain safeguards to protect consumer transactions. The safeguards include, amongst others:

- requiring real estate businesses to maintain a registered office;

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- requiring that all salespersons be registered;
 - requiring that real estate businesses maintain a trust account and other forms of insurance; and
 - establishing dispute resolution processes.

In most State and Territory legislation, a real estate agent is defined as a person or business that acts as an intermediary between a person wanting to engage in a real estate transaction and a person who owns real estate (box 2.1).

Box 2.1 Real estate agents as defined in State and Territory legislation

New South Wales — a person, who, for reward, conducts a business (main or otherwise) as an auctioneer of land or acts as an agent for a real estate transaction, or negotiation for a real estate transaction, or as an agent between a land owner and prospective buyer, lessee or other agent, or collects rents or provides other property management services in respect to the leasing of land.

Victoria — a person who undertakes a business in selling, buying, exchanging, letting, collecting rents or otherwise dealing with or disposing of (or the negotiation thereof) real estate or business on behalf of any other person.

Queensland — a person who, on behalf of others for reward, buys, sells, exchanges, lets, collects rents or has other interests in residences, land, businesses or livestock.

Western Australia — a person whose business is to act as an agent in return for payment in a real estate transaction.

South Australia — a person who carries on a business that consists of, or involves, selling, purchasing or otherwise dealing (including negotiations) with land or businesses on behalf of others or their own behalf.

Tasmania — a person who carries on a business of selling, buying, exchanging, leasing, collecting rents, managing leases or otherwise dealing with or disposing of (or negotiations thereof) real estate pursuant to the instructions received from other people.

Australian Capital Territory — a person who provides, or offers to provide, a real estate service (buying, selling, exchanging, leasing or the negotiation thereof) for a principal for reward.

Northern Territory — a person whose business (main or otherwise) is to act as an agent for reward in the sale, purchase, exchange, leasing or other dealing of land within or outside the Territory (includes negotiations for the listed activities).

Sources: Agents Act 2003 (ACT); Property, Stock and Business Agents Act 2002 (NSW); Agents Licensing Act 1979 (NT); Property Agents and Motor Dealers Act 2000 (QLD); Land Agents Act 1994 (SA); Estate Agents Act 1980 (Vic); Real Estate and Business Agents Act 1978 (WA); and Auctioneers and Real Estate Agents Act 1991 (TAS).

Key words used to define a real estate agent include acting ‘on behalf of others’ and ‘for reward’. That is, a real estate agent brings together parties, such as a person selling a house and a potential buyer, or a landlord and a tenant for remuneration.

With the exception of South Australia, anyone selling, leasing or conducting any other real estate transactions for their own property are not classified as a real estate agent. In South Australia, while the definition of an agent includes a person acting on their own behalf, it is in the context of dealings carried out as part of a business.

2.2 Is competitive neutrality policy appropriately applied to DHA?

Competitive Neutrality policy requires that government businesses comply with the same regulations (and therefore bear the costs) that apply to their private sector counterparts.

Central to the issue of whether DHA enjoys a cost advantage over private sector real estate businesses because of licensing and registration exemptions is whether or not DHA operates as a real estate agent when buying, selling, leasing back and managing property. Put another way, if DHA were trading as a private business, would it be required to comply with legislation covering real estate businesses/agents in each State and Territory?

Should DHA comply with real estate agent regulation?

In order to fulfil its statutory requirements to provide housing and housing related services to the Australian Defence Force and their families, and other government agencies (as ministerially directed), DHA:

- constructs and purchases new properties (both on and off defence land);
- sells and leases back property to private investors; and
- sells surplus houses no longer suitable for its needs.

While a number of the activities that are performed by DHA are of a similar nature to those conducted by a real estate business, DHA acts on its *own behalf* and not on behalf of a third party, when purchasing, selling and leasing. As DHA indicated in its response to the complaint:

While private sector real estate agents provide sale and marketing services for third parties, and compete to provide these services to property owners, DHA deals with its own properties in its own right, just as any other landowner is entitled to deal with its own properties, and competes with other property owners seeking to sell real property.

DHA also advised the AGCNCO that, unlike private sector real estate agents, it does not ‘advertise third party property for sale or letting, attract tenants for third parties, collect rent for third parties, receive bonds for third parties, or hold money on trust for third parties’.

Because DHA buys and sells property in its own right, it is not required to comply with real estate licensing obligations (in all States and Territories except South Australia). This is consistent with individual (private) property owners being able to sell their homes, or buy a house, without being licensed. Similarly, property owners are not required to be licensed to sell and lease back (as a financing method) their own property. In the case of South Australia, DHA employs licensed agents thereby complying with the legislation.

In its response to the REIA complaint, DHA argued that its activities are more closely aligned with those of a private sector property developer than a real estate agent:

In providing DHA houses to Defence, which in turn provides housing to Defence force members, DHA deals with its properties in its own right, in the open market in competition with other property developers and property trusts. It bears all acquisition and holding costs, and property ownership, inventory disposal and sale and leaseback syndication risks. Real estate agents do not bear such costs or risks when making sales of residential properties for owners.

And, like private sector property developers and property trusts, DHA:

- has a large inventory stock (residential housing);
- utilises a range of financial instruments and methodologies to finance its stock of residential properties to fulfil its statutory functions, including funding out of capital, borrowings and commercial sale and leaseback syndication;
- builds and acquires new houses off-base, and undertakes on-base construction and refurbishment projects. Over the period 2007 – 2009, DHA estimates that it will spend \$1.4 billion on building and acquiring new houses to fulfil its statutory charter; and
- sells surplus houses, which are no longer suitable for its operations.

Private sector property developers and property trusts do not have to employ persons registered as real estate agents.

The REIA also raised the broader public policy issue of whether licensing requirements placed on real estate agents should apply to a broader set of property market participants (such as private property developers). This issue was not examined as part of this investigation as it lies outside the purview of the Australian Government’s Competitive Neutrality complaints process. However, this issue was

considered by the Parliamentary Joint Committee on Corporations and Financial Services in 2005. The Committee concluded that the lack of licensing requirements was a ‘major deficiency in the current system’ and suggested that:

... sales staff of developers should operate, as a minimum, under a real estate agent’s license. (Parliamentary Joint Committee on Corporations and Financial Services 2005, p. 45.)

To date, no amendments have been made to licensing requirements imposed by State and Territory governments.

The REIA also noted that, *unlike* property developers, DHA continues to maintain ongoing relationships with non-Defence consumers:

DHA has an existing real estate business relationship with consumers (private investors) for over 10 500 properties around Australia with key benefits to investors which include ‘... a secure long-term lease agreement, no loss of rent due to tenant vacancy, high quality property management ...’. In 2005-06, DHA sold and leased back 844 properties across Australia, thus establishing an on-going relationship with each buyer for periods for up to 12 years.

The *Defence Housing Australia Act 1987*, Part II Section 7, provides DHA with the power to:

- (e) rent out, and generally manage and control:
 - (i) land and houses acquired by it; and
 - (ii) land and houses that are: owned or held under leases by the Commonwealth or a State or Territory; and made available to it;
- (f) determine and collect rents, fees and charges in relation to land and houses rented out by it.

DHA conducts these activities either as a property owner or, in the case of leasing properties under the sale and lease back program, as a ‘tenant’.

Under the sale and lease back program, properties are sold with a DHA lease — that is, investors purchase a property and then lease it back to DHA (the tenant) for a specified term and agree to pay DHA a fee to manage and maintain the property. Thus, DHA does not act as an agent facilitating property transactions between a customer (Defence personnel) and a seller (private property investor). Instead, the relationship is more akin to the sub-letting of property where DHA is responsible for the head lease. Such activities do not require licensing under the various State and Territory real estate agent Acts.

Irrespective of the fact that DHA is not required to be licensed as a real estate agent to conduct its activities, the AGCNCO was advised by DHA that the substantial majority of its property sales are made using registered real estate agents. In

2006-07, over 90 per cent of DHA's surplus properties were sold using registered real estate agents (predominantly through private agents and a small proportion by agents employed by DHA). All properties in South Australia were sold through licensed real estate agents. In the same year, 90 per cent of all properties sold and leased back were undertaken through licensed real estate agents (again predominantly by private agents). Similar proportions of DHA's properties were sold through licensed agents in other years. Also, where housing stock is unlikely to be occupied by Defence force members for some time, DHA lets out the properties to private tenants, through private agents.

2.3 Findings

In relation to the purchase and sale of property, DHA conducts these operations as a property owner and does not act on the behalf of others. Leaseback arrangements under the sale and lease back program are also formed as a commercial relationship between DHA and individual private investors. As the various State and Territory legislation (with the exception of South Australia) does not require a person or business to be licensed when purchasing, selling or leasing their own property, DHA or its staff are not required to be licensed as a real estate agent or to comply with the subsequent regulations relating to licensed agents. Irrespective of this, DHA uses licensed real estate agents to conduct the majority of its transactions.

In the case of South Australia, where the activities of DHA could be considered as conducting business consisting of dealing with property on their own behalf, DHA employs licensed agents, thereby complying with the legislation.

The AGCNCO finds that DHA does not gain a regulatory advantage as a result of being government owned. DHA does not breach regulatory neutrality provisions. Consequently, the AGCNCO finds that no further action is required in relation to this complaint.

References

- Department of Finance and Administration 2004, *Australian Government Competitive Neutrality Guidelines for Managers*, Australian Government, Canberra.
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