



Australian Government
Productivity Commission

Australian Hearing

Australian Government
Competitive Neutrality
Complaints Office

Investigation No. 16

© Commonwealth of Australia 2018

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

The Australian Government Competitive Neutrality Complaints Office

The Australian Government Competitive Neutrality Complaints Office, a separate unit within the Commission, operates as the Australian Government's competitive neutrality complaints mechanism. It provides independent advice to the Government following complaints about unfair competition from the public sector.



Australian Government
Productivity Commission

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Neutrality Complaints Office**

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16 May 2018

The Hon Scott Morrison MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear 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 Australian Hearing.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S King', with a stylized flourish at the end.

Dr Stephen King
Commissioner
Competitive Neutrality Complaints

Competitive neutrality policy

Competitive neutrality is a policy which aims to promote efficient competition between public and private businesses. The Australian Government's approach is set out in its *Competitive Neutrality Policy Statement* (Australian Government 1996):

Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership. (p. 4)

In particular, competitive neutrality policy:

... requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector. (p. 5)

While the policy recognises that there are a number of advantages and disadvantages of government ownership, it does not seek to ameliorate all of these. Instead, it focuses specifically on those competitive advantages enjoyed by government businesses that are widespread and relatively easy to observe and correct (Australian Government 1996, p. 6), including:

- exemptions from various taxes (taxation neutrality)
- access to borrowings at concessional interest rates (debt neutrality)
- exemptions from complying with regulatory arrangements imposed on private sector competitors (regulatory neutrality)
- other benefits associated with not having to achieve a commercial rate of return on assets (commercial rate of return requirements).

The policy is applied to significant government businesses where the benefits from doing so outweigh the costs. For the purpose of competitive neutrality policy, a business activity is defined as one where:

- there is user charging
- there is an actual or potential competitor (that is, users are not restricted by law or policy from choosing alternative sources of supply)
- 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.

Competitive neutrality policy deems the following organisations as significant as they have been specifically structured to operate along commercial lines:

- all government business enterprises (listed under the *Commonwealth Authorities and Companies Act 1997*) and their subsidiaries
- other share-limited trading companies
- all designated business units.

Other activities which operate in accordance with the definition of a business and generate in excess of \$10 million in revenue from commercial activities are also considered to be significant.

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OVERVIEW

Overview

Australian Hearing is the sole provider of the Government's community service obligation (CSO) in hearing services and competes with private providers in the Government-subsidised voucher hearing services market and (to a limited extent) the private hearing services market.

In late 2017, the Australian Government Competitive Neutrality Complaints Office (AGCNCO) received two complaints alleging that Australian Hearing is engaging in anticompetitive behaviour in the voucher services market, and enjoys market advantages over its competitors as a result of its government ownership.

Some issues raised by the complaints fell outside the realm of competitive neutrality policy. These issues (the alleged anticompetitive behaviour and policies governing Australian Hearing's role in providing CSOs under the Hearing Services Program and in providing services to National Disability Insurance Scheme clients) have not been considered by the AGCNCO.

The remaining issues raised by the complaints that were within the scope of competitive neutrality policy fell into two categories — those relating to the behaviour of Australian Hearing itself and those relating to the behaviour of other areas of government (which allegedly treat Australian Hearing more favourably than its competitors).

The main competitive neutrality concern raised in relation to Australian Hearing's behaviour was that it is cross-subsiding its commercial operations with CSO funding. On this matter, the AGCNCO found that Australian Hearing has a robust system of cost allocation that, together with regular external scrutiny of its CSO monitoring reports by the Department of Health, provides sufficient discipline to ensure that the cross-subsidisation of its voucher business with CSO funding does not occur.

The complaints also contended that Australian Hearing is advantaged in tendering for goods and services by its government status and has preferential access to the National Acoustic Laboratories' research. The complaint further alleged that Australian Hearing is operating in the private, fee-for-service market and that this is outside the remit of its enabling legislation.

However, the AGCNCO found all these concerns to be unsubstantiated and, with a minor exception, Australian Hearing is complying with its competitive neutrality obligations.

The minor exception is where it is advantaged as a result of the workers compensation regulation it operates under. To address this, the AGCNCO recommends that

Australian Hearing make annual regulatory neutrality payments to the Official Public Account of an amount equal in value to this advantage.

Beyond the behaviour of Australian Hearing itself, the complaints also alleged that other areas of government (primarily the Department of Human Services and the Department of Health) were favouring Australian Hearing over its competitors. That alleged favourable treatment included giving Australian Hearing preferential access to Centrelink offices for marketing purposes and preferential access to Hearing Services Program client data.

While the AGCNCO found most of the concerns about favourable treatment were not justified, it did find that some areas of government were and are providing a minor competitive advantage to Australian Hearing as a result of undue promotion on government websites and in Ministerial media releases. The AGCNCO has recommended changes to address these sources of advantage.

Recommendations and findings

Is Australian Hearing complying with competitive neutrality?

FINDING 2.1

Australian Hearing is complying with the tax neutrality requirement of competitive neutrality policy.

FINDING 2.2

Australian Hearing's commercial operations enjoy a cost advantage relative to its competitors as a result of operating under one national workers compensation regulatory regime. Moreover, there are no offsetting disadvantages of government ownership that would provide a reason to not require Australian Hearing to make annual competitive neutrality payments to neutralise this advantage.

RECOMMENDATION 2.1

Australian Hearing should make annual regulatory neutrality payments to the Official Public Account to the value of the annual benefit its commercial operations derive from lower than otherwise workers compensation premiums and compliance costs.

FINDING 2.3

Australian Hearing is complying with the commercial rate of return requirement of competitive neutrality policy.

FINDING 2.4

Australian Hearing is complying with the full cost attribution requirement of competitive neutrality policy and is not subsidising its commercial operations with CSO funding.

FINDING 2.5

Any relatively favourable terms and conditions Australian Hearing receives from its tendering for goods and services are the result of the volume of its purchases and not from its government-owned status or its access to the government tendering process.

FINDING 2.6

Australian Hearing abides by Commonwealth procurement guidelines for high value tenders not because it is required to, but because it considers they are best practice. Thus, any cost ‘disadvantages’ it incurs as a result of using those guidelines is not a consequence of its government ownership. Accordingly, any such disadvantage cannot be used to offset any competitive advantages arising from government ownership.

FINDING 2.7

Australian Hearing’s commercial operations are not uniquely supported by the National Acoustic Laboratories and obtain no competitive advantage as a consequence of the government ownership (and integration in one organisation) of Australian Hearing and the National Acoustic Laboratories.

Previous descriptions of this relationship by Australian Hearing (‘We are uniquely supported in Australia by our research division, the world-renowned National Acoustic Laboratories’) — by omitting the caveat that this only applies to its CSO operations — were ambiguous and potentially misleading. That claim has since been removed from Australian Hearing’s website.

RECOMMENDATION 2.2

Australian Hearing should ensure the language used on its website and in promotional literature avoids giving the false impression that its commercial activities enjoy some competitive advantage as a result of its relationship with the National Acoustic Laboratories.

FINDING 2.8

Australian Hearing’s enabling legislation (the *Australian Hearing Services Act 1991*) does not preclude it from operating in the private (fee-for-service) market.

However, in practice, it is operating on the basis that it is subject to a Ministerial direction to limit its involvement in the private market, which, as a consequence, significantly limits Australian Hearing’s ability to expand its business and profits.

FINDING 2.9

Australian Hearing, the Department of Human Services and the Department of Health have no record of a Ministerial direction limiting Australian Hearing's commercial activities in the private hearing services market. Similarly, there is no record in the Federal Register of Legislation of such a Ministerial direction.

Accordingly, together with the finding that Australian Hearing's enabling legislation does not preclude it from operating in the private market, there appear to be no legal grounds that would require Australian Hearing to limit its commercial activities in that market.

Are other areas of government complying with competitive neutrality?

FINDING 3.1

Concerns about Australian Hearing having preferential access to primary schools and their students (and thus a competitive advantage over its competitors) are unfounded.

FINDING 3.2

The Department of Human Services has no policies that provide Australian Hearing with preferential access to Centrelink offices (or any of the department's premises) for the purpose of displaying promotional material or conducting hearing screening services.

The department's policies regarding access and the terms and conditions of that access make no distinction between Australian Hearing and any other business accredited to provide hearing services under the Hearing Services Program.

FINDING 3.3

Information provided on the Centrelink website about other government support services to help people manage their hearing impairment is poorly worded and gives undue prominence to Australian Hearing.

RECOMMENDATION 3.1.

The Department of Human Services should change the information on its website about government support services and useful information to help people manage their hearing impairment.

That change should remove the reference to Australian Hearing as the apparent preferred source of such information and, instead, provide a general statement along the lines of the Australian Government runs the Hearing Services Program to help people manage their hearing impairment — and augment this by providing a link to the Department of Health’s web page dealing with that program.

FINDING 3.4

Some of the (then) Minister for Human Services’ media releases have given undue prominence (and, consequently, promotion) to Australian Hearing as a provider of hearing services in the voucher market. This would likely confer some competitive advantage to its business operations and is behaviour inconsistent with the principles of the Government’s competitive neutrality policy.

RECOMMENDATION 3.2

When the Minister or the Department for Human Services are developing media releases, they should give more attention to competitive neutrality policy and its implications so as to avoid promoting the government’s hearing services business over its competitors.

FINDING 3.5

The Department of Health’s process for dealing with complaints against service providers under the Hearing Services Program is rigorous, consistent and transparent, and does not treat Australian Hearing more leniently than other providers.

FINDING 3.6

Australian Hearing’s targeting of potential customers as part of its ‘Switchers Campaign’ has not been informed by any preferential access to the Hearing Services Program’s client data but, rather, by normal commercial practice of identifying targets through the use of commercially available data lists.

FINDING 3.7

Australian Hearing's listing on the Australian Government Directory of government services is not inconsistent with competitive neutrality policy.

1 About the complaint

In late 2017, the Australian Government Competitive Neutrality Complaints Office (AGCNCO) received two complaints against Australian Hearing. This chapter provides background on Australian Hearing and the market in which it operates, and describes the nature of the complaints and how the AGCNCO has addressed them.

1.1 The Australian hearing services market

The Australian hearing services market covers the provision of services (such as assessment, fitting, case management, rehabilitation and maintenance) and assistive hearing technology. This market is supplied through three channels:

- Community Service Obligations (CSO)
 - a component of the Government’s Hearing Services Program (administered by the Department of Health) that provides subsidised hearing services and assistive hearing technology, which is delivered solely by Australian Hearing. Eligible clients for this service include individuals who are under 26 years of age, eligible adults with complex hearing needs, and Aboriginal and Torres Strait Islanders over 50 years of age. In 2015-16, this channel accounted for about 8 per cent of total market revenue in Australia.
- Voucher services
 - a component of the Hearing Services Program (also administered by the Department of Health) that provides subsidised hearing services and assistive hearing technology to eligible clients through some 300 approved service providers and 13 device manufacturers. This channel serves eligible clients who are predominantly pension concession cardholders and, in 2015-16, accounted for about 60 per cent of total market revenue.
- Private market
 - where hearing services and assistive hearing technology are provided to consumers at a market-determined price. Some businesses operating in this market are also approved voucher service providers. In 2015-16, this channel accounted for about 32 per cent of total market revenue (PwC 2017, pp. 6–7; SSCH 2015, pp. 7–9).

1.2 About Australian Hearing

Australian Hearing is an Australian Government body that sits within the portfolio of the Department of Human Services and is accountable to the Minister for Human Services. It is managed by a Board of Directors appointed by the Minister for Human Services, and is subject to the requirements of the *Australian Hearing Services Act 1991* and the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Under the PGPA Act, Australian Hearing is defined as a corporate Commonwealth entity. Annual financial statements are subject to audit by the Auditor-General and are provided to the Minister.

Australian Hearing has two main functions:

- providing hearing services under the two components of the Hearing Services Program
 - free audiological services to clients under the CSO Program (where Australian Hearing is the sole provider and is funded by the Australian Government)
 - commercial hearing services under the Voucher Program (a market where Australian Hearing operates in competition with private providers)
- undertaking research through its research division — the National Acoustic Laboratories (NAL) — on hearing assessments, preventing hearing loss and rehabilitating people with hearing loss (HRSCHACS 2017, p. 99).

Australian Hearing also has some limited activities in the private market.

It is Australian Hearing's commercial operations under the Voucher Program and its limited activity in the private market that are the subject of the competitive neutrality complaint.

1.3 Nature of the complaint

In October and November 2017, the AGCNCO received two complaints against Australian Hearing. Respectively, those complaints were from an individual hearing care services business and the Hearing Business Alliance (HBA) (representing small to medium, privately-owned businesses that provide hearing care services). Those complaints were also sent to the Australian Competition and Consumer Commission (ACCC).

The complaints allege that Australian Hearing is engaging in anticompetitive behaviour, and enjoys market advantages over its competitors as a result of its government ownership.

As the two complaints covered similar issues, the AGCNCO has treated them as one 'omnibus' complaint.

The complaint identified four main areas of concern:

1. Australian Hearing's aggressive marketing of a Memorandum of Understanding with medical practitioners Australia-wide — which has the potential to lock consumers into a

referral pathway directly to Australian Hearing and compromises consumers' freedom to select a hearing services provider of their choice.

2. Australia Hearing — as a government-owned entity — enjoys commercial advantages when operating in the Voucher Scheme market, which arise from its other government-conferred roles, such as delivering the Government's CSO for hearing services, operating the National Acoustic Laboratories (NAL) and providing hearing services and devices under the National Disability Insurance Scheme (NDIS).
3. Government ownership of Australian Hearing appears to have resulted in other government agencies favouring Australian Hearing in such a way as to provide it with a competitive advantage. (This includes alleged unique and free promotion via departmental websites and media releases, preferential access to commercially useful information and to government premises for the purpose of conducting hearing screening tests and recruiting voucher clients, and a more lenient treatment when enforcing regulations Australian Hearing is subject to.)
4. Australian Hearing appears to be operating beyond its legislated remit, by offering commercial services to private patients who are ineligible for hearing services under the Voucher Program.

The first of these areas — dealing with potentially anticompetitive behaviour — is, however, outside the remit of the AGCNCO. This area falls within the responsibility of the ACCC and is the subject of a separate investigation by that body.

Many of the specific concerns within the second area about non-compliance with competitive neutrality policy boil down to questions about the allocation of costs between Australian Hearing's CSO and commercial activities. In other words, whether government funding for CSO activities is subsidising Australian Hearing's commercial activities.

The second area's other concerns are about Australian Hearing's role as sole provider of the Government's CSO for hearing services and in servicing clients under the NDIS. These are, however, the result of broader policy decisions of the Australian Government. As such, these are matters outside the realm of competitive neutrality policy and, thus, outside the remit of the AGCNCO to consider.

The competitive neutrality concerns in the third area relate to the behaviour of government agencies other than Australian Hearing, but have been investigated as examples of actions inconsistent with the principles underlying the Government's competitive neutrality policy.

The fourth area, regarding Australian Hearing's legislated remit — although directed at the legitimacy of its activities in the private hearing services market — raises the question of whether government ownership imposes material disadvantages that could compromise competitive neutrality.

More generally, the complaint raised concerns about Australian Hearing's behaviour in the commercial voucher market. In particular, the complaint questioned whether it should be competing so aggressively — for example, its 'poaching' of clients from other (privately

owned) businesses and the manner in which it has harnessed social media, Facebook etc., via its *Hearing Help* program to attract voucher clients. And, more fundamentally, the complaint questioned whether it should be competing with the private sector at all.

These various concerns (other than the anticompetitive behaviour issue and broader CSO and NDIS policy issues) are discussed in the following chapters.

1.4 Jurisdiction of the AGCNCO

In accordance with the Australian Government's *Competitive Neutrality Policy Statement* of June 1996, Australian Hearing is a government business to which competitive neutrality arrangements are intended to apply. Thus, as Australian Hearing's annual report acknowledges, its commercial activities are subject to competitive neutrality policy:

Australian Hearing provides services on a for-profit basis and is subject to the Australian Government's competitive neutrality policy. (Australian Hearing 2017, p. 57)

The *Productivity Commission Act 1998* empowers the AGCNCO to investigate complaints that a Commonwealth Government business or business activity (which is subject to competitive neutrality policy) is not being conducted in accordance with the competitive neutrality arrangements that apply to it.

In deciding to investigate any complaint the office must have regard to the *Productivity Commission Act 1998* (part 4, division 2) and the *Competitive Neutrality Policy Statement* (Australian Government 1996) and ensure that the complaint:

- is not better handled by another body
- does not relate to competitive neutrality policies that are being finalised or are currently the subject of review by government
- is not vexatious
- raises issues of substance and with non-trivial resource allocation effects.

With regard to the first of these, as noted, elements of the complaint deal with allegations of anticompetitive behaviour. These elements have not been investigated by the AGCNCO, but are the subject of an ACCC investigation.

With regard to the second, the AGCNCO has considered whether a recommendation in a recent House of Representatives report is grounds to not proceed with an investigation of the complaint. That recommendation was for a review of Australian Hearing's commercial operations to ensure it is undertaking a competitively neutral approach to its participation in the Hearing Services Program Voucher Market (HRSCHACS 2017, p. xxvi).

While the AGCNCO expects such a review would cover the issues raised in the current complaint, the Government has yet to formally respond to that report. Thus, whether and when such a review might occur is unknown. Consequently, the AGCNCO has determined

that that (possible) review is not a credible substitute for an AGCNCO investigation now of the complaint against Australian Hearing.

Similarly, the AGCNCO has considered whether the current Treasury review of competitive neutrality policy (Treasury 2017) provides grounds to not proceed with the complaint. The AGCNCO has discussed the scope and likely outcome of that review with the secretariat responsible for it, and is confident that it does not provide a reason to avoid investigating the complaint against Australian Hearing.

Further, the AGCNCO considers the complaints are neither vexatious nor trivial in the issues they raise.

Accordingly, the AGCNCO decided to proceed with its investigation of the merits of the competitive neutrality complaints lodged with it against Australian Hearing.

1.5 Conduct of the investigation

Consistent with the Productivity Commission Act, the AGCNCO gave interested parties the opportunity to comment on the matters raised by the complaint.

During the course of its investigation, the office held discussions with and/or sought information from the complainants, Australian Hearing, Independent Audiologists Australia, major hearing device and device part manufacturers, some of the larger national competitors of Australian Hearing, the Department of Human Services (within whose portfolio Australian Hearing sits), the Department of Health (responsible for managing the hearing CSO and Voucher programs under the Government's Hearing Services Program), the Do Not Call Register, Comcare, Safe Work Australia, WorkSafe Victoria, Comcover, the departments of education in Tasmania, Queensland and Victoria, and various state competitive neutrality complaints offices.

The AGCNCO provided a draft of this report to Australian Hearing and the complainants on 30 April 2018, for their comment on any matters of fact. The office received responses from Australian Hearing and the complainants on the 3rd and 4th of May, respectively.

2 Is Australian Hearing complying with competitive neutrality?

The primary focus of this investigation is to assess whether Australian Hearing's commercial operations are being conducted in accordance with competitive neutrality policy. This involves assessing Australian Hearing's compliance with its obligations for:

- debt, taxation, and regulatory neutrality
- earning a commercial rate of return
- pricing to reflect full cost attribution for its business activities.

The latter requirement raises the issue of whether all relevant costs (and only those costs) are being allocated to its commercial operations — a concern that underpinned much of the content of the complaint against Australian Hearing.

This assessment extends to whether Australian Hearing's government status provides it with benefits other than debt, tax and regulatory advantages (preferential terms and conditions in response to its calls for tender or preferential access to the National Acoustic Laboratories' (NAL) research). And to whether its government status results in material competitive disadvantages (by limiting its activities in the private hearing services market).

Underlying the complaint's concerns that Australian Hearing enjoys competitive advantages as a result of its government status was the theme that its competing with the private sector (and competing so aggressively) was inappropriate. As competition between government and private businesses is the *raison d'être* for competitive neutrality policy, the AGCNCO has provided some discussion on this issue at the end of this chapter.

2.1 Australian Hearing's competitive neutrality obligations

Debt, tax, and regulatory neutrality

Debt neutrality

Australian Hearing currently holds no debt and, accordingly, its compliance with the debt neutrality requirements of competitive neutrality policy is not an issue at this time.

Tax neutrality

As an Australian Government business, Australian Hearing is exempt from all forms of taxation except fringe benefit tax and goods and services tax. However, competitive neutrality policy requires that it make tax equivalent payments to the Government equal to the amount of tax it would incur were it not exempt.

Australian Hearing's annual report notes that it makes explicit competitive neutrality payments to account for relevant state, territory and Australian government taxes it is exempt from. In 2016-17, these state/territory payroll tax equivalent payments and Commonwealth company tax equivalent payments amounted to around \$5.3 million and \$9.6 million, respectively (Australian Hearing 2017, p. 57).

Payroll tax adjustments are based on the rates and regulations prevailing in each jurisdiction. Company income tax payments are based upon prevailing corporate tax rates. These tax equivalent payments are made annually to the Official Public Account.

Other tax neutrality adjustments to account for Australian Hearing's exemptions from property-related 'taxes', such as stamp duty and council rates, are not required as it has divested itself all land and building assets (the last being sold in 2016).

The AGCNCO therefore considers that Australian Hearing is fully compliant with its tax neutrality obligations under competitive neutrality policy and that its business activities receive no advantage relative to its competitors as a result its tax-exempt status.

FINDING 2.1

Australian Hearing is complying with the tax neutrality requirement of competitive neutrality policy.

Regulatory neutrality

Competitive neutrality policy requires subjecting, where appropriate, government businesses to the same regulatory environment as their private sector competitors.

Regulatory neutrality was not an issue raised by the complaint. Nonetheless, the AGCNCO assessed whether Australian Hearing gains regulatory advantages from its treatment under regulations governing workers compensation and work health and safety.

Workers compensation regulation

Previous AGCNCO investigations have identified the potential for government businesses to enjoy a cost advantage as a result of the regulatory regime for workers compensation they operate under.

Although Australian Hearing operates in each state and territory, it operates under one workers compensation regime — the *Safety, Rehabilitation and Compensation Act 1988* (Cwth), administered by Comcare. However, its competitors, where they operate in more than one jurisdiction, do not have this option of one regulatory regime. As a result, they can face up to eight separate state and territory workers compensation regimes.

This situation can advantage Australian Hearing in two ways.

First, it faces only one set of compliance costs to meet the workers compensation regulation it is subject to. Its competitors, on the other hand, face regulatory regimes for workers compensation in each state and territory in which they operate. Competitors with a national presence would, thus, face eight sets of compliance costs.

Second, there is scope for the total workers compensation insurance premium under Comcare to be significantly less than the sum of insurance premiums otherwise levied for its employees under the schemes of each state and territory. As the AGCNCO has noted in an earlier investigation:

OzJobs had an independent insurance broker determine the premium it would face if it sought insurance outside Comcare¹ — having regard to the nature of the business it was engaged in, the occupation mix of its placement activities, its volume of work and the jurisdictions in which it operated. This market testing determined an insurance premium for OzJobs that was higher than that charged by Comcare.

To ensure competitive neutrality in the light of this difference, OzJobs has added a notional increase to its cost base to reflect these higher workers compensation premiums rather than using those actually applying to it. (CCNCO 2002, p. 7)

This point was also noted in the Productivity Commission's 2004 report on workers compensation and occupational health and safety:

As well as generating costs of compliance, scheme differences can also result in different premium levels for apparently similar businesses. (PC 2004, p. 21)

The AGCNCO sought information from small and large private hearing service providers to identify the likely significance of any benefit Australian Hearing might enjoy over their competitors from lower aggregate premiums and/or lower compliance costs. The AGCNCO also sought information from Comcare and state workers compensation schemes about the likely compliance costs associated with any workers compensation scheme.

While those organisations' responses generally confirmed that Australian Hearing is likely to enjoy a cost advantage from lower aggregate premiums and lower compliance costs, they were not able to quantify what the scale of that advantage might be.

The Commission's previous work on this issue suggests that any such advantage can be significant:

¹ That is, if it were to obtain workers compensation insurance under each of the eight state and territory workers compensation regimes.

In relation to compliance costs, lack of uniformity does not affect the majority of employers or employees as they operate within a single jurisdiction. The costs of differences between workers' compensation arrangements within Australia are predominantly born by multi-state employers, and there are significant benefits to them from being able to operate within a single nationally-available scheme. (PC 2004, p. 34)

That report also provided estimates of the significance of any savings in compliance costs:

Optus estimated that the cost of complying with multiple [occupational health and safety] and workers' compensation arrangements adds about 5 to 10 per cent to workers' compensation premiums (sub. 134, p. 2).

BHP Billiton (sub. 110, p. 5) commented that it cost in the vicinity of \$50 000 just to purchase a system to manage and supply information for each of the jurisdictions.

Skilled Engineering, a labour hire company operating in all eight States and Territories, estimated that the annual cost savings from operating under a single set of national [occupational health and safety] and workers' compensation rules would be ... 15 per cent of the company's estimated [occupational health and safety] and workers' compensation annual costs. (PC 2004, pp. 20–1)

On the basis of this information, the AGCNCO has made a ballpark estimate of Australian Hearing's likely advantage from lower aggregate workers compensation premiums and/or lower compliance costs.

Australian Hearing employs around 1330 people in its CSO, commercial and NAL operations, and its workers compensation premium for all employees for 2017-18 was around \$1.4 million (Australian Hearing 2017, p. 15; pers. comm., 15 April 2018). On the basis of its 2017-18 premium and likely savings in the range of 5–15 per cent (from above), its annual cost advantage could be expected to be between \$70 000–\$210 000. Scaling this back to account for employees in non-commercial activities (who constitute about 30 per cent of employees) suggests a mid-range estimate of around \$100 000 as a likely cost advantage for its commercial operations.

Work health and safety regulation

The AGCNCO also considered whether Australian Hearing might enjoy a cost advantage as a result of facing only one regulatory regime for work health and safety (the *Work Health and Safety Act 2011* (Cwth) and its regulations), while its private sector competitors operating in more than one jurisdiction would face multiple regulatory regimes (and, hence, multiple compliance costs).

However, the AGCNCO found that any cost advantage in this area is likely to be negligible.

The introduction, in 2011, of model work health and safety legislation in all jurisdictions except Victoria and Western Australia means that, in practice, a national competitor to Australian Hearing would effectively face compliance costs for three regulatory regimes (Victoria's, Western Australia's and, in essence, a common model regime in all other states and territories), compared to Australian Hearing facing one regime. Moreover, a

Productivity Commission report on benchmarking occupational health and safety regulation found that for small and medium sized enterprises the cost of complying with such regulation was generally trivial (PC 2010, p. 80). In addition, the AGCNCO's discussions with a national competitor of Australian Hearing indicated that its compliance costs for work health and safety across all jurisdictions are not significant.

Accordingly, the AGCNCO considers any cost advantage Australian Hearing might enjoy as a result of operating under a single work health and safety regime is likely to be small, and not enough to warrant an explicit competitive neutrality payments to offset that advantage.

Change needed to restore regulatory neutrality

The above discussion indicates that Australian Hearing does enjoy an advantage relative to its competitors as a result of its government status and consequent ability to operate under one regime of workers compensation regulation. In 2017-18, this advantage is likely to be of the order of \$100 000 per annum (the mid-range of estimates of likely advantage).

In the absence of competitive disadvantages arising from its government ownership that are of equal or greater value, and the inability to bring its competitors under that one regime,² it would be appropriate for Australian Hearing to make annual regulatory neutrality payments to the Official Public Account to neutralise this advantage. The AGCNCO considers those payments should be equal to 10 per cent of the workers compensation premiums otherwise applicable to its commercial operations.

FINDING 2.2

Australian Hearing's commercial operations enjoy a cost advantage relative to its competitors as a result of operating under one national workers compensation regulatory regime. Moreover, there are no offsetting disadvantages of government ownership that would provide a reason to not require Australian Hearing to make annual competitive neutrality payments to neutralise this advantage.

RECOMMENDATION 2.1

Australian Hearing should make annual regulatory neutrality payments to the Official Public Account to the value of the annual benefit its commercial operations derive from lower than otherwise workers compensation premiums and compliance costs.

² Private competitors of Australian Hearing would generally not meet the criteria to obtain a licence under the *Safety, Rehabilitation and Compensation Act 1988* (Cwth) to self-insure in the Comcare scheme.

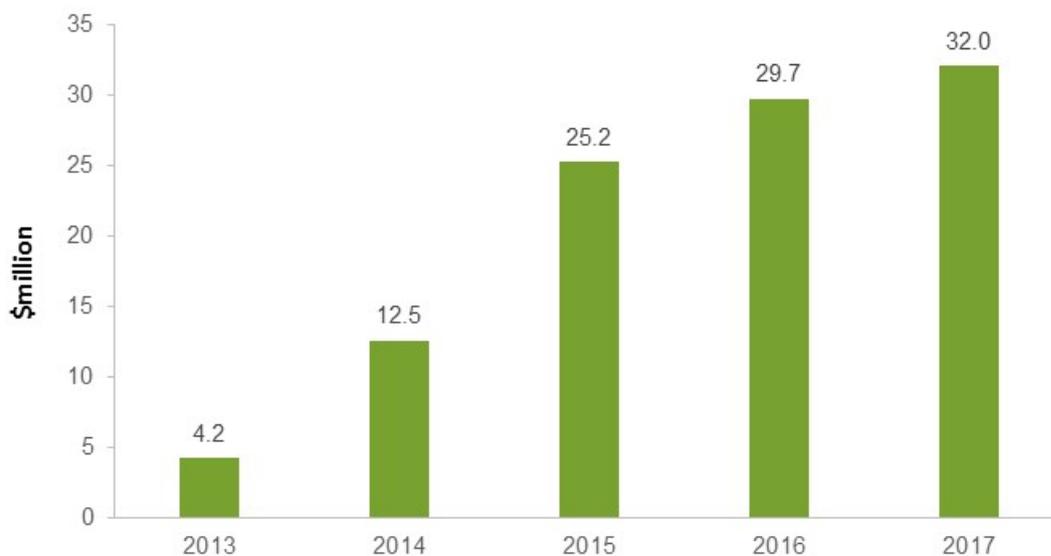
Commercial rate of return

Competitive neutrality policy requires that government-owned businesses should make a commercial rate of return on their assets over a reasonable period of time. Previous publications (CCNCO 1998a, 2000) have noted that the commercial rate of return requirement is not a single year requirement, but rather is an average that should be achieved over a reasonable period.

As detailed financial information on Australian Hearing's commercial operations is not publicly available, the AGCNCO has relied on the financial statements in its annual report.

Australian Hearing's 2017 annual report shows that its pre-tax profits have grown significantly over the past five years (figure 2.1). Those profits are almost entirely derived from sales to clients in the voucher services market.

Figure 2.1 Profit before tax 2013–2017



Source: Australian Hearing (2017).

That annual report also indicates that its earnings — excluding CSO funding — before interest, taxation, depreciation and amortisation (EBITDA) for 2014-15, 2015-16 and 2016-17 as a share of revenue were 20.5, 20.9 and 21.3 per cent, respectively (Australian Hearing 2017, p. 10).

How this rates as a commercial rate of return may be gauged by comparing it to the profitability of Australian Hearing’s competitors or against some objective reasonable rate of return after accounting for risk (CoA 2004, pp. 30–5).³

The first measure, though, is hindered by a lack of industrywide data on profitability. Nonetheless, an insight into this was provided by a large hearing services business, which indicated that a typical rate of return target among smaller private hearing service businesses is for an EBITDA as a percentage of revenue of around 10–15 per cent per annum (Large hearing business, pers. comm., 2 May 2018).

For the second measure, a reasonable minimum rate of return benchmark for this activity would be equal to the Australian Government’s long-term bond rate plus a loading for risk (CCNCO 1998a, p. 11; CoA 2004, p. 32). Given the nature of Australian Hearing’s commercial operations in predominantly serving clients in the voucher services market, the AGCNCO considers its business to be a low-risk activity, and one that would warrant a risk premium of 3 per cent. As the long-term bond rate over the three financial years to June 2017 averaged around 3 per cent (RBA 2018)⁴, a reasonable minimum rate of return for Australian Hearing’s commercial activities would be at least 6 per cent.

Accordingly, after comparing its audited profit and earnings against both these measures, the AGCNCO considers that Australian Hearing is meeting its competitive neutrality obligations with regard to earning a commercial rate of return.

FINDING 2.3

Australian Hearing is complying with the commercial rate of return requirement of competitive neutrality policy.

Full cost attribution

The complaint drew attention to numerous areas where it suspected that government funding for Australian Hearing’s CSO operations has been used to cross-subsidise its voucher business activities — that is, where costs attributable to its commercial operations have been inappropriately allocated to (and paid for by) its non-commercial operations. This concern was illustrated by the Hearing Business Alliance comment that:

Our members understand and accept that larger competitors have marketing budgets which significantly exceed their own. They do, however, object when the marketing budget of AH is government-funded, using their own tax-payer money. (HBA 2017, p. 4)

³ A comparison of rates of return on assets is not possible, as Australian Hearing’s annual report provides this only for total assets, and does not report the return on assets applicable to its commercial operations.

⁴ This represents the simple averaging of the average monthly 10-year bond yield from 1 July 2014 to 30 June 2017.

Areas of concern described in the complaint included Australian Hearing's behaviour associated with its Memorandum of Understanding (MoU) with GPs, its use of Community Hearing Advisors, and its *Love, Listen & Learn* program.

With regard to the MoU with GPs, the complaint referred to Australian Hearing's provision of 'government-funded equipment' (referring to it providing audiometers free of charge to medical practices), 'government-funded training' (referring to it providing training free of charge for medical practice staff in the use of screening equipment) under that MoU, and the use of 'Government-funded gift incentives in the form of \$150 hampers' as part of its MoU marketing initiative to expand its voucher business.

While Australian Hearing acknowledges that it provides screening equipment, training and support staff at no charge, the AGCNCO notes that this practice is not of itself behaviour inconsistent with competitive neutrality. These costs can be viewed as legitimate marketing expenses directed at recruiting clients. What is relevant from a competitive neutrality perspective is how the cost of those goods and services is allocated between Australian Hearing's commercial and non-commercial operations.

On the use of Community Hearing Advisors, the complaint describes these advisors — who are employed to promote commercial relationships with GPs, pharmacies, community groups, aged care facilities and other local health providers and, in doing so, expand Australian Hearing's share of the voucher market — as being government-funded (implicitly, from CSO funding).

With regard to *Love, Listen & Learn* program, the complaint questioned whether Australian Hearing was using its CSO paediatric work as a means of promoting its voucher market operations, and categorised this program as government-funded promotion. The implication of this categorisation being that CSO funding was being used to support it.

Australian Hearing's response to all the examples of alleged cross-subsidisation was to deny this occurs, and to emphasise that all costs associated with its voucher operations are allocated to that activity and that none of the costs associated with its voucher operations are allocated to (nor met by funds intended for) its CSO operations (box 2.1).

In support of its claims that it does not cross-subsidise its commercial voucher operations, Australian Hearing noted that it uses an Activity Based Costing model to ensure that only expenses related to a particular commercial or CSO activity are allocated to that activity. (And, hence, are paid for by the respective revenue or funding associated with that activity.)

The AGCNCO has previously endorsed Activity Based Costing as an appropriate method for allocating costs (CCNCO 1998b), and notes that Australian Hearing's costing model was independently reviewed in November 2016 (EY 2016), following which it was refined to even better reflect the allocation of costs between activity centres.

Box 2.1 Australian Hearing response to claims of cross-subsidisation

MoU

As the equipment, training and support staff are used solely for screening activities for voucher clients, those costs are allocated to commercial operations and are entirely met from voucher revenue.

Community Hearing Advisors

There is no allocation of Community Hearing Advisors' expenses to the CSO program. The funding of Community Hearing Advisors is solely from the revenue derived from our commercial activities in the voucher program.

Love, Listen & Learn program

The *Love, Listen & Learn* program did not publicise or market the CSO program. Rather, the program was designed to encourage children to spot hearing loss in older relatives and encourage them (not the children) to participate in hearing checks. This initiative was very much an awareness campaign focused on attracting new voucher clients. As such, the cost of the program was fully funded from revenue derived from our commercial activities in the voucher program.

Source: Australian Hearing (2018).

In addition, the AGCNCO notes that Australian Hearing produces quarterly monitoring reports about its CSO operations and achievements against its budget. Those reports are the subject of quarterly meetings between the Department of Health and Australian Hearing, at which they discuss the delivery of CSO services against agreed performance indicators and the CSO budget plan. Those regular meetings expose Australian Hearing's CSO operations to the scrutiny of the Department of Health, with the potential to identify any irregularities in CSO expenditure compared with its planned budget. As such, those reports and meetings provide an ongoing discipline on Australian Hearing's use of its CSO funding.

These monitoring reports and quarterly meetings should be viewed against a background of changes to the Department of Health/Australian Hearing relationship for the delivery of hearing CSOs in 2013. Those changes sought to enhance accountability and transparency for the delivery of the CSO program:

In 2012-13, [the Department of Health and Australian Hearing] supported a change in program management arrangements, moving from an MOU to an MOA, which the parties agreed should be legally enforceable. A key driver for the revised arrangements was the desire to enhance accountability and transparency for the delivery of the CSO program. (ANAO 2014, p. 53)

Furthermore, the Australian National Audit Office's audit of Australian Hearing's delivery of the hearing CSO following those changes found:

Overall, the CSO program is being effectively administered by Australian Hearing in accordance with an MOA developed jointly with [the Department of Health]. The MOA reflects relevant legislative and key program requirements, and incorporates a generally effective monitoring and reporting framework ... (ANAO 2014, p. 15)

Accordingly, the AGCNCO is satisfied that Australian Hearing's cost allocation model and the regular scrutiny of its CSO monitoring reports are sufficient to prevent the cross-subsidisation of its voucher business with CSO funding.

In view of the above, the AGCNCO is satisfied that Australian Hearing complies with the competitive neutrality policy requirement for full cost attribution and is not cross-subsidising its commercial operations with CSO funding.

FINDING 2.4

Australian Hearing is complying with the full cost attribution requirement of competitive neutrality policy and is not subsidising its commercial operations with CSO funding.

2.2 Other advantages or disadvantages of government ownership

The complaint raised the possibility of advantages and disadvantages of government ownership not captured by the debt, tax and regulatory neutrality adjustments discussed earlier. The issue of whether Australian Hearing is operating outside the remit of its enabling legislation is dealt with here as it raises issues about possible disadvantages of government ownership.

Preferential terms and conditions for tendered goods and services

The complaint held that Australian Hearing — as a government body — benefits from receiving better terms and conditions when it tenders for hearing devices than would non-government providers. This benefit, the complaint argued, provides a competitive advantage to Australian Hearing:

The multi-million dollar government tender relating to the supply of hearing devices to AH clients allows AH to bargain specific benefits not available to any non-government providers. ... Their contract, thanks to the government tender to reduce AH costs, significantly reduces the length of a hearing aid warranty from the usual 37 months (as it applies to all non-government-owned providers), to just 13 months. This benefit to AH occurs solely due to government ownership and by virtue of the government tendering system. ...

No other [Office of Hearing Services] provider has this advantage; not even the large national and multinational providers, or the vertically-integrated providers who have considerable budgets and substantial purchasing power with manufacturers. (HBA 2017, pp. 7–8)

This allegation has two components:

- that Australian Hearing's access to the Australian Government's tender process delivers some material advantage via better terms and conditions received for the tendered-for goods and services, or lower administrative costs incurred in conducting any tender

-
- that Australian Hearing's 'government' status somehow results in it obtaining better terms and conditions for the tendered-for goods and services.

With regard to the first of these, the AGCNCO notes that the government tender process is subject to extensive Commonwealth procurement guidelines (DoF 2018). Australian Hearing stated that these impose requirements (and costs) on it that are more onerous than would otherwise be the case. Similarly, a large hearing device manufacturer contacted by the AGCNCO stated that responding to a government tender was a more rigorous and costly exercise than for a non-government tender. And it maintained that it could see no reasons why a government tender process would deliver better terms and condition for Australian Hearing than a tender process used by its private sector competitors.

Moreover, there is some evidence that these more rigorous requirements can deter businesses from participating in government tenders. A recent report of the Joint Select Committee on Government Procurement, for example, noted the failure of many SMEs to take advantage of the opportunities presented by government procurement, referring to the Australian Chamber of Commerce and Industry's submission to it that warned against onerous procurement requirements or processes:

SMEs often do not have the time or the expertise to read and understand complicated rules and write lengthy submissions. (PJSCPAA 2017, p. 50)

The AGCNCO has viewed confidential correspondence from a manufacturer of hearing aid batteries to Australian Hearing that confirms this is not an academic issue, but actually affects respondents to Australian Hearing's tenders. That manufacturer stated it would not be responding to a particular Australian Hearing tender, and attributed this solely to its inability to meet the technical specifications required by the process and within the required timeframe (Australian Hearing, pers. comm., 15 April 2018).

Where such deterrence occurs, this is likely to lead to a 'thinning' of the market and less attractive offerings being received by Australian Hearing.

With regard to the second matter (of government ownership somehow resulting in better terms and conditions), Australian Hearing acknowledged that its tenders for hearing devices have resulted in more favourable terms than many of its competitors would receive when they tender for such devices.

However, it argued that this was the result of the scale of the order it put to tender, and that its government-owned status was immaterial. In support of this claim, it provided the AGCNCO with confidential evidence of the importance of volume to price, which clearly but unsurprisingly showed an inverse relationship between price and volume (with unit price falling as volume rises) (Australian Hearing, pers. comm., 15 April 2018).

On this matter, it is relevant to recall that Australian Hearing is one of the largest retailers of hearing devices in Australia, and is responsible for fitting some 25 per cent of all hearing devices each year (HRSCHACS 2017, p. 97). The scale of its purchases sought through tendering would reflect that size.

The large manufacturer of hearing devices contacted by the AGCNCO also asserted that government ownership would have no effect on the commercial terms it might offer when responding to a tender. It noted that a common practice among hearing device manufacturers is to offer a matrix of prices depending on the volume of any purchase. The clear message is that volume is king when it comes to obtaining favourable terms and conditions. Consistent with this message, it stated that a private hearing service business seeking a similar-sized order to that from Australian Hearing would receive similar terms and conditions.

The AGCNCO also contacted one of the major private competitors of Australian Hearing to test the claim that government ownership delivered more favourable terms and conditions. That competitor was also of the view that in the market for hearing devices, volume is the key determinant of terms and conditions, and that government ownership is irrelevant. It noted that if it went to tender for a similar sized order as Australian Hearing then it would expect to receive similar terms and conditions. That company also observed that the government tendering process used by Australian Hearing was more demanding than the tender process used by non-government businesses such as themselves.

Thus, the claim that even large national and multinational hearing service providers or vertically integrated providers (with their substantial, sometimes global, market power) could not achieve terms and conditions comparable or better than Australian Hearing is mistaken.

This issue of possible advantages resulting from the ‘government-owned’ status of businesses has been encountered by one other (state) competitive neutrality complaints office. In that case, its investigations concluded that any advantageous terms received by the government business were due to the size of its purchase, and ownership status had no bearing on the tender outcome.

In view of the above, the AGCNCO considers government ownership and access to the Australian Government’s tendering process are unlikely to confer any significant competitive advantage on Australian Hearing. More likely is that any relatively favourable terms and conditions that Australian Hearing receives from its tendering for goods and services is the result of the volume of its purchases.

FINDING 2.5

Any relatively favourable terms and conditions Australian Hearing receives from its tendering for goods and services are the result of the volume of its purchases and not from its government-owned status or its access to the government tendering process.

Separately, although the government procurement process imposes costs on Australian Hearing, this process is not one that it is legally required to adopt. Rather, Australian Hearing does so because it considers that process to be best practice for high value tenders. As such, any additional costs involved cannot be viewed as ‘competitive disadvantages’ incurred as a result of its government ownership. Accordingly, they also cannot be viewed as a source

of ‘offsetting’ disadvantage that would justify not requiring Australian Hearing to make regulatory neutrality payments to account for its advantages arising from its regulatory regime for workers compensation.

FINDING 2.6

Australian Hearing abides by Commonwealth procurement guidelines for high value tenders not because it is required to, but because it considers they are best practice. Thus, any cost ‘disadvantages’ it incurs as a result of using those guidelines is not a consequence of its government ownership. Accordingly, any such disadvantage cannot be used to offset any competitive advantages arising from government ownership.

Preferential access to National Acoustic Laboratories’ research

The complaint alleged that Australian Hearing gains a competitive edge as a consequence of government ownership (and integration in one organisation) of it and NAL. To support this view, the complaint cited a statement to this effect on Australian Hearing’s website, and provided a link to the Australian Hearing website where this occurred:

AH exploits its Research Arm, the National Acoustics Laboratories (NAL) when promoting their OHS arm. (<https://www.hearing.com.au/PDSA/>) ‘We are uniquely supported in Australia by our research division, the world-renowned National Acoustic Laboratories (NAL).’ (HBA 2017, p. 7)

The complaint concluded that this advantage occurs solely because of government ownership of both Australian Hearing and NAL.⁵

Australian Hearing denied that it gains any special competitive advantage for its commercial operations as a result of government ownership of both it and NAL. It stated:

All of NAL’s government-funded research is openly published in research journals and presented at domestic and international conferences. Therefore all private hearing service providers have open access to the results of NAL’s government-funded research. ...

The statement of ‘uniquely supported’ by NAL is in reference to the CSO program and where Government-funded research into paediatric, infant and adolescence hearing loss and spatial processing disorders uniquely supports Australian Hearing in its delivery of new techniques, practices and procedures via the CSO program. (Australian Hearing 2018, p. 5)

When the AGCNCO approached the Department of Health for its view on this issue it, too, held that Australian Hearing’s commercial arm has no special access to NAL research and, accordingly, would obtain no competitive advantage:

In regards to the relationship between Australian Hearing and the National Acoustic Laboratories (NAL), NAL is the research division of Australian Hearing. ...

⁵ The AGCNCO accessed the cited link at the time it received the complaint, and can confirm the web page did contain that statement.

NAL undertakes research using the funding provided by the Department of Health that supports government research priorities or Hearing Services Program functions. Other service providers can also approach NAL to work in partnership or request NAL conduct research on their behalf.

... Research that is conducted by NAL is publicly available through their website. NAL does aim to publish scientific articles in scientific journals that promote and inform the public and industry of their research findings. (Department of Health, pers. comm., 7 December 2017)

Similarly, when the AGCNCO discussed this issue with a number of small and large private hearing service businesses, they confirmed that they have access to the non-proprietary research of NAL.

In view of the above, the AGCNCO is satisfied that Australian Hearing's commercial operations have no competitive advantage as a consequence of government ownership of it and NAL.

Nonetheless, the statement about Australian Hearing being uniquely supported by NAL is clearly ambiguous, and is easily interpreted to mean its commercial activities are uniquely supported by NAL. In this respect, the concern in the complaint is justified.

In practice, there is no unique relationship to advantage Australian Hearing's commercial operations and Australian Hearing should ensure the language used to describe this relationship with NAL avoids giving that false impression.

Subsequent to the AGCNCO's formal receipt of the complaint, Australian Hearing removed this particular claim from its website. However, the complainants expressed concern that the claim might still remain in the public domain where printed copies of promotional brochures contain this statement.

FINDING 2.7

Australian Hearing's commercial operations are not uniquely supported by the National Acoustic Laboratories and obtain no competitive advantage as a consequence of the government ownership (and integration in one organisation) of Australian Hearing and the National Acoustic Laboratories.

Previous descriptions of this relationship by Australian Hearing ('We are uniquely supported in Australia by our research division, the world-renowned National Acoustic Laboratories') — by omitting the caveat that this only applies to its CSO operations — were ambiguous and potentially misleading. That claim has since been removed from Australian Hearing's website.

RECOMMENDATION 2.2

Australian Hearing should ensure the language used on its website and in promotional literature avoids giving the false impression that its commercial activities enjoy some competitive advantage as a result of its relationship with the National Acoustic Laboratories.

The AGCNCO drew Australian Hearing's attention to the possible continued presence of this misleading statement in its promotional literature. Australian Hearing acknowledged the importance of ensuring that what it says about NAL is not misleading. As most of its brochures are online, it has committed to review their content to identify any wording in relation to NAL that needs to be changed. This exercise will also help ensure that future print runs contain no potentially misleading statements (Australian Hearing, pers. comm., 18 April 2018).

Is Australian Hearing operating outside its legislated remit?

One of the four main areas of concern identified in the complaint was that Australian Hearing is operating beyond its legislated remit.

The complaint argued that Australian Hearing was offering commercial services to clients in the private market (which accounts for about 30 per cent of the hearing services market in Australia) — but should not. It observed:

The Australian Hearing Services Act 1991 determines criteria for eligibility of clients to receive services from AH. ... Historically, and under this legislation and eligibility criteria, AH does not offer services to private patients who are ineligible for an OHS [Office of Hearing Services] voucher. (HBA 2017, p. 17)

This view is understandable as it accords with that in the 2015 Senate report, *Australian Hearing: too important to privatise* that, drawing on the Department of Finance's summary of findings from its scoping study into privatising Australian Hearing, stated:

... Government ownership locks Australian Hearing out of participating in the private market and limits its ability to offer clients other products and services. (SSCH 2015, p. 20)

Australian Hearing has previously sought legal advice on this issue. Its most recent advice (from 14 April 2011) concluded that, under the *Australian Hearing Services Act 1991*, the functions of Australian Hearing do extend to the provision of hearing services to the general public and providing those services for a commercial return (Australian Hearing, pers. comm., 26 March 2018).

The AGCNCO also sought the view of the Department of Human Services on this matter. The department's response indicated that the view expressed in the complaint (that Australian Hearing was precluded by its enabling legislation from pursuing commercial clients outside of the voucher market) was incorrect. That response noted:

Under paragraph 8(1)(a) of the *Australian Hearing Services Act 1991* (the Act), Australian Hearing is authorised to provide hearing services to voucher-holders in accordance with an agreement entered into under Part 3 of the *Hearing Services Administration Act 1997*.

However, paragraph 8(1)(d) of the Act also empowers Australian Hearing ‘to enter into arrangements for supply of hearing services’. This provides legislative authority for Australian Hearing to enter into arrangements for the supply of hearing services to any person, whether or not on a commercial basis. Australian Hearing may on this legislative authority provide commercial hearing services to clients outside the cohorts specified in paragraphs 8(1)(a)–(ad) of the Act. (Department of Human Services, pers. comm., 27 April 2018)

These legal opinions indicate that the *Australian Hearing Services Act 1991* does allow Australian Hearing to participate in the private market for hearing services in Australia.

However, there are broader Constitutional issues that muddy these legal waters.

The Department of Human Services drew attention to legal advice in 2004 that concluded — with regard to Australian Hearing’s provision of hearing services on a commercial basis to private clients — that Section 51(xxiiiA) of the Constitution suggested that Commonwealth legislative power did not extend to provision of ‘medical services’ on a commercial basis (pers. comm., 22 March 2018). This advice, though, is at odds with the view expressed by the (then) Solicitor-General, David Bennett QC, in a memorandum dated 27 September 2000, that there were ‘reasonable prospects of persuading the High Court to take the view’ that the words “medical services” in Section 51(xxiiiA) of the Constitution ‘are not to be read down so as to preclude the provision of medical services on a commercial basis’ (Australian Hearing, pers. comm., 17 April 2018).

The upshot of these differing views is that any commercial activity by Australian Hearing in the private market is subject to a degree of constitutional risk.

Notwithstanding legal advice that the *Australian Hearing Services Act 1991* allows it to operate in the private market, Australian Hearing advised the AGCNCO that it is subject to a Ministerial direction that limits its participation in that market. As a consequence, although that market constitutes about 30 per cent of the total hearing services market, Australian Hearing’s private market sales (predominantly business-to-business sales) account for a minute share of its total revenue (Australian Hearing, pers. comm., 26 April 2018).

Accordingly, and contrary to the belief expressed in the complaint that Australian Hearing’s enabling legislation prevents it from operating in the private market, that legislation does allow it to do so. Australian Hearing is, however, operating on the basis that it is subject to a Ministerial direction that limits its involvement in that market.

Australian Hearing’s enabling legislation sets out the right of the Minister to give such directions (CoA 1991, Part 2, s. 12). And a Ministerial direction to this effect would constitute a significant disadvantage arising from government ownership — a disadvantage the AGCNCO has estimated could ‘cost’ Australian Hearing some \$15 million per annum (box 2.2) in foregone pre-tax profits.

Box 2.2 **A competitive disadvantage from government ownership**

In 2017, Australian Hearing realised a profit before tax of some \$32 million (figure 2.1). This profit was delivered from its approximate 30 per cent share of the voucher market and some very minor activity in the private market.

Assuming that it would achieve the same degree of market share in the private market (which is a little over half the size of the voucher market) a simple extrapolation suggests Australian Hearing could end up with an annual pre-tax profit from operating in the private market of about half that it achieves in the voucher market — that is about \$15 million.

Therefore, a Ministerial direction that limits Australian Hearing's unfettered operation in the private market can crudely be viewed as denying it the ability to grow its business and eventually earn annual pre-tax profits of the order of \$15 million.

Moreover, given that the total hearing services market in Australia is anticipated to grow but experience a noticeable shift in growth from the Voucher to the private, fee-for-service market (KPMG 2012, p. 7), such a Ministerial direction would effectively confine Australian Hearing to that part of the commercial hearing services market with relatively low growth prospects.

FINDING 2.8

Australian Hearing's enabling legislation (the *Australian Hearing Services Act 1991*) does not preclude it from operating in the private (fee-for-service) market.

However, in practice, it is operating on the basis that it is subject to a Ministerial direction to limit its involvement in the private market, which, as a consequence, significantly limits Australian Hearing's ability to expand its business and profits.

However, this finding must be qualified.

While Australian Hearing is operating on the basis that it is subject to a Ministerial direction that limits its operation in the private market, no evidence of that direction exists.

The AGCNCO requested a copy of the direction from Australian Hearing so as to better understand its effects on its operations. However, Australian Hearing was unable to find any record of it (Australian Hearing, pers. comm., 17 April 2018). The AGCNCO also requested a copy of the direction from the Department of Human Services. The department, too, has no record of it (Department of Human Services, pers. comm., 27 April 2018).

Pursuing the possibility that the direction might have originated around 1996 when the provision of hearing services under the Voucher Program changed from the sole province of Australian Hearing to a contestable market or at some later time up to 2004, during which Australian Hearing sat within the Department of Health portfolio, the AGCNCO requested that department to check if the direction had come from its Minister. The department reported that a search of its records management system uncovered no evidence of such a direction (Department of Health, pers. comm., 17 April 2018).

Separately, the AGCNCO sought evidence of any such Ministerial direction on the Federal Register of Legislation — www.legislation.gov.au/ — which is the central repository for legislative instruments, including Ministerial directions. A search of that database found no evidence of the supposed Ministerial direction.

This absence of any record indicates that Australian Hearing has been operating under a mistaken belief that it is subject to a Ministerial direction to limit its participation in the private market. In reality, it appears no such restriction exists.

Accordingly, there appear to be no legal grounds that require Australian Hearing to limit its commercial activities in the private, fee-for-service market.

FINDING 2.9

Australian Hearing, the Department of Human Services and the Department of Health have no record of a Ministerial direction limiting Australian Hearing's commercial activities in the private hearing services market. Similarly, there is no record in the Federal Register of Legislation of such a Ministerial direction.

Accordingly, together with the finding that Australian Hearing's enabling legislation does not preclude it from operating in the private market, there appear to be no legal grounds that would require Australian Hearing to limit its commercial activities in that market.

2.3 Australian Hearing competing with the private sector

In addition to concerns that Australian Hearing has unfair competitive advantages as a result of its government status, the complaint had an underpinning theme that competing with the private sector (and competing so aggressively) was inappropriate. For example, it noted:

All Providers have marketing budgets, and a government-funded corporation has a very large one, but it is not our members' principle to offer financial incentives to poach clients from other providers, certainly not from our practices where our longstanding commitment and services to our communities are highly valued. Nor do we believe that there is any place for it in Australia's healthcare system. Yet, AH has many marketing campaigns designed to do exactly that ... (HBA 2017, p. 11)

and

AH [is] also taking an aggressive full on, 'take no prisoners', 'do whatever it takes' approach to poach clients and attract new clients across the industry. The Commonwealth Government has created a 'monster' that needs to be reined in. Why does small business in the hearing healthcare industry have to compete with a large corporatised government entity? (HBA 2017, p. 12)

However, it should be noted that competitive neutrality policy is not aimed at inhibiting or prohibiting government businesses from competing with their private sector counterparts. Rather, it aims to promote efficient competition between public and private businesses. To that end, it aims to ensure that where government businesses do compete, they do not have a net competitive advantage purely because of government ownership (such as being exempt from some taxes, being able to borrow at the ‘government’ rate or being subject to different regulations).

The original 1996 competitive neutrality statement expressed this as:

Competitive neutrality does not imply that government businesses cannot be successful in competition with private businesses. Government businesses can achieve success as a result of their own merits and intrinsic strengths, but not as a consequence of unfair advantages flowing from government ownership. (Australian Government 1996, p. 5).

Accordingly, although Australian Hearing’s competition for market share in the four years from 2013 to 2017 has seen its pre-tax profit increase from \$4.5 million to \$32 million (figure 2.1), its aggressive and innovative marketing strategies to achieve this outcome are not at odds with competitive neutrality policy or its obligations under that policy.

Indeed, given that the standard of living of all Australians is ultimately dependent on how productively we use our resources, that standard of living is best served by having the most efficient users of those resources supplying goods and services. Whether those most efficient and most productive businesses are private or government owned is irrelevant.

Competitive neutrality policy simply aims to ensure that businesses achieve competitive success on their own merits and not on the back of artificially lower costs because of their government ownership.

3 Are other areas of government complying with competitive neutrality?

A secondary focus of this investigation is to assess whether other government agencies — whose actions can preferentially benefit the competitiveness of Australian Hearing — are operating in a manner consistent with competitive neutrality policy.

3.1 Compliance with competitive neutrality principles by other areas of government

The complaint expressed concerns about the actions of other areas of government that, it claimed, gave Australian Hearing a competitive advantage relative to its competitors.

While those actions would not in any case constitute a breach of competitive neutrality by Australian Hearing, they could indicate that other arms of government neither understand competitive neutrality policy nor appreciate that their actions could be inconsistent with the principles underlying competitive neutrality policy and, hence, be inimical to its operation in practice. As such, the AGCNCO has investigated these concerns.

Preferential access to schools

With regard to the *Love, Listen & Learn* marketing program, the complaint raised concerns that Australian Hearing received preferential access to primary schools and their students to conduct this program, and did so because of its government status. Any such preferential access, the complaint argued, would give Australian Hearing a competitive advantage relative to its competitors.

Australian Hearing denied that it is accorded any preferential access to schools as a consequence of its government ownership. Further, it noted that any number of commercial providers of other services — such as representative sporting groups/associations and health advocacy groups — seek and are granted access to schools (Australian Hearing 2018).

To assess this concern, the AGCNCO contacted a sample of three state education departments, seeking information about their policies governing external bodies' access to primary schools and their students. Their responses indicated that none had policies that gave preferential or exclusive access to government agencies. Rather, all had policies that delegated responsibility for allowing external visitors access to the school level, with that access governed by general guidelines that are publicly available (Tasmanian Department of

Education, pers. comm., 10 April 2018; Queensland Department of Education, pers. comm., 23 April 2018).

In Victoria, for example, the acceptance of visitors to government schools is ultimately a decision made at the individual school level, in accordance with Department of Education and Training policy. School principals are expected to act in accordance with the *Visitors in Schools* policy, which sets out minimum requirements and considerations for assessing the suitability of visitors and the purpose of their visit. This policy is available at www.education.vic.gov.au/school/principals/spag/safety/pages/visitorsinschool.aspx (Victorian Department of Education and Training, pers. comm., 28 March 2018).

In view of the responses from various state education departments, the AGCNCO considers that the concerns about Australian Hearing’s preferential access to schools and students are unfounded.

FINDING 3.1

Concerns about Australian Hearing having preferential access to primary schools and their students (and thus a competitive advantage over its competitors) are unfounded.

Preferential access to Centrelink offices

One area of complaint was that Australian Hearing — because it is a government business — appeared to enjoy preferential access to Centrelink offices to display its promotional brochures, and to conduct hearing screening tests for the purpose of recruiting customers (with the latter allegedly on a rent-free basis). This, it was claimed, gave Australian Hearing a significant commercial advantage in accessing potential customers and growing its share of the voucher market.

The AGCNCO sought information from the Department of Human Services on whether Australian Hearing was accorded any preferential treatment. Its response stated that it does not extend preferential treatment by way of exclusivity (explicit or otherwise), discounted rates or other commercial advantages to Australian Hearing for the display of promotional material or the use of space in the department’s service centres (DHS 2018, p. 1).

The department noted that there is no current or former policy or advice to prevent the display of any commercial hearing providers’ brochures within Centrelink premises. The department is, though, actively reducing the amount of printed promotional material displayed in service centres, due to the significant cost and impost to keep the material up to date, relevant and tidy. Although community information displays are still present in a number of departmental service centres, this initiative could be expected to affect the willingness of Centrelink offices to display brochures from any hearing service providers — be they private or government.

The department also affirmed that Australian Hearing pays a commercial rate to conduct business within departmental premises. This commercial rate is set in accordance with the department's financial policy and with advice from the Department of Finance. Australian Hearing's use of the department's premises is also subject to availability and space requirements. The department noted that other commercial entities can negotiate similar arrangements with the department in accordance with the department's shared premises policy.

Subsequent to this competitive neutrality complaint being lodged with the AGCNCO, a hearing services business (an accredited provider under the voucher program that was also a party to the complaint) approached its local Centrelink office requesting access for the purpose of conducting hearing screening services for Centrelink clients (private hearing services business, pers. comm., 29 March 2018). That request was granted, subject to acceptable commercial terms and conditions regarding such access. The AGCNCO has taken this example as independent confirmation that there is indeed no departmental policy that discriminates against private hearing service providers and favours Australian Hearing.

The AGCNCO notes that if individual Centrelink offices are offering such preferential access to their premises, then they are doing so in breach of the Department of Human Services' own policy governing such access. Where competitors of Australian Hearing are aware of this occurring then they should, in the first instance, bring to the attention of those offices that their behaviour is inconsistent with the department's own governing arrangements, as noted above. If this is not enough to eliminate this practice, competitors should bring this to the attention of the Australian Hearing team via the Portfolio.Agency.Advice@humanservices.gov.au mailbox within the Department of Human Services, which is responsible for ensuring compliance with the department's policies on this matter.

FINDING 3.2

The Department of Human Services has no policies that provide Australian Hearing with preferential access to Centrelink offices (or any of the department's premises) for the purpose of displaying promotional material or conducting hearing screening services.

The department's policies regarding access and the terms and conditions of that access make no distinction between Australian Hearing and any other business accredited to provide hearing services under the Hearing Services Program.

Preferential promotion on the Department of Human Services and Centrelink website

Another example of alleged preferential treatment cited in the complaint was of information on the Department of Human Services' website that appeared to promote Australian Hearing as a provider of voucher services, rather than acknowledge it was just one of many accredited providers.

This alleged preferential treatment took two forms. One was the preferential mention of Australian Hearing on the Department of Human Services/Centrelink website as the source of information on other government (hearing) support services. The other was the preferential mention in the (then) Minister for Human Services' media releases of Australian Hearing as a provider of hearing services in the voucher market.

On the first of these, the Centrelink website — in a subsection headed **Other government and community support services** within a section titled **Payments for Older Australians** — includes a statement (as at 16 May 2018) that:

Australian Hearing has information to help people manage their hearing impairment so they have a better quality of life. [with 'Australian Hearing' as a hypertext link to its website]

As noted, government support with regard to hearing services is provided generally under the Hearing Services Program, which has two components (the CSO program providing free hearing services to eligible persons and the voucher program providing subsidised hearing services to eligible persons). Both components are administered by the Department of Health. While hearing services under the first are provided solely by Australian Hearing, those under the second may be provided by any of almost 300 accredited providers.

Thus, it is odd that rather than emphasising that government (hearing) support services are available through the Hearing Services Program and providing potential users of those services with a link to that program's website for information, the statement:

- refers to Australian Hearing as the source of information about those government (hearing) support services and, in doing so
- directs potential voucher customers to the website of just one provider of hearing services in the voucher market.

The statement with the link to Australian Hearing is also in contrast with the approach taken in the same subsection by text referring to information and support services for aged care. That text notes:

myagedcare has information on a wide range of community, aged care and support services. [with 'myagedcare' as a hypertext link]

However, in this case the 'myagedcare' hypertext link takes the reader to a general website providing information about types of aged care services available, eligibility for those services, service providers in the reader's area, and so on.

The AGCNCO considers that the text in question does constitute preferential promotion of Australian Hearing, as alleged by the complainants, and that if Australian Hearing was not a government-owned business then it would not receive such preferential mention.

However, this is not evidence of a breach of competitive neutrality policy by Australian Hearing. Rather, it is behaviour by a government agency that is inconsistent with the intent of competitive neutrality policy — which is that government businesses should not enjoy competitive advantages merely because of their government ownership.

This preferential treatment of Australian Hearing could be avoided with a neutral statement along the lines that the Australian Government runs the Hearing Services Program to help people manage their hearing impairment so they have a better quality of life — and augment this by having ‘Hearing Services Program’ as hypertext link to the Department of Health’s web page dealing with that program. This would provide readers with links to information on assistance for their hearing needs under either the CSO or voucher components of the program, and to the Department of Health’s link to ‘locate a [voucher] provider’ in or near to the readers’ location.

A change along these lines would also address one of the findings of the recent PwC report on the Hearing Services Program — that there is a need to improve the quality of information made available to clients regarding their own entitlements and rights (PwC 2017, p. vii). It would also be consistent with the related recommendation 3 — that is, to ‘Improve the information about hearing services and [Assistive Hearing Technology], and dissemination of this information to clients in the voucher scheme’ (PwC 2017, p. xi).

FINDING 3.3

Information provided on the Centrelink website about other government support services to help people manage their hearing impairment is poorly worded and gives undue prominence to Australian Hearing.

RECOMMENDATION 3.1

The Department of Human Services should change the information on its website about government support services and useful information to help people manage their hearing impairment.

That change should remove the reference to Australian Hearing as the apparent preferred source of such information and, instead, provide a general statement along the lines of the Australian Government runs the Hearing Services Program to help people manage their hearing impairment — and augment this by providing a link to the Department of Health’s web page dealing with that program.

Preferential promotion in the Minister for Human Services’ media releases

The complaint alleged that various media releases from the (then) Minister for Human Services have promoted Australian Hearing and directed potential voucher service clients to its site. For example, the complaint cites one media release from the Minister where, when referring to the use of Australian Hearing’s online ‘HearingHelp’ advisory service, he states:

After speaking with a hearing expert through the webchat or helpline, eligible individuals can visit their local GP to obtain a referral for a thorough hearing assessment at an Australian Hearing centre. (Tudge 2016)

While factually correct, this statement omits the detail that:

- ‘eligible individuals’ embraces those eligible for services provided under the CSO program and those eligible for services under the voucher services program
- while the former can only be served by Australian Hearing, the latter (a group almost eight times larger) could be given a referral for a hearing assessment (and subsequent supply of hearing services) at any of the nearly 300 accredited providers of choice.

Accordingly, the statement gives undue prominence to Australian Hearing as a provider of hearing assessments and of any subsequent hearing services.

In this example, the complaint’s concern that the Minister’s media releases have been used to give a free kick to Australian Hearing — rather than an even-handed delivery of information on who can provide government subsidised hearing services — appears justified. Although it is not possible to accurately assess the value of that advantage, the AGCNCO considers this undue prominence would likely confer some competitive advantage on Australian Hearing and is behaviour inconsistent with the principles of competitive neutrality policy.

This use of media releases to promote Australian Hearing rather than inform the public more generally about the government’s hearing services and providers of those services appears to represent a conflict of interest and is at odds with the intent of competitive neutrality.

The Department of Human Services maintained that it takes the government’s competitive neutrality policy and its implications into account when developing media releases (Department of Human Services, pers. comm., 16 January 2018). However, the examples cited in the complaint suggest that this oversight and consideration could, and should, be improved.

FINDING 3.4

Some of the (then) Minister for Human Services’ media releases have given undue prominence (and, consequently, promotion) to Australian Hearing as a provider of hearing services in the voucher market. This would likely confer some competitive advantage to its business operations and is behaviour inconsistent with the principles of the Government’s competitive neutrality policy.

RECOMMENDATION 3.2

When the Minister or the Department for Human Services are developing media releases, they should give more attention to competitive neutrality policy and its implications so as to avoid promoting the government’s hearing services business over its competitors.

Preferential treatment in complaint investigations

The complaint noted that the Department of Health seems to treat Australian Hearing more leniently than private providers when addressing complaints against them. This, by implication, accords Australian Hearing a competitive advantage over its competitors.

In support of this claim, the HBA cited a number of its members' experience. For example:

We have made numerous complaints to OHS in relation to the conduct of AH and OHS wipe their hands of the issues. We are bound to work ethically under our contract to OHS and believe if we were having complaints made to OHS we would be held accountable. (*Name withheld).

Australian Hearing has a visiting site located in my suburb ... and I am aware of certain marketing practises which I think are in breach of the OHS contract. I have contacted OHS to report these practises but OHS does not seem interested in pursuing this matter in regard to Australian Hearing ... despite my objections. OHS seems to have no interest in investigating this practise, maybe because it is just too hard to monitor, or maybe because Australian Hearing seems to get away with a lot more than other clinics. Other practitioners I have spoken to about this matter are also annoyed about this marketing practise, and think it is unfair and unethical, and also in breach of the OHS contract regarding marketing strategies. (*Name withheld) (HBA 2017, p. 17)

The AGCNCO sought the Department of Health's response to these concerns.

The department stressed that it takes its responsibilities in administering and regulating the Hearing Services Program seriously. It noted, though, that its efforts are confined to that program and it is not responsible for regulating the hearing sector as a whole. Its role when dealing with complaints is in regard to program compliance — that is, possible breaches of the *Hearing Services Administration Act 1997* and related legislation, the service provider contract and related standards, and guidance policies and procedures as published on the program's website.

Where complaints do not relate to program requirements, the department will suggest the complainant approach a more appropriate body, such as the ACCC. If a complaint about the conduct of Australian Hearing is outside the program's scope, the department will recommend the complainant approach the Department of Human Services, or in complex or unusual cases will refer the matter to it directly (with the complainant's consent).

The department noted that during the current service provider contract period (that is, since 1 July 2015), Australian Hearing has been the subject of about 24 per cent of all complaints. This is broadly proportionate to its market share of program clients.

It observed that the most common types of complaints from clients about their service provider are about their hearing aids or about sales pressure, and mainly relate to:

- dissatisfaction with the hearing aids prescribed
- duress from the service provider to pay for partially subsidised devices instead of fully subsidised
- unsolicited phone calls and enticements from their previous service providers when they relocate to somewhere new.

The most common types of complaints from service providers about other service providers are about ‘poaching’ clients, particularly about:

- advertising, cold calling, offering incentives to clients to change provider, allegedly relocating clients on the Hearing Services Online portal without their written consent
- record keeping and record transfer — not transferring client records in a timely manner when clients relocate to a new provider, transferring incomplete records, delaying transfer of records while they try to entice the client back.

Complaints about Australian Hearing align with these common themes.

The department stated that all complaints are handled equally and in accordance with the program’s Complaints Policy, as published on the Hearing Services Program website. The AGCNCO notes that this policy draws on best practice for complaints handling, as contained in:

- the Australian Standard *Customer Satisfaction — Guidelines for complaints handling in organizations*
- the Commonwealth Ombudsman — *BETTER PRACTICE GUIDE TO complaint handling*
- other guidelines for best practice complaints handling (including the UK Parliamentary and Health Service Ombudsman — *The principles of Good Complaint Handling*).

Complaint statistics are also published on the department’s website, albeit with broad descriptions and no identifiable information. In addition, the department noted that its complaints policy is regularly reviewed to check for effectiveness and customer satisfaction.

The department’s stated aim is to resolve complaints as quickly as possible, and has set itself a target to resolve most complaints within 28 business days. Some complaints are complicated and require detailed investigation, while others are resolved immediately. Currently, the average time taken to resolve complaints (in total) is 10.4 business days and the average time taken to resolve complaints about Australian Hearing (in particular) is 13.3 business days (Department of Health, pers. comm., 11 January 2018).

Where the investigation of complaints finds instances of non-compliance with program requirements, sanctions are applied. Complaints data is also used as a risk indicator when determining the program’s audit schedule. Australian Hearing has been subject to both these outcomes during the current service provider contract period.

The AGCNCO contacted a number of the larger private hearing service businesses for their views on whether the Department’s approach to handling complaints is even-handed or treats Australian Hearing more leniently. Their unanimous view was that they saw no evidence of any hearing service businesses receiving more lenient treatment than other businesses.

On the basis of its investigations, the AGCNCO considers the Department of Health’s process for dealing with complaints against service providers under the Hearing Services

Program is rigorous, consistent and transparent, and that the department does not treat Australian Hearing more leniently than any other provider.

FINDING 3.5

The Department of Health's process for dealing with complaints against service providers under the Hearing Services Program is rigorous, consistent and transparent, and does not treat Australian Hearing more leniently than other providers.

Preferential access to Hearing Services Program client data

The complaint notes that Australian Hearing has contacted private providers' clients through a telemarketing and mail-out campaign as part of its 'Switchers Campaign'. The complaint observes that the contacted clients have never been clients of Australian Hearing, and questions how it could obtain the contact details of those private businesses' clients. For example, one member of the HBA stated:

Several of our OHS clients received a mail-out from AH asking if they were happy with their hearing aids. ... These clients had never been an OHS client of any other provider. Some of them were incensed that the government obtained and used their details without their consent. The campaign was called the 'Switchers Campaign'. How did AH obtain their details when they had never been a client of AH? (HBA 2017, p. 16)

The implication behind this concern is that Australian Hearing could only have access to client names and contact details because it has access to the Hearing Services Program voucher client database as a result of its (Australian Hearing's) government status.

The AGCNCO asked Australian Hearing 'Are you able to confirm that Australian Hearing does not and never has had preferential access to OHS' voucher client database?'. In response to that request, it stated:

Just like other commercial businesses in Australia, Australian Hearing has purchased a data list that is collated from opted in sources from a reputable third party. The cost of this purchase was solely met from revenue derived from our commercial activities in the voucher program.

This list, along with a list of our former voucher clients that may have moved to another provider (but whose active consent allows us to still contact them) have been collated together and been used in the Switcher Campaign. (AH 2018, p. 4)

The AGCNCO also sought a response to this concern about preferential access to client data from the Department of Health (which holds this data). The department's response clearly indicates that Australian Hearing is accorded the same access as other service providers:

... Australian Hearing is provided with the same level of access that other services providers receive in relation to data contained within the Hearing Services Program Online Portal. Australian Hearing can access data for clients they provide services to, and they may hold historical data on clients they have provided services to in the past, but they cannot access data on clients registered with other service providers. This level of data control is applied to all

services providers registered to deliver services in the Program. (Department of Health, pers. comm., 7 December 2017)

Further, the AGCNCO discussed the issue of access to people's name and contact details for the purpose of telemarketing with some of the larger private hearing services businesses and with the Do Not Call Register. Those discussions generally affirmed that purchased data lists were a credible basis to explain Australian Hearing's telemarketing and mail-out campaign contacting clients of other hearing services businesses.

On the basis of information available to it, the AGCNCO is satisfied that clients of private hearing services businesses, contacted as part of the 'Switchers Campaign', have been targeted as a result of normal practice in telemarketing. That is, they have been identified through the purchase of commercially available data lists and not through any preferential access to data contained within the Hearing Services Program Online Portal.

FINDING 3.6

Australian Hearing's targeting of potential customers as part of its 'Switchers Campaign' has not been informed by any preferential access to the Hearing Services Program's client data but, rather, by normal commercial practice of identifying targets through the use of commercially available data lists.

Preferential listing on the directory of government services

The complaint alleged that Australian Hearing enjoys a competitive advantage by being listed on the Australian Government's Directory of government services (at www.australia.gov.au/directories/australia/australian-hearing), whereas private hearing service providers also accredited to provide services under the Hearing Services Program are not mentioned.

However, as the purpose of this site is to identify and describe the various agencies of the Australian Government, the AGCNCO considers that Australian Hearing's listing (and the exclusion of non-government hearing services businesses) is entirely appropriate and is not inconsistent with competitive neutrality policy.

FINDING 3.7

Australian Hearing's listing on the Australian Government Directory of government services is not inconsistent with competitive neutrality policy.

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