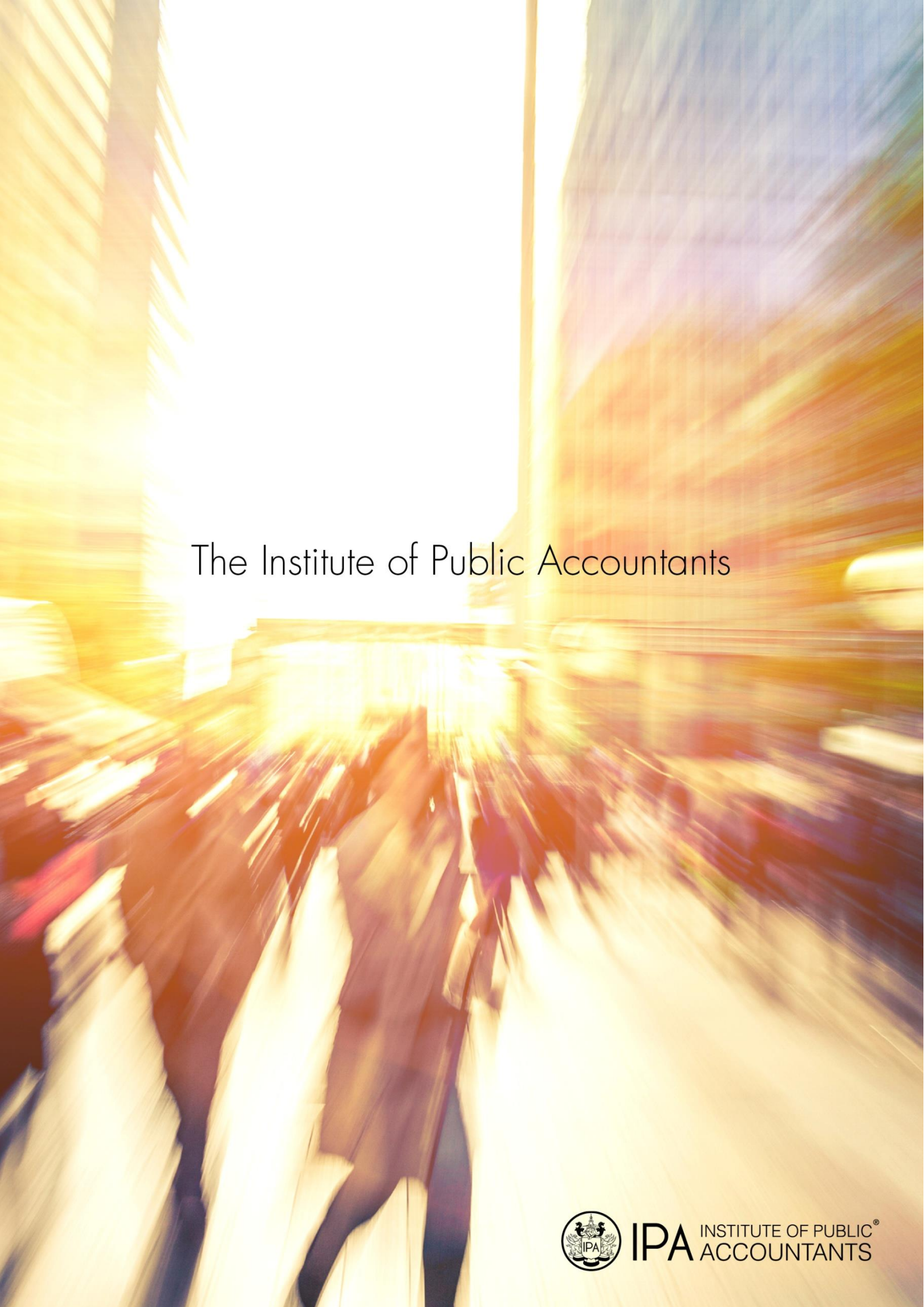
The Institute of Public Accountants
IPA INSTITUTE OF PUBLIC ACCOUNTANTS®

IPA - Deakin SME Research Centre

The Institute of Public Accountants (IPA) is one of the three legally recognised professional accounting bodies in Australia. The IPA has been in operation for over 90 years and has grown rapidly in recent years to represent more than 35,000 members and students in Australia and in more than 80 countries. The IPA has offices around Australia and in London, Beijing, Shanghai, Guangzhou and Kuala Lumpur. It also has a range of partnerships with other global accounting bodies. The IPA is a full member of the International Federation of Accountants and has almost 4,000 individual accounting practices in its network, generating in excess of $2.1 billion in accounting services fees annually. The IPA's unique proposition is that it is for *small business*; providing personal, practical and valued services to its members and their clients/employers. More than 75 per cent of IPA members work directly in or with small business every day. The IPA has a proud record of innovation and was recognised in 2012 by *BRW* as one of Australia's top 20 most innovative companies.

In 2013, the IPA partnered with Deakin University to form the IPA Deakin SME Research Partnership, a first in Australia. This partnership has grown and evolved into the IPA assisting Deakin University in establishing the IPA-Deakin SME Research Centre in 2016. The goal of the Centre is to bring together practitioner insights with cutting edge SME academic research, to provide informed comment for substantive policy development.

The IPA-Deakin SME Research Centre comprises:

Chair Andrew Conway FIPA
(Chief Executive of the IPA and Professor of Accounting *honoris causa* Shanghai University of Finance and Economics)

Mr Tony Greco FIPA
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This report was prepared by Dr Philip Clarke on behalf of the IPA-Deakin SME Research Centre, Deakin Business School, Deakin University.

21 April 2017

Competitive Neutrality Policy Review

The Treasury

Langton Crescent

PARKES ACT 2600

Dear Sir/Madam

Review of Australian Commonwealth Government's Competitive Neutrality Policy

Introduction

This submission is made on behalf of the Institute of Public Accountants (the IPA), one of Australia's oldest professional bodies with over 35,000 members in Australia and beyond. It responds to those 'Consultation questions', on which it has an opinion, raised in the Consultation Paper Review of the Commonwealth Government's Competition Neutrality Policy.

The IPA supports a strong competitive neutrality (CN) policy, seeing this as essential to ensuring that markets within the Australian economy are not distorted through private businesses, especially SMEs, being unable to compete fairly with government business enterprises. In our opinion, an element of such a policy should include a mechanism for enabling damages to be recovered by private business suffering loss as a result of the policy being contravened. On the other hand, the IPA recognises that there may be instances (in our opinion, likely to be very rare) in which government policy is best pursued through a business enterprise but without that enterprise being subject to CN. For this reason, a public interest exemption should exist. However, rather than this exemption being unique to CN it should be one that is modelled on the exemptions existing within the *Competition and Consumer Act 2010* (CCA), namely authorisation and notification.

Scope of CN policy:

The policy objective of CN

The IPA believes that the policy objective of CN should be the protection and enhancement of competition within Australian markets, rather than the protection of private competitors. Pursuing this objective will best ensure the optimal allocation of resources within those markets and maximise the benefits competition can confer on consumers. Whilst this objective is clearly reflected in the reference to 'the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities' in clause 3(a) of the Competition Principles Agreement (1995), the concluding words in that clause and the statement in clause 9(f) of the Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms (2016) that Government business activities 'should comply with competitive neutrality principles to ensure that they do not enjoy a net competitive advantage' can be read as adopting the alternative objective. Although the two are related and although adoption of the former objective may usually achieve the latter, they are distinct and not always consistent as some of the recent discussions concerning reform of s. 46 of the CCA have shown. As, in some cases, this may be relevant to the application of a public interest exemption, in the IPA's opinion, the Review should unambiguously make clear that the objective of CN is the protection and enhancement of competition by 'the elimination of resource allocation distortion arising out of the public ownership of entities engaged in significant business activities'.

A 'business activity'

The current criteria for determining whether a government entity is engaged in a 'business activity' are satisfactory. Although the 'competitor' requirement may sometimes require difficult and contentious market definition issues to be resolved, these are issues with which competition law and practice are familiar and experienced so that there is no reason to believe that they will be more difficult to resolve in relation to CN than they are in other areas. While the 'user-charging' requirement is also useful as it filters out of consideration beneficent, as distinct from commercial, government activity, we have noted that this distinction can become easily blurred. We note that government agencies are offering free of charge services which are competing with private sector players. One example is in the space of tax related software and services. Even though there might be some benefit to

consumers there is also an overlap with the same services which have been developed and provided in the market by private sector players. In these situations it may be useful to consider the competitive impact on a case by case basis.

The requirement that the business activity be 'significant'

In connection with the requirement that a government entity's business activities must be 'significant' to be automatically subject to CN policy, the IPA would retain the existing $10m threshold for those businesses that are not already subject to that policy by virtue of being within one of the categories of business specifically deemed to be significant. As the Consultation Paper notes, this provides a simple means of determining whether a business activity is of that nature. Also, although the $10m figure has existed for some time and is designed to exclude from the automatic application of CN policy business activities in respect of which compliance costs would outweigh the benefits to be gained from the policy's application, we would not increase the figure in line with inflation. This is because doing so would risk prima facie excluding from the policy businesses (those with turnovers in excess of $10m but below the new, increased, threshold) that are capable of damaging competition, especially in small markets.

A factor influencing the IPA to support retention of the $10m threshold, rather than its reduction or elimination, is the two tier nature of the policy – a feature that it supports and would strengthen. Thus, although compliance with CN policy is automatic only for government entities engaged in 'significant' business activities, a complaint can still be made about other business activities which, if sustained through the complaints mechanism, can result in compliance being prescribed.

The public interest test

The IPA supports the retention in CN policy of a public interest exemption that would exempt a government entity's business activity from the application of that policy where this is considered to be in the public interest. This exemption should be broad so that all matters that are considered to be embraced by the public interest can be balanced against the detriment that would result from the exemption being granted. Thus, for example, it should

not be restricted to merely balancing the administrative costs of applying the CN policy to an activity against the benefits of doing so as the current Commonwealth CN Guidelines suggest. The IPA sees similarities between the objectives of the public interest exemption and those of the authorisation and notification procedures in Part VII of the CCA. As a result, it is of the view that, given that CN is an aspect of competition policy, it would be desirable for exemptions to be available to government entities in respect of particular business activities only where authorisation or notification would be available under the CCA; that is, where exempting the activity would 'result, or be likely to result, in a benefit to the public' that outweighs 'the detriment to the public constituted by the lessening of competition that would result' from the exemption. If it is considered that it would be too onerous to expect an entity to establish this before an exemption were available (as authorisation would require) then a process akin to notification could be adopted. This would confer an exemption unless and until it was determined that the exemption was not in the public interest. An appropriate body for making such determinations would be an expanded Australian Government Competitive Neutrality Complaints Office (AGCNCO), relocated from the Productivity Commission to the ACCC.

Competitive neutrality and start-up government business

CN should be built into the planning and business models of new government business activities. However, they should not be required to publish information that in the private sector would be regarded as commercial in confidence.

The IPA appreciates that, just as in the private sector, it may take some time for a new government business activity to earn a commercial rate of return and that in the meantime the activity may require some form of subsidy. Unless monitored, this could have anti-competitive consequences. Given the variables relevant to determining what is justifiable in particular cases it is suggested that a procedure modelled on notification be adopted. For example, it could require the government entity to notify the AGCNCO of the assistance being given to the business activity that would otherwise contravene the CN Policy and for the AGCNCO to determine whether, in the particular circumstances, this was commercially appropriate and for what period of time.

Competitive neutrality compliance reporting and accountability

The IPA agrees that there is little community and business awareness of CN Policy; in particular, of the obligations it imposes and the benefits and opportunities it creates. Ways of addressing this include requiring government entities engaged in significant business activities to include in their annual reports a statement setting out how they are ensuring compliance with CN Policy, requiring such entities to publish as part of their annual reports the results of any CN complaints made against them in terms settled by the AGCNCO and encouraging bodies such as the ACCC to include references to CN Policy on their websites and in their other forms of communication.

Competitive neutrality complaints process

The IPA believes that CN Policy would be enhanced by the introduction of remedy and compliance monitoring provisions. This would encourage compliance with that policy and provide a tangible means of addressing the detrimental effects of non-compliance where that occurs.

Remedy provisions: these should enable businesses suffering loss or damage as a result of a government entity's business activity contravening CN Policy to recover compensatory damages for their loss or damage. As well as addressing the justice of the case, in some instances this may enable them to remain competitive in the market, thereby furthering the objectives of CN Policy, where this may otherwise not be possible. In addition to allowing the recovery of damages, remedy provisions should be framed to enable other remedial measures to be taken; again, the remedy provisions of the CCA can provide guidance in this regard.

The IPA notes that the list of AGCNCO complaint investigations set out in Appendix C of the Consultation suggests that the introduction of remedy provisions along the lines suggested would not be burdensome.

Compliance monitoring: although the AGCNCO may determine that a government entity's business activity has not complied with CN Policy, it does not follow up with that entity to ensure that its non-compliance has been rectified. The AGCNCO should be empowered and required to do this and to publicise the results of its efforts.

Yours sincerely

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