

South Australia

# Government Business Enterprises (Competition) Act 1996

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

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## Legislative history

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## The Parliament of South Australia enacts as follows:

### Part 1—Preliminary

#### 1—Short title

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

#### 3—Interpretation

In this Act—

**confidential information** means—

- (a) information that is commercially sensitive or otherwise of its nature confidential; or
- (b) information that is provided on a confidential basis; or
- (c) information that is declared by its terms to be confidential or is affected by a contractual requirement as to confidentiality; or
- (d) information that is otherwise affected by a requirement as to confidentiality,

but does not include information that is publicly available (unless the information became publicly available through a breach of a duty of confidentiality);

**declared GBE** means a GBE declared to be subject to prices oversight under Part 3;<sup>1</sup>

**declared market** means a market in which a declared GBE is subject to prices oversight;<sup>2</sup>

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

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

**government agency** means—

- (a) a Minister; or
- (b) an administrative unit of the Public Service; or
- (c) any other agency or instrumentality of the Crown that is subject to control or direction by a Minister;

**local government agency** means—

- (a) a council, or a body established by a council, under the *Local Government Act 1999*; or

(b) the Local Government Finance Authority of South Australia;

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

*pricing recommendation* — See section 4;

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

*services* includes the supply of goods.

**Examples—**

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

**Notes—**

- 1 See section 8(1).
- 2 See section 8(3)(a).

#### **4—Pricing recommendation**

(1) A pricing recommendation—

(a) may contain recommendations about pricing principles; or

**Examples—**

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

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

(b) may recommend price limitations.

**Examples—**

For example, a pricing recommendation may contain recommendations about—

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

(2) A pricing recommendation remains current until—

(a) superseded by a later pricing recommendation; or

(b) if not superseded during a term (which cannot exceed 5 years) stated in the recommendation—the end of that term.

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

## **Part 2—Competition Commissioners**

### **5—Appointment of Commissioners**

(1) The Governor may appoint Commissioners.

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

**Examples—**

- a person might be appointed for a specified term and on specified terms and conditions;
  - a person might be appointed on specified terms and conditions to carry out a specified investigation.
- (3) However, an appointment cannot be made or renewed for more than 2 years (although the aggregate of the initial term and one or more renewals may be more than 2 years).
- (4) A Commissioner cannot be removed from office except for—
- (a) mental or physical incapacity to carry out official duties satisfactorily; or
  - (b) misconduct.
- (5) A Commissioner is not, as such, a member of the Public Service of the State.

## **6—Independence of the Commissioners**

- (1) A Commissioner is not subject to Ministerial direction about a recommendation, finding or report.
- (2) However, the Minister may, by written direction given to a Commissioner, require the Commissioner to take into account specified facts, policies or issues in a particular investigation.

## **7—Power to require attendance of witness or production of documents**

- (1) For the purposes of an investigation, a Commissioner may issue a summons—
- (a) requiring a person to attend before the Commissioner at a specified time and place to give evidence; or
  - (b) requiring a person to produce specified documentary material to the Commissioner within a specified period.
- (2) A person who fails, without reasonable excuse, to comply with a summons under this section is guilty of an offence.
- Maximum penalty: \$1 000.

## **Part 3—Prices oversight**

### **Division 1—GBE subject to prices oversight**

#### **8—Liability to prices oversight**

- (1) The Governor may, by proclamation, declare a GBE to be subject to prices oversight.
- (2) A declaration may only be made under this section if the Governor is satisfied that the GBE has the market power of a monopoly or near monopoly in one or more markets.
- (3) A declaration under this section—
- (a) must identify the market or markets in relation to which the GBE is subject to prices oversight; and
  - (b) must fix the period for which the declaration is to be effective.

- (4) The Governor may, by proclamation—
  - (a) amend a declaration under this section; or
  - (b) extend the period for which a declaration under this section is to be effective; or
  - (c) revoke a declaration under this section.

## **Division 2—Investigation**

### **9—Requirement to make investigation and make pricing recommendation**

- (1) The Minister may assign a Commissioner to carry out an investigation into the prices charged by a declared GBE in a declared market—whether or not a pricing recommendation relevant to those prices is current.
- (2) If a declared GBE notifies its portfolio Minister of an intention to increase prices for services provided in a declared market and there is no current pricing recommendation relevant to those prices, the Minister must, at the request of the portfolio Minister, assign a Commissioner to carry out an investigation into the prices charged by the GBE in the declared market.
- (3) A Commissioner cannot be assigned to carry out an investigation into the prices charged by a GBE in a declared market if—
  - (a) the Commissioner has a business or commercial relationship with the GBE (other than a relationship of a kind that is common to a substantial section of the public); or
  - (b) the Commissioner is, for some other reason, subject to influence or control by the GBE.
- (4) A Commissioner assigned to carry out an investigation under this section must—
  - (a) carry out an investigation to enable the Commissioner to make a pricing recommendation about the prices to be charged by a declared GBE for services provided in the declared market; and
  - (b) provide a report on the investigation (including a pricing recommendation) within a period fixed by the Minister.

### **10—Budget for carrying out investigation**

- (1) Before a Commissioner begins an investigation, the Commissioner must—
  - (a) prepare a budget setting out the estimated costs of the proposed investigation; and
  - (b) discuss the budget with the GBE and the GBE's portfolio Minister; and
  - (c) submit the budget to the Minister for approval.
- (2) The Minister may approve a budget submitted under this section with or without amendment.
- (3) The GBE must, if the Minister directs, pay to the Minister the cost of carrying out the investigation, as disclosed in an approved budget, or a proportion of that cost decided by the Minister.

## 11—Public notice of investigation

- (1) When a Commissioner begins an investigation, the Commissioner must give public notice of the investigation, in a manner and form determined by the Commissioner to be most appropriate in the circumstances, inviting interested persons to make written representations on the subject matter of the investigation within a period (which must be reasonable) specified in the notice for that purpose.
- (2) The Commissioner must consider all representations made in response to the notice.

## 12—Matters to be considered by Commissioner in carrying out investigation

- (1) The prime objective of a Commissioner in carrying out an investigation and making a pricing recommendation is—
  - (a) to achieve prices that reflect, in the Commissioner's opinion, the cost of efficient production and supply; and
  - (b) through that means to achieve efficient resource allocation,so far as that objective is consistent with explicitly identified and defined community service obligations imposed on the relevant GBE by Act of Parliament or by the Government.
- (2) In the furtherance of that objective, the Commissioner must have regard to—
  - (a) the need to protect consumers from abuse of market power; and
  - (b) the costs of efficient production and supply; and
  - (c) the costs of complying with government policies and Ministerial directions and, in particular the costs of carrying out community service obligations, to the extent the relevant costs are not reimbursed; and

### Examples—

For example—

- if it is government policy that services should be available to metropolitan and country users at the same price even though it is more costly to provide the services in the country, the costs of complying with that policy are to be considered by the Commissioner in arriving at the pricing recommendation;
  - if it is government policy that services are to be provided to pensioners at a reduced price, the cost of giving that concession (to the extent the cost is not reimbursed out of the general revenue of the State) must be considered by the Commissioner in arriving at the pricing recommendation.
- (d) the provisions of any relevant intergovernmental agreement or understanding; and
  - (e) the efficiency of the GBE's operations and the targets for efficient delivery of the relevant services that should reasonably be met by the GBE; and
  - (f) the quality of the relevant services and the possible effect implementation of the proposed pricing recommendation would have on the quality of services; and
  - (g) the need for sufficient revenue to defray outgoings and achieve a reasonable return on assets; and

- (h) the cost of complying with statutory and other legal obligations; and
- (i) matters the Minister directs the Commissioner to take into account; and
- (j) other relevant matters.

### **13—Draft report and pricing recommendation**

- (1) When a Commissioner completes an investigation, the Commissioner must prepare a draft report setting out the findings made on the investigation, the proposed pricing recommendation and the reasons for it.
- (2) The report must also contain—
  - (a) a list of the persons who gave evidence or made submissions to the Commissioner; and
  - (b) a list of persons who prepared expert reports for the purposes of the investigation and the topics of the various reports; and
  - (c) a statement of the cost of the investigation.
- (3) The Commissioner must submit a copy of the draft report for comment to—
  - (a) the Minister; and
  - (b) the GBE; and
  - (c) other person to whom the Minister directs that a copy of the draft report is to be given.
- (4) The Commissioner must allow the persons to whom the draft report is submitted for comment a reasonable time to comment on the draft report.

### **14—Final report**

- (1) As soon as practicable after the time allowed for comment on the draft report has passed, the Commissioner must—
  - (a) consider any comments made on the draft report; and
  - (b) make any amendments to the report and the pricing recommendation the Commissioner considers appropriate in the light of the comments; and
  - (c) issue the report as a final report.
- (2) When the Commissioner issues a report as a final report, the Commissioner must give a copy of the report to the Minister.
- (3) The Minister must—
  - (a) have the final report published in the Gazette as soon as practicable after receiving it; and
  - (b) have copies of the final report laid before both Houses of Parliament within 6 sitting days after receiving it.

## Division 3—Limitation on GBE's power

### 15—Increase of prices

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

## Part 4—Principles of competitive neutrality

### 16—Principles of competitive neutrality

- (1) *Principles of competitive neutrality* are principles designed to neutralise any net competitive advantage that a government or local government agency engaged in significant business activities would otherwise have, by virtue of its control by the government or local government, over private business operating in the same market.
- (2) The principles of competitive neutrality are principles identified in policies published by the Minister from time to time for the purposes of this Part.
- (3) The Minister may publish policies under subsection (2)—
  - (a) by making the policies available for inspection by the public at a place determined by the Minister; and
  - (b) by publishing the policies in such other manner as the Minister thinks fit.
- (4) Policies published by the Minister under subsection (2)—
  - (a) may include provisions which define or limit the scope of the application of principles of competitive neutrality under this Act; and
  - (b) may operate by reference to materials referred to in the policies; and
  - (c) may amend, or provide for the substitution of, policies previously published under this section.

### 17—Complaints

- (1) A person that competes, or seeks to compete, in a particular market may make a complaint to the Minister alleging an infringement of the principles of competitive neutrality by a government or local government agency.
- (2) A complaint—
  - (a) must be in writing; and
  - (b) must contain full details of the alleged infringement; and
  - (c) must contain any further information required under the regulations.

### 18—Assignment of Commissioner

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



- (2) However—
- (a) the Minister must not assign a complaint to a Commissioner unless the Minister is satisfied that the matter has been referred to the relevant government or local government agency for investigation (or further investigation) and report and the Minister is satisfied that there is no reasonable prospect of the matter being resolved by agreement between the parties; and
  - (b) the Minister may refuse to assign a complaint to a Commissioner if the Minister considers that a previous investigation by a Commissioner has found that the business activities of the relevant government or local government agency on which the complaint is based comply with principles of competitive neutrality (unless there has been a change in the principles, or a change in the business activities of the government or local government agency, which affects the relevance of that finding); and
  - (c) the Minister may refuse to assign a complaint to a Commissioner if the Minister considers that the complaint is frivolous or vexatious, or that the matter raised in the complaint is trivial.

### **19—Investigation of complaint by Commissioner**

- (1) A Commissioner assigned to investigate a complaint of infringement of the principles of competitive neutrality must investigate the complaint.
- (2) A Commissioner may, if appropriate, delegate any aspect of the investigation to another person.
- (3) The Commissioner must prepare a report on the outcome of the investigation and give a copy of the report to—
  - (a) the Minister; and
  - (b) the complainant; and
  - (c) the government or local government agency alleged to have infringed the principles of competitive neutrality.
- (4) The report must set out or include—
  - (a) a determination as to whether the grounds of the complaint have been substantiated; and
  - (b) the Commissioner's reasons for making the determination; and
  - (c) if the Commissioner finds that the principles of competitive neutrality have been infringed by a government or local government agency—the Commissioner's recommendations in relation to the matter (which may include recommendations for the implementation of policies or practices to avoid further infringement of the same kind).
- (5) The Commissioner must also prepare a summary of the contents of a report under this section.
- (6) The Minister must ensure that copies of any summary are available for inspection by the public at a place determined by the Minister.
- (7) A summary must not disclose confidential information.

## Part 5—Miscellaneous

### 20—Confidentiality

- (1) A person who is, or has been, engaged in work related to an investigation under this Act must not, in respect of confidential information obtained in the course of that work, disclose or use the confidential information except—
  - (a) in the course of carrying out official duties; or
  - (b) as authorised by a person who is entitled to the benefit of a duty of confidentiality in respect of the information; or
  - (c) as authorised or required by law.

Maximum penalty: \$10 000.

- (2) A complainant must not, in respect of confidential information obtained through the provision of a report of an investigation under this Act—
  - (a) disclose the confidential information; or
  - (b) use the confidential information for a purpose unrelated to the making or resolution of the complaint,except—
  - (c) as authorised by the Minister; or
  - (d) as authorised by a person who is entitled to the benefit of a duty of confidentiality in respect of the information; or
  - (e) as authorised or required by law.

Maximum penalty: \$10 000.

- (3) A reference in this section to an investigation includes an investigation undertaken by a government or local government agency under or in connection with the operation of the principles of competitive neutrality or otherwise under or in connection with the operation of Part 4.

### 21—Annual report

The annual report of the administrative unit of the Public Service that is responsible, under the Minister, for the administration of this Act must include a report on the investigations carried out under this Act for the relevant financial year.

### 22—Regulations

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

## Legislative history

### Notes

- Please note—References in the legislation to other legislation or instruments or to titles of bodies or offices are not automatically updated as part of the program for the revision and publication of legislation and therefore may be obsolete.
- Earlier versions of this Act (historical versions) are listed at the end of the legislative history.
- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal Act and amendments

New entries appear in bold.

| Year        | No        | Title   | Assent           | Commencement  |
|-------------|-----------|---|------------------|---|
| 1996        | 56        | <i>Government Business Enterprises (Competition) Act 1996</i>                           | 8.8.1996         | 16.8.1996 ( <i>Gazette 15.8.1996 p526</i> )                     |
| 2000        | 2         | <i>Government Business Enterprises (Competition) (Miscellaneous) Amendment Act 2000</i> | 13.4.2000        | 25.5.2000 ( <i>Gazette 25.5.2000 p2627</i> )                    |
| 2009        | 84        | <i>Statutes Amendment (Public Sector Consequential Amendments) Act 2009</i>             | 10.12.2009       | Pt 71 (ss 168 & 169)—1.2.2010 ( <i>Gazette 28.1.2010 p320</i> ) |
| <b>2019</b> | <b>25</b> | <b><i>Statutes Amendment and Repeal (Simplify) Act 2019</i></b>                         | <b>3.10.2019</b> | <b>Pt 21 (s 44)—3.10.2019: s 2(1)</b>                           |

### Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

| Provision                | How varied   | Commencement     |
|--------------------------|--|------------------|
| Pt 1                     |  |                  |
| <i>s 2</i>               | <i>omitted under Legislation Revision and Publication Act 2002</i> |                  |
| s 3                      |  |                  |
| confidential information | inserted by 2/2000 s 3(a)  | 25.5.2000        |
| government agency        | substituted by 2/2000 s 3(b)                                       | 25.5.2000        |
|                          | amended by 84/2009 s 168   | 1.2.2010         |
| local government agency  | inserted by 2/2000 s 3(b)  | 25.5.2000        |
| Pt 3                     |  |                  |
| <b>s 11</b>              |  |                  |
| <b>s 11(1)</b>           | <b>substituted by 25/2019 s 44</b>                                 | <b>3.10.2019</b> |

## Government Business Enterprises (Competition) Act 1996—3.10.2019

### Legislative history

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#### Pt 4

##### s 16

s 16(1) amended by 2/2000 s 4(a) 25.5.2000

s 16(2)—(4) substituted by 2/2000 s 4(b) 25.5.2000

##### s 18

s 18(2) substituted by 2/2000 s 5 25.5.2000

##### s 19

s 19(3) amended by 2/2000 s 6(a) 25.5.2000

s 19(4) substituted by 2/2000 s 6(b) 25.5.2000

s 19(5)—(7) inserted by 2/2000 s 6(b) 25.5.2000

#### Pt 5

##### s 20

s 20(1) amended by 2/2000 s 7(a), (b) 25.5.2000

s 20(2) substituted by 2/2000 s 7(c) 25.5.2000

s 20(3) inserted by 2/2000 s 7(c) 25.5.2000

s 21 substituted by 84/2009 s 169 1.2.2010

## Historical versions

Reprint No 1—25.5.2000

1.2.2010