

**Competition and Infrastructure Reform Agreement
10 February 2006**

WHEREAS the Council of Australian Governments at its meeting in Canberra on 10 February 2006 agreed to a programme for the implementation of further National Competition Policy reforms;

AND WHEREAS the Parties intend to achieve a simpler and consistent national approach to the economic regulation of significant infrastructure;

THE COMMONWEALTH OF AUSTRALIA

THE STATE OF NEW SOUTH WALES

THE STATE OF VICTORIA

THE STATE OF QUEENSLAND

THE STATE OF SOUTH AUSTRALIA

THE STATE OF WESTERN AUSTRALIA

THE STATE OF TASMANIA

THE AUSTRALIAN CAPITAL TERRITORY, AND

THE NORTHERN TERRITORY OF AUSTRALIA

agree as follows:

Interpretation

- 1.1 For the purposes of this agreement significant infrastructure means infrastructure, including ports and export related infrastructure, that falls within the scope of subclause 6(3)(a) of the Competition Principles Agreement or Part IIIA of the *Trade Practices Act 1974*.
- 1.2 Nothing in this agreement requires existing access regimes certified in accordance with Part IIIA of the *Trade Practices Act 1974* to be resubmitted for assessment.
- 1.3 The access regimes for electricity and gas which are to be developed and certified in accordance with the Australian Energy Market Agreement and the access regime for the Tarcoola to Darwin Railway will be taken to satisfy the requirements of clause 2 of this agreement.
- 1.4 For the purposes of clause 6.1 government business enterprises are enterprises that are incorporated under State, Territory or Commonwealth legislation and are classified as Public Financial Corporations or Public Non-Financial Corporations, excluding central borrowing authorities, under the Government Financial Statistics Classifications.

- 1.5 For the purposes of this agreement the term “regulator” also includes dispute resolution bodies.
- 1.6 This agreement is to be read in conjunction with, and does not replace, the Competition Principles Agreement 1995 and the *Trade Practices Act 1974*.

Simpler and consistent regulation of significant infrastructure

- 2.1 The Parties agree to establish a simpler and consistent national approach to economic regulation of significant infrastructure.
- 2.2 The Parties agree that, in the first instance, terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure.
- 2.3 The introduction of price monitoring for services provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or when scaling back from more intrusive regulation.
- 2.4 All third party access regimes for services provided by means of significant infrastructure facilities will include the following consistent regulatory principles.
 - a. Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.
 - b. Regulated access prices should be set so as to:
 - i. generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
 - ii. allow multi-part pricing and price discrimination when it aids efficiency;
 - iii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
 - iv. provide incentives to reduce costs or otherwise improve productivity.
 - c. Where merits review of regulatory decisions is provided, the review will be limited to the information submitted to the regulator.
- 2.5 The Parties agree to amend clause 6 of the Competition Principles Agreement to include subclause 2.4 above.
- 2.6 The Parties agree to introduce requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided that the regulator has been given sufficient information.
 - a. Regulators will have the discretion to determine when the six month time limit is suspended:
 - i. Grounds for commencing time limits include when the regulator considers that sufficient information has been provided to enable the regulatory process to commence; and

- ii. Grounds for suspending time limits include requests for further information from significant infrastructure facility service providers, provided these are on reasonable grounds, and consultation periods during which the regulator seeks submissions from third parties or the community.
 - b. Where the service provider of a significant infrastructure facility has not provided the requested information, a regulator will be permitted to make a determination on the information before it in order to satisfy six month time limits.
- 2.7 The principles in clause 2.4 and 2.6 will be incorporated in existing access regimes for services provided by means of significant infrastructure facilities and Part IIIA of the *Trade Practices Act 1974* as soon as practicable or as they are reviewed, provided that they are included in such regimes no later than the end of 2010.
- 2.8 Commonwealth and State officials will oversight the implementation of the principles in clauses 2.4 and 2.6, including developing a streamlined process and appropriate administrative arrangements for the certification of access regimes, and may develop further proposals for consideration by COAG for the adoption of appropriate additional regulatory principles that may contribute to a simpler and consistent national approach to regulation.
- 2.9 The Parties agree that, to advance the objective of a simpler and consistent national approach to regulation, all state and territory access regimes for services provided by means of significant infrastructure facilities will be submitted for certification in accordance with the *Trade Practices Act 1974* and the Competition Principles Agreement.
- a. All new third party access regimes will be submitted for certification as soon as practicable.
 - b. Third party access regimes existing at the time this agreement commences will be submitted for certification as soon as practicable, or as they are reviewed, provided they are submitted for certification no later than the end of 2010.
 - c. The certification of access regimes under this clause is subject to Parties agreeing a streamlined certification process and appropriate administrative arrangements to be developed as part of the mechanism established under clause 2.8.

Rail freight infrastructure

- 3.1. The Parties agree to implement a simpler and consistent national system of rail access regulation, using the Australian Rail Track Corporation access undertaking to the Australian Competition and Consumer Commission as a model, to apply to the following agreed nationally significant railways:
- a. Interstate rail track from Perth to Brisbane, currently managed by the Australian Rail Track Corporation and other parties, subject to the outcome of commercial negotiations; and
 - b. Major intra-state freight corridors on an agreed case by case basis depending on the costs and benefits of inclusion under a national regime.
- 3.2. The Parties agree to develop an agreed approach to the application of the Australian Rail Track Corporation access undertaking model including pricing and access mechanisms that will be appropriate if vertically integrated operators retain control of relevant sections of track.
- 3.3. The Parties agree that state based rail access regimes governing other significant export related rail infrastructure facilities will be submitted for certification as required by clause 2.9.

3.4. This agreement does not require any change to passenger priority policies.

Port competition and regulation

4.1. The Parties agree that:

- a. ports should only be subject to economic regulation where a clear need for it exists in the promotion of competition in upstream or downstream markets or to prevent the misuse of market power; and
- b. where a Party decides that economic regulation of significant ports is warranted, it should conform to a consistent national approach based on the following principles:
 - i. wherever possible, third party access to services provided by means of ports and related infrastructure facilities should be on the basis of terms and conditions agreed between the operator of the facility and the person seeking access;
 - ii. where possible, commercial outcomes should be promoted by establishing competitive market frameworks that allow competition in and entry to port and related infrastructure services, including stevedoring, in preference to economic regulation;
 - iii. where regulatory oversight of prices is warranted pursuant to clause 2.3, this should be undertaken by an independent body which publishes relevant information; and
 - iv. where access regimes are required, and to maximise consistency, those regimes should be certified in accordance with the *Trade Practices Act 1974* and the Competition Principles Agreement.

4.2. The Parties agree to allow for competition in the provision of port and related infrastructure facility services, unless a transparent public review by the relevant Party indicates that the benefits of restricting competition outweigh the costs to the community, including through the implementation of the following:

- a. port planning should, consistent with the efficient use of port infrastructure, facilitate the entry of new suppliers of port and related infrastructure services;
- b. where third party access to port facilities is provided, that access should be provided on a competitively neutral basis;
- c. Commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly powers; and
- d. any conflicts of interest between port owners, operators or service providers as a result of vertically integrated structures should be addressed by the relevant Party on a case by case basis with a view to facilitating competition.

4.3. Each Party will review the regulation of ports and port authority, handling and storage facility operations at significant ports within its jurisdiction to ensure they are consistent with the principles set out in clauses 4.1 and 4.2.

- a. Significant ports include:
 - i. Major capital city ports and port facilities at these ports;
 - ii. Major bulk commodity export ports and port facilities, except those considered part of integrated production processes; and
 - iii. Major regional ports catering to agricultural and other exports.

Promotion of competitive infrastructure arrangements through competitive tendering

- 5.1. In some circumstances competitive infrastructure market structures are not feasible because the infrastructure exhibits natural monopoly characteristics. Where governments are considering the development of such monopoly infrastructure, they can initiate competition for the market through competitive tendering that promotes efficient service delivery. This allows the market to establish the terms and conditions for the supply of infrastructure services, reducing the need for subsequent regulation.
- 5.2. The Parties agree to consider the use of competitive tendering to establish the terms and conditions for the supply of significant new services provided by government owned monopoly infrastructure.
- 5.3. The Commonwealth has introduced amendments to Part IIIA of the *Trade Practices Act 1974* to provide that declaration will not apply to government owned infrastructure developed by way of a competitive tender approved by the Australian Competition and Consumer Commission.
- 5.4. For the purposes of clause 5.3, the Parties agree to work together to develop a consistent set of criteria for access related elements of tenders for the provision of nationally significant infrastructure facility services.

Competitive neutrality of government business enterprises

- 6.1 The Parties agree to enhance the application of competitive neutrality principles to government business enterprises engaged in significant business activities in competition with the private sector:

Objectives

- a. That the enterprise has clear commercial objectives.
- b. That any non commercial objectives or obligations established for the enterprise are clearly specified and publicly reported.
- c. That enterprises do not exercise regulatory or planning approval functions in circumstances in which they compete with private sector enterprises.

Governance

- d. That the responsibilities of the governing board of the enterprise and the performance measures against which the board will be held accountable are published.
- e. That the governing board is appointed on the basis of particular skills needed by the board.
- f. That having received strategic guidance from the government about the achievement of its objectives, the enterprise has operational autonomy in the day to day management of its affairs.
- g. That the dividend policy applicable to the enterprise should be clearly and publicly specified.
- h. That any payments to the government as shareholder or for the purposes of competitive neutrality, such as taxes, tax equivalent payments, special dividends, capital repayments, are identified in a transparent manner.

Reporting

- i. That at least annually the enterprise will report publicly on its commercial performance and on its performance of any non commercial activities.
- j. That any directions given to the enterprise by the government are published.

- k. That where the legislation establishing an enterprise derogates from competitive neutrality the derogation has been published.

New Parties and Withdrawal of Parties

- 7.1 A jurisdiction that is not a Party at the date of this Agreement commences operation may become a Party by sending written notice to all the Parties.
- 7.2 A Party may withdraw from this Agreement by sending written notice to all other Parties. The withdrawal will become effective six months after the notice was sent.
- 7.3 If a Party withdraws from this Agreement, this Agreement will continue in force in respect of the remaining Parties.

Review of this Agreement

- 8.1 Once this Agreement has operated for five years, the Parties will review its operation and terms.

Commencement of this Agreement

- 9.1 This Agreement commences once the Commonwealth and at least four other jurisdictions have executed it.