

NSW GOVERNMENT RESPONSE

to the

REVIEW OF PORT COMPETITION AND REGULATION IN NSW

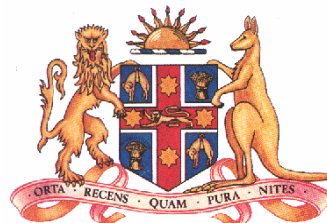
under the

COUNCIL OF AUSTRALIAN GOVERNMENTS'

COMPETITION AND INFRASTRUCTURE REFORM

AGREEMENT

SEPTEMBER 2008



RESPONDING EFFECTIVELY TO A GROWING FREIGHT TASK

FACILITATING TRADE GROWTH

As an island nation, Australia relies on its ports for the vast majority of its international trade. Demand for port services and port-related supply chain services is rapidly increasing across the NSW economy.

The 2003 NSW Ports Growth Plan provides strategic direction to ensure NSW continues to benefit from strong future trade levels by expanding port capacity to meet demand. This includes the expansion of Port Botany, the transfer of car and general cargo stevedoring from Sydney Harbour to Port Kembla, and increasing capacity at Newcastle.

Major port expansion projects are underway to support the Ports Growth Plan. These include the \$1 billion Port Botany expansion; the \$150 million Enfield Intermodal Logistics Centre; \$167 million expansion of facilities at Port Kembla to accommodate car stevedoring, container and general cargo; more than \$1.1 billion worth of new and expanded coal loading facilities at Newcastle; and redevelopment of the former BHP site at Mayfield.

NATIONAL REFORM AGENDA

On 10 February 2006, the Council of Australian Governments (COAG) agreed to a National Reform Agenda. The Reform Agenda is designed to make markets work more efficiently, foster the efficient use of national infrastructure and reduce the regulatory burden on Australian business.

At the same time, COAG endorsed a Competition and Infrastructure Reform Agreement (CIRA) setting out actions to achieve a simpler and more consistent national approach to the economic regulation of significant infrastructure. Actions under the CIRA are designed to support the efficient use of significant infrastructure by reducing regulatory uncertainty and compliance costs for owners, users and investors.

As part of the CIRA, COAG agreed to review the regulation of 'significant' ports, port authorities and handling and storage facility operations to ensure they are consistent with the following access, planning and competition principles:

- wherever possible, third-party access to port services should be on the basis of agreed terms and conditions;
- commercial outcomes should be promoted by establishing competitive market frameworks in preference to economic regulation;
- where regulatory oversight of prices is warranted, this should be undertaken by an independent body which publishes relevant information; and

- 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.

REVIEW OF PORT COMPETITION AND REGULATION IN NSW

The CIRA Review of Port Competition and Regulation in NSW was conducted by PricewaterhouseCoopers (PwC) in 2007. The review process was overseen by a Steering Committee comprising representatives from the Department of Premier and Cabinet, NSW Treasury, NSW Maritime and the Ministry of Transport.

PwC was tasked with assessing the regulation of Sydney Ports, the Port of Newcastle and Port Kembla (including the regulation of handling and storage facility operations such as stevedores, coal terminals etc) against the CIRA principles. In particular, the review sought to:

- assess whether the current economic regulation of significant ports conforms with the principle that ports should only be subject to economic regulation where it is required to promote competition in upstream or downstream markets or to prevent any abuse of market power;
- assess whether the prices, terms, and conditions for port facilities reflect commercially agreed outcomes and that no government business accrues any net competitive advantage as a result of its public sector ownership;
- determine whether any restrictions to competition imposed by regulation generate benefits to the community that outweigh any costs; and
- identify any inconsistencies or divergence from the CIRA principles and make recommendations for achieving consistency with the principles.

Public submissions were invited and PwC consulted with key stakeholders including the NSW Port Corporations, stevedores, port terminal operators and maritime unions. The PwC Issues Paper, submissions and Report can be found on the NSW Maritime website — www.maritime.nsw.gov.au.

Overall the review found that the current regulatory framework achieves an appropriate balance between promoting competition and ensuring viable port operations. Other key findings include:

- the NSW planning framework ensures the provision of adequate port facilities;
- common user provisions can facilitate market entry and non-preferential treatment of port users but can also restrict competition if open access facilities cannot match the same terms and conditions as another facility;
- pricing and access arrangements for port facilities and services do not constitute a significant barrier to entry or exit; and

- expanding the current levels of economic regulation of Port Corporation prices is not likely to deliver improved outcomes for competition.

The review did not recommend increasing the economic regulation of ports and port services, however it did make a number of recommendations in relation to improving port services, price oversight, lease and access arrangements. Accordingly, the proposals outlined below focus only on those aspects of port regulation that will deliver improvements in competition and port services consistent with the CIRA principles noted above.

PRIORITIES FOR IMPLEMENTATION

Improving competitive outcomes at the Ports

While each NSW Port Corporation has performed its statutory functions in a commendable manner, the PwC review has highlighted the need to ensure that, as demand for port services and port-related supply chain services increases, each Corporation is empowered with the tools necessary to ensure that:

- competition occurs both for and between port services operations;
- coordination of port-related supply chain services can occur, where needed; and
- port services and port-related supply chain service providers maintain service standards that meet economic and productivity performance benchmarks.

The *Ports and Maritime Administration Act 1995* (PMAA) sets out statutory objectives for the Port Corporations, which include efficiency and business success but do not make any explicit reference to fostering a competitive commercial environment.

In order to provide clear policy direction and improve the competitiveness of port operations, the Government will modernise the statutory objectives of the Port Corporations to allow for the provision of a more competitive commercial environment by including objectives to:

- foster competition and commercial behaviour in port operations; and
- advance productivity and efficiency in the port and the port-related supply chain.

The PwC review also noted that “more could be done to ensure that terms and conditions of long term leases encourage as much as possible a competitive environment in respect of leased lands and facilities”. The review called on the Government to explore viable options for improving the transparency of the way in which the terms and conditions for long term leases of Port Corporation land are determined.

It is proposed to revise the leasing practices of the Port Corporations to ensure future leases of major port facilities such as stevedoring terminals

contain appropriate provisions to foster enhanced competition, investment and productivity. New lease conditions could include minimum terms of duration; productivity/performance targets, including incentives and penalties; and end-of-term handover provisions. These modernised practices could be furthered through the revised objectives outlined above. Where there is a need to balance competition and commercial outcomes, the portfolio Minister could provide guidance to the Port Corporation through statutory directions.

Coordination of port related supply chain services

The efficient management of freight across the entire logistics chain, from producer to consumer, is crucial to the facilitation of trade growth at the State's major ports. This means that the commercial success of a Port Corporation depends to an extent on the performance of other businesses along the freight logistics supply chain. All participants in the chain need to work together to achieve whole-of-chain efficiency outcomes.

Lengthy coal ship queues at Newcastle and truck congestion at Port Botany demonstrate that these critical supply chains are not functioning optimally. There is a need for independent coordinative capacity to increase competition, improve planning and introduce greater efficiency and transparency throughout the chain.

To address this situation, the Hunter Valley Coal Chain Logistics Team (HVCCLT) was formed in 2003 to improve overall coal chain efficiency. More recently the Government has appointed the former NSW Premier Nick Greiner to facilitate the identification of a long term, sustainable solution for the coal industry to meet its export growth potential.

At Port Botany, the Government has asked the Independent Pricing and Regulatory Tribunal (IPART) to review the interface between stevedores and transport operators. IPART released its final report on 18 March 2008 and the Government is currently considering its response.

The PwC report stressed the need for ports to respond to the needs of the port services supply chain, including facilitating the improvement of landside and stevedoring infrastructure.

A coordinated approach to freight logistics issues requires leadership, impartiality and a safe environment for the input of confidential commercial information necessary to plan for improved performance. In order to optimise the efficiency of the supply chain at the ports, the Port Corporations should be provided with a framework to allow them to act as a coordinator of port-related supply chain services.

The framework will comprise, in addition to the new statutory objectives noted above, a new statutory function: to facilitate and coordinate landside port facilities and supply chain services so that these facilities and services meet performance standards set by the Minister. The framework may also include regulatory powers so that the Government can intervene if it is demonstrated

that voluntary initiatives are not effective in improving the efficiency of port services and supply chains.

Regulations could potentially require port services to report on performance or to meet identified performance or pricing standards. Any regulatory proposals under such a framework would require justification including a full regulatory impact assessment that demonstrates the need for action in accordance with both CIRA principles and the Government's Better Regulation Principles.

RESPONSE TO SPECIFIC RECOMMENDATIONS

The Government's response to each recommendation in the CIRA Report is set out in the following pages.

The Government will work to implement these recommended reforms by December 2008, as agreed by COAG in the Competition and Infrastructure Reform Agreement Implementation Plan.

<u>CIRA Review Recommendation</u>	<u>Government Response .</u>
<p>Recommendation 1: <i>Port corporations should be actively encouraged to continue to develop strong working relationships with business partners and infrastructure/logistics service providers to ensure that port corporations can respond to the needs of the port services supply chain. This could include working collaboratively with stakeholders to identify capacity constraints and other bottlenecks, and facilitate the improvement of landside and stevedoring infrastructure as required in each of the major ports.</i></p>	<p>Supported and being implemented.</p> <p>The following consultative mechanisms are currently in place at the three ports:</p> <p>Sydney The Port Botany Logistics Taskforce was established in 2006 to advise the Minister for Ports and Waterways on options for addressing inefficiencies in the transport of containers to and from Port Botany.</p> <p>The Sydney Ports Users Consultative Group (SPUCG) meets on a regular basis to advise SPC on the development of port infrastructure, road transport issues and rail and intermodal terminal operations and infrastructure.</p> <p>The Sydney Ports Cargo Facilitation Committee (SPCFC) also meets on a monthly basis to discuss matters such as stevedore container terminals operations, landside transport performance and the repositioning of surplus empty containers.</p> <p>Newcastle The Hunter Valley Coal Chain Logistics Team is a cooperative organisation (of which Newcastle Port Corporation is a member) which coordinates ship berthing, coal stockpiling and train sequencing.</p> <p>Port Kembla Port Kembla Port Corporation supports and is a member of the Port User Council, a body representing all facility operators and service providers in Port Kembla. Regular meetings are held under an independent Chair to discuss service delivery standards associated with the Port as a whole.</p> <p>While these mechanisms have fostered a strong working relationship with port stakeholders, it is recognised that the Port Corporations could play a more active role in ensuring future port growth. In order to achieve this outcome, the necessary</p>

<u>CIRA Review Recommendation</u>	<u>Government Response</u>
	<p>framework to enhance port facility management will be put in place through amendments to the Port Corporations' objectives and functions under the <i>Ports and Maritime Administration Act 1995</i> (PMAA) to include a statutory objective to advance productivity and efficiency in the port and the port-related supply chain and a statutory function to facilitate and coordinate landside port facilities and supply chain services so that these facilities and services meet performance standards set by the Minister.</p> <p>The framework could also include regulatory powers for reporting, performance and pricing if it is demonstrated that action is required because voluntary industry actions with the support of port corporations under their enhanced objectives and functions are insufficient to deliver improvements</p>
<p><i>Recommendation 2: Existing price oversighting arrangements for port corporation charges should continue to ensure that an appropriate balance is achieved between recovering efficient port corporation costs and facilitating trade. Port corporation prices should be regularly and appropriately benchmarked against those in other Australian jurisdictions to help assess the reasonableness of port corporation charges on an ongoing basis.</i></p>	<p>Supported and being implemented.</p> <p>The Minister for Ports and Waterways is responsible for approving statutory port charges under the PMAA. The Port Corporations review their port charges on an as needs basis. Such reviews routinely take account of overseas and interstate port pricing mechanisms.</p> <p>NSW Maritime will benchmark Port Corporation fees and charges when changes are proposed against those in other Australian jurisdictions.</p>
<p><i>Recommendation 3: The State Government should explore viable options for improving the transparency of the way in which the terms and conditions for long term leases of port corporation land are determined. This may include developing guiding principles or minimum requirements which can be made publicly available.</i></p>	<p>Supported and being implemented.</p> <p>Legislative arrangements to improve the competitiveness of port operations at NSW Ports will be put in place through amendments to the Port Corporations' statutory objectives under the PMAA.</p> <p>Under these new legislative arrangements, the Minister will be able to direct the Port Corporations to ensure that future leases of major port facilities such as stevedoring</p>

<u>CIRA Review Recommendation</u>	<u>Government Response</u>
<p><i>The State Government could also encourage vertically integrated businesses to improve the transparency of their pricing structure for port services, although it is acknowledged that anti-competitive pricing is a matter for the ACCC.</i></p> <p>Recommendation 4: <i>Terms and conditions of long-term leases should be reviewed (and potentially modernised) to ensure that they sufficiently and appropriately reflect changes in Government policy, such as moves to increase rail's share of the freight task.</i></p>	<p>terminals contain appropriate provisions to foster enhanced competition, investment and productivity.</p> <p>New lease conditions could include minimum terms of duration; review provisions; productivity/performance targets, including incentives and penalties; and end-of-term handover provisions.</p> <p>The Minister would also be in a position to require relevant vertically integrated businesses to publish their pricing structure.</p>
<p>Recommendation 5: <i>The State Government should take a consistent approach to setting the common user status of facilities on State Government land, with clear justifications conveyed to stakeholders for any differences that emerge.</i></p> <p>Recommendation 6: <i>If any differences emerge in common user status between terminals providing a competing service, and that difference is a result of government policy, the differential status should be subject to a transparent and publicly available net benefits test. Such a test would need to consider whether restrictions to open access for any stakeholder improve or limit the competitiveness of exports.</i></p>	<p>Supported and being implemented.</p> <p>The State Government seeks to ensure that all exporters have equal access to international markets and in particular, that smaller exporters are able to compete with larger producers on comparative terms. However, due to high capital costs, supply and demand, this is not always possible for bulk export facilities such as coal loaders.</p> <p>The examination of common user and fair access provisions will include, as a matter of routine, the application of a net benefit test. Subject to commercial confidentiality requirements, the criteria for a net benefit test would in normal circumstances be made publicly available.</p>
<p>Recommendation 7: <i>The State Government should explore options for streamlining the planning process for projects that are not assessed under Part 3A of the Environmental Planning and Assessment Act 1979 – the EP&A</i></p>	<p>Supported and being implemented.</p> <p>The <i>State Environmental Planning Policy (Infrastructure) 2007</i>, which commenced on 2 January 2008, provides additional scope for the Port Corporations to develop appropriate facilities in port areas without consent. Such</p>

<i>CIRA Review Recommendation</i>	<i>Government Response .</i>
<p><i>Act and are greater than \$5 million in value (ie those that are currently subject to assessment and approval under Part 4 of the EP&A Act). This could include expanding the scope for port corporations to be the consent authority for port investments above \$5 million under specified circumstances (the self management model provided for in Part 5 of the EP&A Act).</i></p>	<p>facilities include those used in connection with the carrying of freight and persons by water from one port to another for business or commercial purposes provided the facilities are on land within a designated port (within the meaning of section 47 of the PMAA).</p> <p>The Government has proposed to identify the ports at Newcastle, Botany and Port Kembla as State Significant Sites under the planning regime. Under this proposal, significant developments at the ports, such as berths or terminals worth more than \$30 million and hazardous goods facilities would come to the State Government for assessment. Public infrastructure works such as roads, rail and utilities (internal to port land) and dredging by public authorities would also be assessed by the Government. Other proposals for port facilities on port corporation-owned land would be assessed by the relevant port corporation under Part 5 of the EP&A Act.</p> <p>Public submissions were invited on the proposals and the Government is considering submissions received.</p>
<p><i>Recommendation 8: The State Government should keep abreast of the monitoring and reporting work of the Australian Competition and Consumer Commission (ACCC) and Bureau of Infrastructure, Transport and Regional Economics of stevedoring prices and productivity, and support the ACCC in its oversight of stevedoring behaviour.</i></p>	<p>Supported and being implemented.</p> <p>Stevedoring prices, productivity and behaviour are routinely considered and regularly inform port policy considerations.</p>