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# Competition Principles Agreement – 11 April 1995

## *(As amended to 13 April 2007)*

WHEREAS the Council of Australian Governments at its meeting in Hobart on 25 February 1994 agreed to the principles of competition policy articulated in the report of the *National Competition Policy Review*;

AND WHEREAS the Parties intend to achieve and maintain consistent and complementary competition laws and policies which will apply to all businesses in Australia regardless of ownership;

THE COMMONWEALTH OF AUSTRALIA

THE STATE OF NEW SOUTH WALES

THE STATE OF VICTORIA

THE STATE OF QUEENSLAND

THE STATE OF WESTERN AUSTRALIA

THE STATE OF SOUTH AUSTRALIA

THE STATE OF TASMANIA

THE AUSTRALIAN CAPITAL TERRITORY, AND

THE NORTHERN TERRITORY OF AUSTRALIA agree as follows:

### **Interpretation**

1.(1) In this Agreement, unless the context indicates otherwise:

“Commission” means the Australian Competition and Consumer Commission established by the Trade Practices Act;

“Commonwealth Minister” means the Commonwealth Minister responsible for competition policy;

“constitutional trade or commerce” means:

- (a) trade or commerce among the States;
- (b) trade or commerce between a State and a Territory or between two Territories; or
- (c) trade or commerce between Australia and a place outside Australia;

“Council” means the National Competition Council established by the Trade Practices Act;

“jurisdiction” means the Commonwealth, a State, the Australian Capital Territory or the Northern Territory of Australia;

“Party” means a jurisdiction that has executed, and has not withdrawn from, this Agreement;

“Trade Practices Act” means the *Trade Practices Act 1974*.

(2) Where this Agreement refers to a provision in legislation which has not been enacted at the date of commencement of this Agreement, or to an entity which has not been established at

the date of commencement of this Agreement, this Agreement will apply in respect of the provision or entity from the date when the provision or entity commences operation.

- (3) Without limiting the matters that may be taken into account, where this Agreement calls:
  - (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or
  - (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
  - (c) for an assessment of the most effective means of achieving a policy objective;the following matters shall, where relevant, be taken into account:
  - (d) government legislation and policies relating to ecologically sustainable development;
  - (e) social welfare and equity considerations, including community service obligations;
  - (f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
  - (g) economic and regional development, including employment and investment growth;
  - (h) the interests of consumers generally or of a class of consumers;
  - (i) the competitiveness of Australian businesses; and
  - (j) the efficient allocation of resources.
- (4) It is not intended that the matters set out in subclause (3) should affect the interpretation of “public benefit” for the purposes of authorisations or notifications under the Trade Practices Act.
- (5) This Agreement is neutral with respect to the nature and form of ownership of business enterprises. It is not intended to promote public or private ownership.

### **Prices Oversight of Government Business Enterprises**

- 2.(1) Prices oversight of State and Territory Government business enterprises is primarily the responsibility of the State or Territory that owns the enterprise.
- (2) The Parties will work cooperatively to examine issues associated with prices oversight of Government business enterprises and may seek assistance in this regard from the Council. The Council may provide such assistance in accordance with the Council’s work program.
- (3) In accordance with these principles, State and Territory Parties will consider establishing independent sources of price oversight advice where these do not exist.
- (4) An independent source of price oversight advice should have the following characteristics:
  - (a) it should be independent from the Government business enterprise whose prices are being assessed;
  - (b) its prime objective should be one of efficient resource allocation but with regard to any explicitly identified and defined community service obligations imposed on a business enterprise by the Government or legislature of the jurisdiction that owns the enterprise;

- (c) it should apply to all significant Government business enterprises that are monopoly, or near monopoly, suppliers of goods or services (or both);
  - (d) it should permit submissions by interested persons; and
  - (e) its pricing recommendations, and the reasons for them, should be published.
- (5) A Party may generally or on a case-by-case basis:
- (a) with the agreement of the Commonwealth, subject its Government business enterprises to a prices oversight mechanism administered by the Commission; or
  - (b) with the agreement of another jurisdiction, subject its Government business enterprises to the pricing oversight process of that jurisdiction.
- (6) In the absence of the consent of the Party that owns the enterprise, a State or Territory Government business enterprise will only be subject to a prices oversight mechanism administered by the Commission if:
- (a) the enterprise is not already subject to a source of price oversight advice which is independent in terms of the principles set out in subclause (4);
  - (b) a jurisdiction which considers that it is adversely affected by the lack of price oversight (an “affected jurisdiction”) has consulted the Party that owns the enterprise, and the matter is not resolved to the satisfaction of the affected jurisdiction;
  - (c) the affected jurisdiction has then brought the matter to the attention of the Council and the Council has decided:
    - (i) that the condition in paragraph (a) exists; and
    - (ii) that the pricing of the enterprise has a significant direct or indirect impact on constitutional trade or commerce;
  - (d) the Council has recommended that the Commonwealth Minister declare the enterprise for price surveillance by the Commission; and
  - (e) the Commonwealth Minister has consulted the Party that owns the enterprise.

### **Competitive Neutrality Policy and Principles**

- 3.(1) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.
- (2) Each Party is free to determine its own agenda for the implementation of competitive neutrality principles.
- (3) A Party may seek assistance with the implementation of competitive neutrality principles from the Council. The Council may provide such assistance in accordance with the Council’s work program.
- (4) Subject to subclause (6), for significant Government business enterprises which are classified as “Public Trading Enterprises” and “Public Financial Enterprises” under the Government Financial Statistics Classification:

- (a) the Parties will, where appropriate, adopt a corporatisation model for these Government business enterprises (noting that a possible approach to corporatisation is the model developed by the inter-governmental committee responsible for GTE National Performance Monitoring); and
- (b) the Parties will impose on the Government business enterprise:
  - (i) full Commonwealth, State and Territory taxes or tax equivalent systems;
  - (ii) debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and
  - (iii) those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, on an equivalent basis to private sector competitors.
- (5) Subject to subclause (6), where an agency (other than an agency covered by subclause (4)) undertakes significant business activities as part of a broader range of functions, the Parties will, in respect of the business activities:
  - (a) where appropriate, implement the principles outlined in subclause (4); or
  - (b) ensure that the prices charged for goods and services will take account, where appropriate, of the items listed in paragraph 4(b), and reflect full cost attribution for these activities.
- (6) Subclauses (4) and (5) only require the Parties to implement the principles specified in those subclauses to the extent that the benefits to be realised from implementation outweigh the costs.
- (7) Subparagraph (4)(b)(iii) shall not be interpreted to require the removal of regulation which applies to a Government business enterprise or agency (but which does not apply to the private sector) where the Party responsible for the regulation considers the regulation to be appropriate.
- (8) Each Party will publish a policy statement on competitive neutrality by June 1996. The policy statement will include an implementation timetable and a complaints mechanism.
- (9) Where a State or Territory becomes a Party at a date later than December 1995, that Party will publish its policy statement within six months of becoming a Party.
- (10) Each Party will publish an annual report on the implementation of the principles set out in subclauses (1), (4) and (5), including allegations of non-compliance.

### **Structural Reform of Public Monopolies**

- 4.(1) Each Party is free to determine its own agenda for the reform of public monopolies.
- (2) Before a Party introduces competition to a sector traditionally supplied by a public monopoly, it will remove from the public monopoly any responsibilities for industry regulation. The Party will re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its (existing and potential) rivals.
- (3) Before a Party introduces competition to a market traditionally supplied by a public monopoly, and before a Party privatises a public monopoly, it will undertake a review into:
  - (a) the appropriate commercial objectives for the public monopoly;

- (b) the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;
  - (c) the merits of separating potentially competitive elements of the public monopoly;
  - (d) the most effective means of separating regulatory functions from commercial functions of the public monopoly;
  - (e) the most effective means of implementing the competitive neutrality principles set out in this Agreement;
  - (f) the merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations;
  - (g) the price and service regulations to be applied to the industry; and
  - (h) the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including the rate of return targets, dividends and capital structure.
- (4) A Party may seek assistance with such a review from the Council. The Council may provide such assistance in accordance with the Council's work program.

## **Legislation Review**

- 5.(1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
  - (b) the objectives of the legislation can only be achieved by restricting competition.
- (2) Subject to subclause (3), each Party is free to determine its own agenda for the reform of legislation that restricts competition.
- (3) Subject to subclause (4) each Party will develop a timetable by June 1996 for the review, and where appropriate, reform of all existing legislation that restricts competition by the year 2000.
- (4) Where a State or Territory becomes a Party at a date later than December 1995, that Party will develop its timetable within six months of becoming a Party.
- (5) Each Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in subclause (1).
- (6) Once a Party has reviewed legislation that restricts competition under the principles set out in subclauses (3) and (5), the Party will systematically review the legislation at least once every ten years.
- (7) Where a review issue has a national dimension or effect on competition (or both), the Party responsible for the review will consider whether the review should be a national review. If the Party determines a national review is appropriate, before determining the terms of reference for, and the appropriate body to conduct the national review, it will consult Parties that may have an interest in those matters.

- (8) Where a Party determines a review should be a national review, the Party may request the Council to undertake the review. The Council may undertake the review in accordance with the Council's work program.
- (9) Without limiting the terms of reference of a review, a review should:
  - (a) clarify the objectives of the legislation;
  - (b) identify the nature of the restriction on competition;
  - (c) analyse the likely effect of the restriction on competition and on the economy generally;
  - (d) assess and balance the costs and benefits of the restriction; and
  - (e) consider alternative means for achieving the same result including non-legislative approaches.
- (10) Each Party will publish an annual report on its progress towards achieving the objective set out in subclause (3). The Council will publish an annual report consolidating the reports of each Party.

Note: The Council of Australian Governments at its meeting on 3 November 2000 agreed to the following amendment to this Agreement to provide further guidance to the Council on how to assess whether jurisdictions have met their legislative review commitments.

In assessing whether the threshold requirement of clause 5 has been achieved, the Council should consider whether the conclusion reached in the report is within a range of outcomes that could reasonably be reached based on the information available to a properly constituted review process. Within the range of outcomes that could reasonably be reached, it is a matter for Government to determine what policy is in the public interest.

### **Access to Services Provided by Means of Significant Infrastructure Facilities**

- 6.(1) Subject to subclause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where:
  - (a) it would not be economically feasible to duplicate the facility;
  - (b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;
  - (c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and
  - (d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.
- (2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
  - (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.
- (3) For a State or Territory access regime to conform to the principles set out in this clause, it should:
- (a) apply to services provided by means of significant infrastructure facilities where:
    - (i) it would not be economically feasible to duplicate the facility;
    - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
    - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and
  - (b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

- (3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:
- (a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under the access regime; and
  - (b) should recognise that, as provided by subsection 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.
- (4) A State or Territory access regime should incorporate the following principles:
- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
  - (b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.
  - (c) Any right to negotiate access should provide for an enforcement process.
  - (d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

- (e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.
- (f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.
- (g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.
- (h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.
- (i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:
  - (i) the owner's legitimate business interests and investment in the facility;
  - (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
  - (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
  - (iv) the interests of all persons holding contracts for use of the facility;
  - (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
  - (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
  - (vii) the economically efficient operation of the facility; and
  - (viii) the benefit to the public from having competitive markets.
- (j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:
  - (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
  - (ii) the owner's legitimate business interests in the facility being protected; and
  - (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.
- (k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.
- (l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.
- (m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.



- (n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.
  - (o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.
  - (p) Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.
- (5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following 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 decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:
    - (i) may request new information where it considers that it would be assisted by the introduction of such information;
    - (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and
    - (iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

### **Application of the Principles to Local Government**

- 7.(1) The principles set out in this Agreement will apply to local government, even though local governments are not Parties to this Agreement. Each State and Territory Party is responsible for applying those principles to local government.

- (2) Subject to subclause (3), where clauses 3, 4 and 5 permit each Party to determine its own agenda for the implementation of the principles set out in those clauses, each State and Territory Party will publish a statement by June 1996:
  - (a) which is prepared in consultation with local government; and
  - (b) which specifies the application of the principles to particular local government activities and functions.
- (3) Where a State or Territory becomes a Party at a date later than December 1995, that Party will publish its statement within six months of becoming a Party.

### **Funding of the Council**

8. The Commonwealth will be responsible for funding the Council.

### **Appointments to the Council**

- 9.(1) When the Commonwealth proposes that a vacancy in the office of Council President or Councillor of the Council be filled, it will send written notice to the States and Territories that are Parties inviting suggestions as to suitable persons to fill the vacancy. The Commonwealth will allow those Parties a period of thirty five days from the date on which the notice was sent to make suggestions before sending a notice of the type referred to in subclause (2).
- (2) The Commonwealth will send to the States and Territories that are Parties written notice of persons whom it desires to put forward to the Governor-General for appointment as Council President or Councillor of the Council.
- (3) Within thirty five days from the date on which the Commonwealth sends a notice of the type referred to in subclause (2), the Party to whom the Commonwealth sends a notice will notify the Commonwealth Minister in writing as to whether the Party supports the proposed appointment. If the Party does not notify the Commonwealth Minister in writing within that period, the Party will be taken to support the proposed appointment.
- (4) The Commonwealth will not put forward to the Governor-General a person for appointment as a Council President or Councillor of the Council unless a majority of the States and Territories that are Parties support, or pursuant to this clause are taken to support, the appointment.

### **Work Program of the Council, and Referral of Matters to the Council**

- 10.(1) The work of the Council (other than work relating to a function under Part IIIA of the Trade Practices Act or under the *Prices Surveillance Act 1983*) will be the subject of a work program which is determined by the Parties.
- (2) Each Party will refer proposals for the Council to undertake work (other than work relating to a function under Part IIIA of the Trade Practices Act or under the *Prices Surveillance Act 1983*) to the Parties for possible inclusion in the work program.
- (3) A Party will not put forward legislation conferring additional functions on the Council unless the Parties have determined that the Council should undertake those functions as part of its work program.

- (4) Questions as to whether a matter should be included in the work program will be determined by the agreement of a majority of the Parties. In the event that the Parties are evenly divided on a question of agreeing to the inclusion of a matter in the work program, the Commonwealth shall determine the outcome.
- (5) The Commonwealth Minister will only refer matters to the Council pursuant to subsection 29B(1) of the Trade Practices Act in accordance with the work program.
- (6) The work program of the Council shall be taken to include a request by the Commonwealth for the Council to examine and report on the matters specified in subclause 2(2) of the Conduct Code Agreement.

### **Review of the Council**

11. The Parties will review the need for, and the operation of, the Council after it has been in existence for five years.

### **Consultation**

12. Where this Agreement requires consultation between the Parties or some of them, the Party initiating the consultation will:
  - (a) send to the Parties that must be consulted a written notice setting out the matters on which consultation is to occur;
  - (b) allow those Parties a period of three months from the date on which the notice was sent to respond to the matters set out in the notice; and
  - (c) where requested by one or more of those Parties, convene a meeting between it and those Parties to discuss the matters set out in the notice and the responses, if any, of those Parties.

### **New Parties and Withdrawal of Parties**

13. (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.
- (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.
- (3) If a Party withdraws from this Agreement, this Agreement will continue in force with respect to the remaining Parties.

### **Sending of Notices**

14. A notice is sent to a Party by sending it to the Minister responsible for the competition legislation of that Party.

### **Review of this Agreement**

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

## **Commencement of this Agreement**

16. This Agreement commences once the Commonwealth and at least three other jurisdictions have executed it.