

Review of Current Port Competition and Regulation in Queensland

Discussion Paper



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1.0 Introduction

1.1 The role of ports in economic growth

There is strong public interest in ensuring that Queensland's ports operate efficiently and that fair and competitive services are provided. This public interest stems from the vital role that ports play in Queensland's logistics network, as gateways for economic trade and commerce. With the globalisation of the world economy, Queensland's economic competitiveness is linked increasingly to its ability to manage the movement of both import and export commodities efficiently and effectively.

The Queensland coastline is host to twenty ports which are administered by seven government-owned port authorities which principally operate under the provisions of the *Government Owned Corporations Act 1993*, the *Transport Infrastructure Act 1994 (TIA)* and the *Financial Administration and Audit Act 1977*. Each port authority provides a broad range of facilities that cater for the diverse land/sea interface requirements of their trade catchment areas. In many cases, they are responsible for the construction of essential port infrastructure, administration, and in some cases, the operation of port facilities.

However, there is no single model by which a port authority should manage and administer its port. A port authority's degree of involvement in port operations, infrastructure and services is defined on a case by case basis, according to its history, needs and requirements of the various participants in the supply chain. Nevertheless, whichever port structure is in place, Australia's trade potential relies unquestionably on the efficiency and effectiveness of the ports through which most of Australia's trades move.

1.2 Background

Following on from reforms under the National Competition Policy (NCP) Review, the Council of Australian Governments (COAG) has agreed to a new National Reform Agenda (NRA).

The COAG Competition and Infrastructure Reform Agreement (CIRA) (see Attachment 3.1) of 10 February 2006 is intended to achieve a simpler and consistent national approach to the economic regulation of significant infrastructure.

The Parties to the CIRA have agreed to "*review the regulation of ports and port authority handling and storage facility operations at significant ports...to ensure they are consistent with the (agreed) principles*". COAG has agreed that the review of ports regulation will be completed by the end of 2007 (see Attachment 3.2 – CIRA Implementation Plan).

The COAG background paper, detailing the NCP Review (including the CIRA agreed principles) can be accessed at:

http://www.coag.gov.au/meetings/100206/attachment_b_ncp_review.pdf

The full version of the CIRA Implementation Plan, as agreed at the COAG meeting of 13 April 2007 can be accessed at:

http://www.coag.gov.au/meetings/130407/docs/coag_nra_competition_reforms.rtf

In relation to the port sector, two streams of the NRA are relevant – competition and regulatory reform. The third stream relating to human capital has not been addressed in this discussion paper.

The competition stream involves reforms in the areas of energy, transport and other export-oriented infrastructure, and its efficient use, by improving pricing and investment signals and establishing competitive markets.

The Productivity Commission's December 2006 "Report to the Council of Australian Governments" on the Potential Benefits of the NRA outlines that the overarching aim of the competition stream is to foster competition in infrastructure industries by:

- Removing regulatory impediments to competition and new entrants;
- Delivering more effective and efficient regulatory oversight;
- Removing unwarranted barriers to investment; and
- Improving pricing and investment signals to owners, investors and consumers to promote the more efficient use of resources within the economy.

The regulatory reform stream comprises two distinct sets of initiatives. The first is designed to promote best-practice regulation making and review. The second focuses on reducing the regulatory burden in 'hot spots' where overlapping and inconsistent regulatory regimes are impeding economic activity.

1.3 The Review

As part of the NRA, the Queensland Government is undertaking a review of current "significant port" operations and commercial business practices for consistency with the principles set out in clauses 4.1 and 4.2 of the CIRA.

The overarching objective of the CIRA principles is to ensure that ports are only subject to economic regulation where it has been determined that there is a clear requirement for it in order to promote competition in upstream or downstream markets, or to prevent the misuse of market power. Where it is determined that the implementation of economic regulation is necessary for a particular port, the form of regulation applied should conform to a consistent national approach.

As specified in the Terms of Reference for the Review of Port Competition and Regulation in Queensland (extract at



Attachment 3.3), the broad objectives of this review are to ensure that significant ports in Queensland:

- are managed efficiently and, where appropriate, allow for competition in the provision of port and related infrastructure facility services;
- maximise the opportunity for competition in upstream and downstream markets, and do not misuse market power; and
- are subject to economic regulation only where there is a clear need.

In Queensland the following ports have been nominated as “significant ports”:

- The Port of Brisbane
- The Port of Gladstone
- The Port of Hay Point
- The Port of Mackay
- The Port of Abbot Point
- The Port of Townsville
- The Port of Weipa

A Ports Competition and Regulatory Review Committee (PRC) comprising senior officers from Queensland Transport, Queensland Treasury and the Department of the Premier and Cabinet has been formed to oversee the review on behalf of the Queensland Government.

This Discussion Paper was prepared to facilitate input to the review from key stakeholders including business groups. While specific issues have been raised to facilitate discussion, these issues are not exhaustive and you are invited to raise issues other than those identified. Responses to the Discussion Paper are due by **Wednesday 17 October 2007**.

In addition, please find attached an Addendum to the Discussion Paper which outlines specific issues relating to certain aspects of the ports being reviewed. You may wish to give consideration to these issues where relevant in the formulation of your response.

If you do not wish your submission to be made publicly available, please ensure it is marked confidential. For publicly available submissions, personal contact details can be removed prior to public release if requested at the time of submission. However please note, all submissions have the potential to be made available through the *Freedom of Information Act 1992* (Queensland). Submission should be forwarded to:

Executive Director (Rail, Ports and Freight) and
 Chair Ports Competition and Regulatory Review Committee
 Queensland Transport
 GPO Box 1549
 BRISBANE QLD 4001
 email: railports&freight@transport.qld.gov.au

1.4 Overview of Queensland Ports

The functions of a port authority as set out in the TIA include:

- a. to establish, manage, and operate effective and efficient port facilities and services in its port;
- b. to make land available for—
 - (i) the establishment, management and operation of effective and efficient port facilities and services in its port by other persons; or
 - (ii) other purposes consistent with the operation of its port;
- c. to provide or arrange for the provision of ancillary services or works necessary or convenient for the effective and efficient operation of its port;
- d. to keep appropriate levels of safety and security in the provision and operation of the facilities and services; and
- e. to provide other services incidental to the performance of its other functions or likely to enhance the usage of the port

It should be noted that the only port related activity located at a significant Queensland Port currently subject to economic regulation, is the operation of one of the two coal export terminals at the port of Hay Point, the Dalrymple Bay Coal Terminal (DBCT). This terminal is both managed and operated by private sector interests and the port authority is not involved with the terminal. Excluding this activity, the significant Queensland ports being examined in this Review are not subject, in the context of this review, to any form of economic regulation.

In Queensland there is a system of ports, port facilities and port services provided through government owned corporation structures.

These facilities and services directly support our export and import industries and operate through commercially based contracts and agreements. This approach has stood the test of time and has provided far superior outcomes than would have developed under an imposed regulatory access and pricing system. For example, the Abbot Point Coal Terminal (APCT) and the RG Tanna Coal Terminal (RGCT) are currently finalising substantive investment programs to expand terminal capacities. These investments were based on commercial agreements, arrived at by direct bargaining in good faith, between the terminal owner (i.e. the port authority) and coal producers. On the other hand, the progress of the expansion of DBCT was seriously delayed due to adversarial debates within the Queensland Competition Authority (QCA) framework regarding costing of the expansion and approvals to include the expenditure in the regulated asset base.



The Port of Brisbane is Queensland's largest multi-user general cargo and bulk commodity port. Port activities are centralised at Fisherman Islands at the mouth of the Brisbane River, although some port operations are conducted at facilities as far upstream as Hamilton, which is situated approximately 13 kilometres upstream from the mouth of the river.

The Port of Brisbane Corporation (PBC) can be considered a landlord port authority in that it acts largely as a regulatory body to the port and as a landlord, while port operations, such as stevedoring, loading and unloading cargo, towage, and pilotage transfer are primarily carried out by private companies.

Berthing arrangements in respect of the berths owned by PBC are generally regulated by contractual licences which are associated with leases of adjoining land upon which terminal operations are conducted by third party operators. Certain berths are multi-user (for example, the coal berth shares spare capacity with cement cargoes) and others are common user (for example, the Pinkenba Wharf and wharves 1, 2, and 3 at Fisherman Islands). Access to the common user wharves is managed directly or overseen by PBC.

Total throughput for the Port of Brisbane has increased over the past five years by an average of 3.0% per annum, from 23.2 million tonnes (Mt) in 2001-02 to 26.7 Mt in 2005-06. Container trade through the port has increased on average by 11.8% per year over the same period, with 766 300 twenty-foot equivalent units shipped in 2005-06.

Expansion projects to be undertaken by the PBC in the future include:

- Hamilton Relocation and Site Redevelopment - relocation of port operations from Hamilton Precinct to Fisherman Islands, and construction of Wharf 10 at Fisherman Islands.
- Construction of new General Purpose Berth at Fisherman Islands and extension to existing Grain Wharf.
- Fisherman Islands expansion - reclamation of 230 hectares of land and associated earthworks required.

- Construction of Berths 11 and 12 for new container terminal.

The Port of Gladstone is Queensland's largest multi-cargo port and the fifth largest port in Australia. The port's facilities cater for the import of raw material and the export of finished product associated with major industries in the region. Multi-user facilities cater for the export of the region's coal, mineral and agricultural resources.

The Central Queensland Ports Authority (CQPA) not only conducts the functions of a landlord for the port, but also owns and operates some of the cargo handling facilities in the port, including two dedicated coal terminals, RGTCT and Barney Point Coal Terminal (BPCT).

Total throughput for the Port of Gladstone for 2005-06 was 67.2 Mt, representing an average growth of 5.0% per annum over the last five years from the 2001-02 throughput of 53.8 Mt. Coal shipped through the port has increased by an average of 4.2% per year from 37.5 Mt in 2001-02 to 45.3 Mt in 2005-06.

Expansion projects currently scheduled or underway for the Port of Gladstone include:

- RGTCT Expansion – increase (nominal) capacity of terminal from 40 to 68 Mt per annum (Mtpa), including construction of third rail inloading station, third shiploader, fourth berth and additional stockpiles. Works are to be completed late 2007.
- Auckland Point/BPCT upgrades & expansions.
- Environmental Impact Statement and preliminary works for new coal export terminal at Wiggins Island with ultimate capacity throughput of 70 Mtpa.

The Port of Hay Point is the second largest coal export port in the world with two dedicated coal loading terminals – DBCT and the Hay Point Services Coal Terminal (HPSCT).

HPSCT is owned and operated by BHP Billiton/Mitsubishi Alliance (BMA) and only provides coal handling services to mines operated by BMA in the northern Bowen Basin. DBCT is a common user terminal, owned by the Queensland Government through DBCT Holdings Pty Ltd. Babcock and Brown Infrastructure (BBI) have a long-term lease arrangement for DBCT, and the asset is managed by BBI (DBCT) Management Pty Ltd. DBCT Pty Ltd, comprising of a number of the terminal users, is responsible for direct terminal operations and maintenance functions under a contractual arrangement with BBI.

PCQ is effectively a landlord for the port, owning (or perpetually leasing) the channel, the seabed and land surrounding the port area. PCQ earns revenue for the provision of its services through port charges on tonnage of coal exported, a charge on cargo ship volume and a Port Security Charge.

Coal shipments through the port of Hay Point has increased on average 3.1% per year from 70.8 Mt in 2001-02 to 81.6 Mt in 2005-06.





Capital works scheduled and ongoing at the Port of Hay Point and the two private coal terminals include:

- Hay Point Departure Path - dredging program to deepen the channel to 14.9 metres to allow better movement of fully loaded ships departing the port and limit the impacts of the high tidal variation.
- HPSCT - BMA is expanding its HPSCT from 40Mtpa to 44Mtpa, with completion expected by August 2007. This expansion includes construction of a second new stacker reclaimer machine.
- DBCT - BBI is currently progressing its DBCT Stage 7X - Phase 1 expansion which will increase capacity from 60Mtpa to 68Mtpa, with expected completion by late 2007. Further expansions (Phase 2/3) will increase capacity at DBCT to 85Mtpa by early-2009. The expansion program includes modifications and enhancements to all major terminal elements of inloading, stockyard and outloading.

The Port of Mackay is operated by the Mackay Port Authority (MPA). MPA operates the Seaport on a landlord basis with its four berths operated by third parties under leases. The Seaport is situated in a breakwater harbour approximately 5 kilometres to the north of the Mackay central business district. The Seaport's major cargo is bulk sugar, but also facilitates trade in commodities such as grain, petroleum products, chemicals, minerals and general freight.

Total throughput for the Port of Mackay in 2005-06 was 2.3 Mt, representing an average growth of 3.0% per annum over the last five years from the 2001-02 throughput of 2.0 Mt. The growth in throughput of sugar products from 727 617 in 2001-02 to 898 264 in 2005-06 (average of 4.7% growth per year) accounts for a high proportion of this increase.

The Port of Abbot Point is Australia's most northerly coal port, located approximately 25 kilometres north of Bowen. It consists of one coal terminal (ACPT) and an offshore berth serviced by a conveyor and shiploader. The terminal is owned by PCQ and managed by Abbot Point Bulkcoal Pty Ltd, which is part of the Newlands-Collinsville-Abbot Point (NCA) Project. The NCA Project is 75 per cent owned by Xstrata Coal Australia Pty Ltd and 25 per cent by Itochu Coal Resources Australia Pty Ltd. PCQ is the port authority for the Port of Abbot Point.

Coal shipments through the APCT has increased on average

0.2% per year from 11.9 Mt in 2001-02 to 12.0 Mt in 2005-06.

Abbot Point Stage X21 expansion is currently under construction, which will increase the throughput of the terminal from 15 Mtpa to 21 Mtpa. This expansion includes construction of two additional stockpiles, new stacker reclaimer, and increasing the speed of conveyor systems.

The Port of Townsville is a breakwater harbour located at the mouth of Ross Creek in Cleveland Bay and in close proximity to the central business district of the City of Townsville. The Townsville Port Authority (TPA) operates as a landlord port authority, with responsibility for the overall management of port infrastructure at the Port of Townsville. The Port of Townsville has grown to be Queensland's third largest industrial port.

Total throughput for the Port of Townsville has increased on average 1.3% per annum for the five year period from 2001-02 (9.3 Mt throughput) to 2005-06 (9.9 Mt throughput).

The Port of Weipa is located on the north-west coast of Cape York Peninsula and is principally involved in the export of bauxite from the nearby Rio Tinto Aluminium Limited (Comalco) mine, together with small quantities of fuel and general cargo. Comalco constructed a number of the original port facilities in the early 1960's, which were subsequently sold to PCQ and leased back to Comalco.

PCQ is the port authority, whilst Comalco operates the port facilities and has on-shore bauxite handling, processing and stockpiling facilities and conveyors running to Lorim Point Wharf for shiploading. Other port facilities include general purpose and fuel wharves and tugs operated by Weipa Tug Services Pty Ltd.

Total throughput for the Port of Weipa for 2005-06 was 18.0 Mt and average growth of 8.1% per annum over the last five years from the 2001-02 throughput of 12.8 Mt. The growth in shipping of bauxite from 12.7 Mt in 2001-02 to 17.9 Mt in 2005-06 (average of 8.2% increase per year) accounts for the majority of this increase.

Expansion projects currently scheduled or underway for the Port of Weipa include the Weipa South Channel Widening, which involves dredging works to widen and deepen channel to accommodate larger ships. This will accommodate an increase in shipping of bauxite up to 25 Mtpa through the port.





2.0 Discussion

Under the CIRA, a number of specific approaches have been agreed to facilitate the competition objectives in providing port and related infrastructure facility services, including implementation of the following:

- port planning should facilitate the entry of new suppliers of port and related infrastructures services;
- where third party access to port facilities is provided that access should be provided on a competitively neutral basis;
- commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly powers; and
- 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.

In addition to these specific approaches, COAG agreed to review the regulation of handling and storage facility operations at significant ports and the regulation of ports and port authorities to ensure they are consistent with the principles.

Economic regulation includes two aspects, regulation of prices set by ports and the regulation of provision of access to port infrastructure and facilities.

The following discussion outlines the areas subject to review under the CIRCA

2.1 Competition and regulation in the provision of key port services

A key objective of this review is to assess the competitive and regulatory impediments to further productivity improvement in relation to the provision of key port and port-related infrastructure facility services, with a particular emphasis on:

- i. the impact of planning practices on potential new service providers;
- ii. competitive neutrality in the provision of third party access to services;
- iii. right to earn a commercial return without exploiting monopoly power; and
- iv. addressing any conflicts of interest in vertically integrated operations.

i. Impact of planning practices on potential new service providers

The construction of export infrastructure, including port infrastructure, is subject to complex planning approval

processes. Planning approvals cover matters such as the environment, occupational health and safety, local planning and managing the interface with the broader community. Facilitation of the planning and approval process for infrastructure investment is often expedited in some States by providing a one-stop shop approach. In Queensland, developing a project on strategic port land (see below) and/or having it declared as a 'project of State significance' may expedite the approval process.

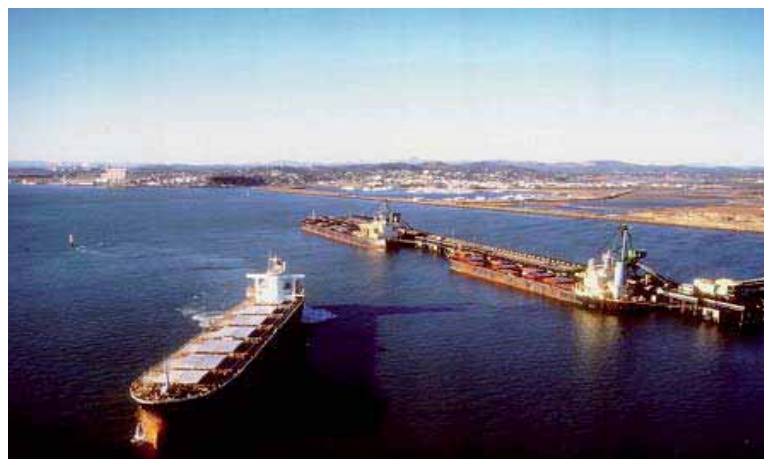
While the Productivity Commission (PC) has argued that the regulatory framework contributes to delays in capacity expansion of infrastructure, there are many other potential causes of delays in infrastructure investment. For example, impediments to new investment in ports can result from a lack of suitable land for new wharves, terminals and facilities. Also, not anticipating the need for increased capacity (e.g. the recent considerable shift in coal demand) may result in significant delays particularly for bulk cargoes, given the time required to bring new capacity on line.

In Queensland, the significant ports are subject to provisions under the TIA which provide the processes and procedures for the allocation, development and expansion of strategic port land.

Allocation of Strategic Port Land

Under the TIA, port authorities are required to prepare a Land Use Plan (LUP) at least every 8 years for the management and assessment of development of 'strategic port land' (section 285 of the TIA). Recent amendments to the TIA in 2005 introduced new and expanded procedures for the preparation of land use plans. These amendments require land use plans to incorporate provisions that are more reflective of the State's overall planning philosophy as outlined in the *Integrated Planning Act 1997*.

In preparing LUPs, port authorities must prepare a statement of proposal which is released for public consultation. After taking account of issues raised in the consultation process, port authorities must prepare a draft LUP. The draft plan must be provided for comment to the local government for the local area within which the port area is situated.





Development of Strategic Port Land

After receiving Ministerial approval, land covered by a LUP is treated as “strategic port land” until the LUP is amended or replaced. Under Section 287 of the TIA, strategic port land is not subject to local government planning schemes. Thus the LUP becomes the formal land planning document for strategic port land with the port authority acting as the assessment manager. However this provision only applies to land held by the port authority and does not apply to land held (either under lease or freehold) by non-port authority interests.

Standards of development and also procedural requirements may differ between developments administered by port authorities and the local government authorities adjoining the port’s strategic port land.

Planning by Ports

Port authority Master Plans normally have 25 year horizons and aim to align planning with business growth, identify infrastructure needs and the optimum timing for providing the infrastructure to support strategic growth opportunities.

- » *Port planning should, consistent with the efficient use of port infrastructure, facilitate the entry of new suppliers of port and related infrastructure services (COAG agreement 4.2a). Does the strategic port land model as used in Queensland assist in achieving that aim?*
- » *Please identify any areas where there is scope to streamline the current planning process including reducing regulatory requirements and ensuring consistency in the administration of strategic port land.*

ii. Competitive neutrality in the provision of third party access to services

The Parties to the CIRA have agreed to the principle that third party access to services provided by means of ports and related infrastructure facilities should, where possible, be on the basis of commercially agreed terms and conditions between the operator of the facility and the access seekers. The CIRA also requires that any third party access to port facilities should be provided on a competitively neutral basis, that is, there is a ‘level playing field’ between access seekers competing in the same market.

The structural configuration of the facility can influence its incentive to misuse any market power or hinder access. For example, vertically integrated facility providers operating in upstream and/or downstream markets may have a conflict of interest (actual or perceived) regarding the provision of

access, and have greater incentive to favour their own access and prevent or hinder access by other access seekers.

Where a facility owner is preventing or hindering access to its facility, economic regulation may be necessary to facilitate access (i.e. by declaring the service under the Third Party Access Regime in either the *Trade Practices Act 1974* (TP Act) or the *Queensland Competition Authority Act 1997* (QCA Act)).

Nationally, there are currently no access regimes for port infrastructure which have been certified as effective, and no ports have been declared under the National Access Regime, set out under Part IIIA of the TP Act. However, state-based access regimes do apply at the DBCT in Queensland, which is regulated under Part 5 of the QCA Act, and seven prescribed commercial ports in South Australia (Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln, Thevenard and Ardrossan), and in Victoria at the commercial seaports of Melbourne, Geelong, Portland and Hastings.

In Queensland, the facilitation of new entrants and competitively neutral access conditions differ between the significant ports. However, there are mechanisms in place to assist with the provision of equitable access where feasible. The arrangements currently in place include:

- Multi-user access policies;
- Port Services Agreements with existing users containing provisions which deal with the issue of new user access;
- The identification and selection of operators(s) of berths and terminals through a Public Request for Proposals process;
- The utilisation of Management Agreements to encourage the entry of new stevedores;
- Voluntary access undertakings which outline the terms and conditions which must be adhered to when granting access to access seekers for services provided;
- Providing additional capacity to meet demand subject to constraints on the availability of suitable land for extending or building new facilities; and
- Port rules and protocols for the prioritisation of ship movements in the channels.

- » *Are there aspects of port operations in Queensland which need to be addressed to ensure equitable third party access to infrastructure and services?*
- » *Where applicable, provide examples of any issues arising in the significant ports in Queensland where access has not been or was perceived not to be, provided in a competitively neutral manner.*



iii. Right to earn a commercial return without exploiting monopoly power

The CIRA states that an access seeker should seek to enter into commercial negotiations for access with the operator of the port infrastructure. If commercial negotiation is not possible and economic regulation of pricing is required, it is preferable a more 'light-handed' form of regulation, such as price-monitoring, be considered in the first instance with an option to move to full price regulation in the event price monitoring is not sufficient to prevent the misuse of market power.

Under commercial negotiations, facility providers should generate a commercial risk adjusted rate of return (the rate of return that would apply in a competitive market) on their assets. This includes having a price structure that enables revenues to be generated that at least meet the efficient costs of providing services including a rate of return consistent with an appropriate weighted average cost of capital.

The risk is that, in the absence of economic regulatory oversight, a facility provider that arguably holds a dominant or monopoly position could attempt to utilise its market power to earn excessive profits through engaging in over-charging, cross-subsidising between users in the same market, or driving out potential competitors. This behaviour could lead to increased costs to port users for the services provided and to the economy at large. Depending on the level of market power and the extent to which it may be misused, there could be a case for economic regulation.

An activity at a port may be a monopoly activity if there is no competition or scope for competition in the provision of the service due to market power of the facility providers and the existence of barriers to entry, consequently it may enable providers to:

- earn an excessive return;
- operate inefficiently, so that the facility provider would earn an excessive return if its costs were lower; or
- cross-subsidise.

One mechanism suggested by CIRA to limit this type of behaviour is to provide guidance in the commercial charter of the port authorities to allow them to seek a commercial rate of return while ensuring that their monopoly powers are not exploited.

Delaying or withholding capital expenditure, which potentially forces higher levels of utilisation of existing port assets and achieves higher returns, potentially at the expense of reduced service standards (i.e. in the form of port congestion and delays) can also point to misuse of market power.

A variety of financial performance measures, such as Return on Assets, can indicate whether a port has been earning

abnormally high profits by comparing it to the rate of return that would apply in a competitive market. It is assumed that abnormal profits may indicate a non-competitive market setting and a possible tendency for ports to be engaged in anti-competitive behaviour by taking advantage of their dominant market power.

As mentioned above, in Queensland, the significant ports (with the exception of the export terminal, the DBCT, located in the Port of Hay Point) being reviewed are not currently subject to economic regulation. However, should the Queensland Ministers responsible for the QCA Act (i.e. the Premier and Treasurer) make an assessment that a port is excessively misusing any market power it may have; it could be declared for a pricing investigation (Part 3 of the QCA Act) or subsequent ongoing price regulation by the QCA at any time. It is often argued that this implicit 'threat of regulation' provides sufficient discipline on the ports to prevent any temptation to behave in this manner.

- » *Is there potential for increasing competition in the provision of port and related infrastructure facility services?*
- » *Assuming there is the potential to increase competition, will this be sufficient to ensure port authorities earn commercial returns that are consistent with those that would apply in a competitive market? Please provide examples where this could be achieved.*
- » *Do you consider there would be benefit to introducing price monitoring for port authorities as a first step where price regulation may be required?*
- » *Does the threat of regulation act to constrain any market power?*
- » *Are the pricing principles utilised by the significant ports covered by this review sufficient to ensure that port authorities pricing mechanisms do not result in price discrimination, cross subsidisation or any other anti-competitive results? Can you provide examples where the pricing principles:*
 - o *Achieve the desired outcome; or*
 - o *Do not achieve the desired outcome.*
- » *Would guidance in the commercial charters for port authorities be sufficient to ensure they earn a commercial rate of return while not exploiting any monopoly powers?*



iv. Conflicts of interest arising from:

- vertically integrated structures; and
- port authorities being both a landlord or transport service provider and exercising regulatory powers for shipping movements and scheduling under the TIA.

The Parties to the CIRA have agreed that any conflicts of interest between facility 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.

Vertically integrated structures occur where the owners of essential infrastructure facilities operate in upstream (e.g. coal production) and/or downstream markets (overseas markets for coal).

In addition, a conflict of interest may arise where a port authority in its role as a landlord or transport service provider also exercises discretionary powers for shipping movements and scheduling under the TIA.

The potential for a conflict of interest for port owners, terminal operators and service providers may result from:

- port owners (the access provider) competing with operators in such activities as stevedoring, warehousing, and other port operations; and
- terminal operators and service providers participating in other upstream or downstream logistics chain operations.

Port owners competing with other operators can have an unfair competitive advantage with their ability impose penalties on other operators in their capacity as the port authority. Acting as both the port authority and a competitor, as outlined above, creates a potential conflict of interest.

Port authorities enter into various contractual arrangements with terminal operators and service providers, develop terminal regulations and put in place Management Arrangements to ensure equitable access for all users.

Given the range of agreements in place, a case by case approach may be appropriate for dealing with conflicts of interest relating to non-price barriers to use terminals and other infrastructure, including the shipping channels.

It should be noted that all of the business activities of the PBC, the PCQ, MPA, TPA and the CQPA (Port of Gladstone and Port of Rockhampton) have been declared as 'significant businesses' under the QCA Act for competitive neutrality purposes (e.g. tax equivalents, dividend payment policies etc). This means that at any time the Queensland Competition Authority may investigate complaints that the ports have a competitive advantage due to government ownership.

- » *Do you have concerns regarding potential conflicts of interest in relation to vertically integrated structures or port authorities exercising their regulatory powers, which should be addressed on a case by case basis with a view to facilitating competition? Are you able to provide examples?*
- » *Is it necessary to promote/improve competition in upstream and/or downstream markets for any of the significant ports in Queensland which are covered by this review?*

2.2 Additional comments

- » *Briefly outline any other specific issues relating to the role of Queensland's port authorities which are aligned with the scope of this review but not addressed elsewhere in this paper.*





3.0 Attachments

3.1 Competition and Infrastructure Reform Agreement — 10 February 2006

The COAG Agreement in relation to port competition and regulation is:

4.1 Parties agreed 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.

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.



3.2 Competition and Infrastructure Reform Agreement – Implementation Plan

On 10 February 2006, the Council of Australian Governments (COAG) reached agreement on a new National Reform Agenda to help underpin Australia's future prosperity. The new agenda comprises three streams – human capital, competition and regulatory reform. The competition stream of the agenda is a substantial addition to, and continuation of, the highly successful National Competition Policy reforms. A significant component of the new initiatives is the *Competition and Infrastructure Reform Agreement* (CIRA), signed by COAG, to provide for a simpler and consistent national approach to the economic regulation of significant infrastructure.

This implementation plan supports the CIRA. It sets out an agreed timetable for the implementation of specific reform commitments, including identifying actions and milestones.

Commencing this year, all jurisdictions, including the Commonwealth, will streamline the regulatory processes in their access regimes, including by incorporating binding time limits and a limited form of merits review for regulatory decisions (where merits review is already provided for). Jurisdictions will also adopt common objectives clauses and pricing principles for access regimes.

As part of the CIRA, jurisdictions will take specific measures to enhance regulatory outcomes for nationally significant ports and rail networks. This includes a commitment to review the regulation of ports and port authority, handling and storage facility operations at significant ports by the end of 2007, with the findings of the reviews to be implemented by each jurisdiction by the end of 2008. Jurisdictions have also set a target of December 2008 to implement a simpler and consistent national system of rail access regulation for agreed interstate rail track and major intra-state freight corridors.

In order to give effect to a number of the commitments set out in the CIRA, COAG has also agreed to amendments to the Competition Principles Agreement (CPA). The full text of the amended CPA is available on the COAG web site.

The plan also includes information relevant to the implementation of CIRA, as follows:

- The access regimes and ports subject to the relevant commitments in CIRA (Appendices 1 and 2 respectively).
- Agreed amendments to the Competition Principles Agreement to include objects clauses, pricing principles and limited merits review of regulatory decisions (where merits review is provided for); and a streamlined process for the certification of state and territory third party access regimes (Appendix 3 – not included).
- Guiding principles for the implementation of binding time limits on regulatory decisions in access regimes (Appendix 4 – not included).
- Guiding principles for the implementation of limited merits review of regulatory decisions in access regimes (where merits review is provided for) (Appendix 5 – not included).
- A year-by-year timetable of reforms (Appendix 6).

The commitments, actions and milestones contained in this implementation plan should be read in conjunction with the interpretive provisions of CIRA, which for ease of reference are replicated below.

COAG may agree the proposed schedule of implementing the CIRA be expanded to include other agreed actions to enhance the efficiency and consistency of Australia's regulation of significant infrastructure. Thus, on an on-going basis, as the need arises and particularly after the 2010 review of the Agreement, the Parties can agree to augment the Agreement.



Principle: The establishment of a simpler and consistent national approach to regulation of significant port infrastructure			
Outcome: More efficient investment in and use of key port infrastructure			
CIRA Clause	Actions	Milestones	Date
<p>4.1 The Parties agree that:</p> <p>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</p> <p>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:</p> <p>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;</p> <p>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;</p> <p>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</p> <p>iv. where access regimes are required, and to maximise consistency, those regimes should be certified in accordance with the <i>Trade Practices Act 1974</i> and the Competition Principles Agreement.</p>	<p>Statement of principle.</p> <p>Note: Where new port access regimes are required to be certified under Part IIIA of the <i>Trade Practices Act 1974</i> (clause 4.1b(iv)), this process is to be subject to agreement on a streamlined certification process as provided for in clause 2.9c.</p>	-	Ongoing.
<p>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:</p> <p>a. port planning should, consistent with the efficient use of port infrastructure, facilitate the entry of new suppliers of port and related infrastructure services;</p> <p>b. where third party access to port facilities is provided, that access should be provided on a competitively neutral basis;</p> <p>c. commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly powers; and</p> <p>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.</p>	<p>Statement of principle.</p>	-	Ongoing.



Principle: The establishment of a simpler and consistent national approach to regulation of significant port infrastructure			
Outcome: More efficient investment in and use of key port infrastructure			
CIRA Clause	Actions	Milestones	Date
<p>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.</p> <p>a. Significant ports include:</p> <ul style="list-style-type: none"> 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. 	<p>Undertake transparent public reviews of the regulation and effectiveness of competition in ports and port authority, handling and storage facility operations. The ports to be reviewed are listed in Appendix 2.</p> <p>Implement findings/ recommendations from reviews, as appropriate.</p>	<p>Complete reviews.</p> <p>Implementation of review findings.</p>	<p>December 2007.</p> <p>December 2008 (subject to contractual obligations).</p>



Appendix 1

Third Party Access Regimes for Services Provided by Means of Significant Infrastructure Facilities (Clauses 2.4, 2.6 and 2.9 of the Competition and Infrastructure Reform Agreement)

Jurisdiction	Access regime	Review of access regime (where applicable)	Implementation of consistent principles	Certification application
Commonwealth	National Access Regime		2007	Not applicable
New South Wales	nil			
Victoria	Channel Access Regime		2007 ¹	2009
	Rail Access Regime			Before end 2010
	Grain Handling and Storage Access Regime	Mid-2009	2007 ¹	2009
Queensland	Queensland Access Regime: comprising the <i>Queensland Competition Authority Act 1997</i> and the declarations of the services provided by Queensland's intrastate rail network and the Dalrymple Bay Coal Terminal		Commencing from 2007	Before end 2010
South Australia	Rail Access Regime	2008	2009	Before end 2010
	Port Access Regime	2007	2008	Before end 2010
Western Australia	Rail Access Regime ²			
Tasmania	nil			
Northern Territory	nil			
Australian Capital Territory	nil			

¹ Subject to review of the *Essential Services Commission Act 2001*.

² Subject to implementation of clause 3.1 of the Competition and Infrastructure Reform Agreement.



Appendix 2

Ports to be reviewed (Clause 4.3 of the Competition and Infrastructure Reform Agreement)

New South Wales
The Sydney Ports (Port Botany, Glebe Island, White Bay, Darling Harbour)
Port of Newcastle
Port Kembla
Victoria
Port of Melbourne
Queensland
Port of Brisbane
Port of Gladstone
Port of Mackay
Port of Abbot Point
Port of Townsville
Port of Weipa
Port of Hay Point
South Australia
Port Adelaide
Western Australia
Port of Fremantle
Port of Port Hedland
Port of Esperance
Tasmania
Nil
Northern Territory
Port of Darwin



Appendix 6

Year-by-year timetable of reforms

<p>2006-07</p> <p><i>Infrastructure Regulation</i> Commence implementation of objects clauses, pricing principles, six month binding time limits and limited merits review (where merits review of regulatory decisions is provided for). Amend clause 6 of the Competition Principles Agreement to include objects clause and pricing principles. Commence processes for submitting all uncertified state based access regimes for certification. Commonwealth and State officials commence consideration of proposals for additional regulatory principles that contribute to a simpler and consistent national approach to regulation.</p> <p><i>Rail Regulation</i> Undertake commercial negotiations on the application of a national rail access regime to the Perth-Kalgoorlie line. Commence undertaking cost benefit analyses to determine which other major intra-state freight corridors would benefit from inclusion under a national rail access undertaking or code.</p> <p><i>Competitive Tendering</i> Work together to develop a consistent set of criteria to operationalise Commonwealth amendments to Part IIIA of the Trade Practices Act 1974. These provide that declaration will not apply to government owned infrastructure whose access provisions are developed by a competitive tender approved by the Australian Competition and Consumer Commission.</p> <p><i>Competitive Neutrality</i> To be considered by Heads of Treasuries — Enhance the application of competitive neutrality principles to government business enterprises engaged in significant business activities in competition with the private sector.</p>
<p>2007-08</p> <p><i>Infrastructure Regulation</i> Agree and implement streamlined access regime certification process.</p> <p><i>Rail Regulation</i> Complete development of a new national rail industry access undertaking/code to allow for both unbundled and vertically integrated operators. Complete process of bringing major intra-state freight corridors — for which cost benefit analyses show would be beneficial — under the national rail undertaking.</p> <p><i>Ports Regulation</i> Undertake transparent public reviews of the regulation and effectiveness of competition in ports and port authority, handling and storage facility operations.</p>



<p>2008-09</p>
<p><i>Infrastructure Regulation</i> Continue processes for having all uncertified state based access regimes certified.</p> <p><i>Rail Regulation</i> Bring rail track, currently managed by the Australian Rail Track Corporation and other parties, linking Perth to Brisbane under a new national rail access undertaking or code, subject to commercial negotiations.</p> <p><i>Ports Regulation</i> Implement reforms identified in reviews of ports that are necessary to:</p> <ul style="list-style-type: none"> • ensure that where the economic regulation of significant ports is warranted, it conforms to a consistent national approach based on the agreed principles; and • promote port service competition.
<p>2009-10</p>
<p><i>Infrastructure Regulation</i> All state and territory access regimes for services provided by significant infrastructure facilities submitted for certification in accordance with the Trade Practices Act 1974 and the Competition Principles Agreement.</p> <p><i>Rail Regulation</i> Complete submitting state based rail access regimes governing other significant export related rail infrastructure facilities for certification.</p> <p><i>Ports Regulation</i> Where access regimes are required, to maximise consistency those regimes should be certified in accordance with the Trade Practices Act 1974 and the Competition Principles Agreement.</p>



3.3 Terms of Reference - Review of Current Port Competition and Regulation in Queensland

1. Background

At the 10 February 2006 meeting of the Council of Australian Governments (COAG), it was agreed, amongst a range of other issues, that each jurisdiction would undertake a review of port competition and regulation. Specifically, this review will “review the regulation of ports and port authority handling and storage facility operations at significant ports...to ensure they are consistent with the (agreed) principles”.

The broad COAG objectives include consideration of:

- *Appropriateness of regulation;*
- *Access to facilities;*
- *Competition in the provision of port infrastructure and services; and*
- *Conflicts of interest arising from vertically integrated port structures.*

The Queensland Government will be undertaking this review in conformance with the COAG Agreement. The Department of the Premier and Cabinet (DPC) will be coordinating the whole of State response to all COAG actions. Queensland Transport (QT) will coordinate this review in consultation with DPC, Queensland Treasury (Treasury) and any other relevant bodies on this review of Queensland’s significant ports.

2. COAG Agreement

The COAG Agreement in relation to port competition and regulation is:

4.1 Parties agreed that:

- 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*
- 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:*
 - 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;*
 - 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;*
 - 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*
 - 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:

- port planning should, consistent with the efficient use of port infrastructure, facilitate the entry of new suppliers of port and related infrastructure services;*
- where third party access to port facilities is provided, that access should be provided on a competitively neutral basis;*
- commercial charters for port authorities should include guidance to seek a commercial return while not exploiting monopoly powers; and*
- 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.

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.

3. Ports to be Reviewed

The following ports are nominated as “significant ports”¹ in Queensland in the context of the COAG Agreement and are to be subject to this review:

- The Port of Brisbane;
- The Port of Gladstone;
- The Port of Hay Point;
- The Port of Mackay;
- The Port of Abbot Point;
- The Port of Townsville; and
- The Port of Weipa.

4. Objectives of the Review

The broad objectives of this review are to ensure that:

- significant ports in Queensland are managed efficiently and, where appropriate, allow for competition in the provision of port and related infrastructure facility services;
- significant ports in Queensland maximise the opportunity for competition in up-stream and downstream markets, and do not misuse market power; and
- economic regulation is only introduced if there is a clear need, and only if these objectives cannot be achieved without regulation.

Specifically the key objectives for the review of each port are to:

- a. Assess competition in relation to the provision of key port and port-related infrastructure facility services, with a particular emphasis on:
 - i. the impact of planning practices on potential new service providers;
 - ii. competitive neutrality in the provision of third-party access to services;
 - iii. returns earned by port authorities; and
 - iv. conflicts of interest in vertically-integrated operations.
- b. Determine any deficiencies in current structures and practices of each port that are inconsistent with clauses 4.1 and 4.2 of the COAG Agreement, and whether these can be modified to comply without the need for economic regulation.
- c. Determine the need for economic regulation on the basis of:
 - i. promoting competition in up-stream or downstream markets; and
 - ii. preventing the misuse of market power.
- d. Where economic regulation is deemed appropriate, consider how nationally-consistent regulatory principles can be applied.

¹ “Significant ports” are held to be those ports which collectively account for 95% of Queensland exports by value.



- e. *Develop recommendations to the individual port authorities and to the Queensland Government in respect of changes required in structures and practices to ensure compliance with clauses 4.1 and 4.2 of the COAG Agreement.*
- f. *Where it is proposed that a restriction on competition is appropriate and is recommended to be maintained, undertake a public benefits test to justify this position.*
- g. *Develop recommendations to the Queensland Government for reform to the regulatory framework as it presently applies to Queensland's significant ports, to ensure that it is consistent with clauses 4.1 and 4.2 of the COAG Agreement.*

5. Proposed Review Process

5.1 Review Body (not included)

5.2 Review Process

The procedural steps proposed for this review are to:

1. Review current port operations and commercial business practices for consistency with the principles set out in clauses 4.1 and 4.2 of the COAG Agreement.
2. Recommend to the Queensland Government whether new or amended regulation or direction to the port authorities is needed to ensure conformance with the COAG principles.
3. Make recommendations to the Queensland Government as to a proposed regulatory framework at specific ports if economic regulation is needed.
4. Liaise as required with the Interdepartmental Committee overseeing implementation of the COAG agreements.

The review shall be conducted as a transparent public process, with an opportunity for all stakeholders to contribute. Inputs to the review will generally be sought in the form of written submissions. While Formal Public Hearings are not proposed, individual presentations by respondents may be considered appropriate in certain circumstances at the discretion of the Ports Competition and Regulatory Review Committee (PRC).

The proposed review process involves:

- a. All port authorities governing Queensland's significant ports are to review their current operations and commercial business practices in the context of the agreed COAG principles and their compliance with these principles, and to submit a report on their internal reviews.
- b. A single Discussion Paper in respect of the particular issues identified for each port to be developed following evaluation of the port authorities' submissions to assist in clarification of the issues and in seeking stakeholder submissions.
- c. Public submissions are to be sought in respect of the COAG agreed criteria for each significant port and its current operations. Key stakeholders, including major users and terminal operators will be specifically invited to respond. Submissions can be treated on a confidential basis if requested by a respondent.
- d. The PRC will oversee the review of the submissions, commission further investigations and liaise with key stakeholders and port authorities as required.
- e. The PRC to finalise a position and make recommendations to the Queensland Government in respect of required compliance with the COAG principles for each significant port.

5.3 Timetable (not included)



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