Business Council of Australia

submission

Submission to the Productivity Commission Review of the National Access Regime and the Competition and Infrastructure Reform Agreement

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Working to achieve economic, social and environmental goals that will benefit Australians now and into the future

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Contents

About the BCA

The Business Council of Australia (BCA) brings together the chief executives of 100 of Australia's leading companies.

For almost 30 years, the BCA has provided a unique forum for some of Australia's most experienced corporate leaders to contribute to public policy reform that affects business and the community as a whole.

Our vision is for Australia to be the best place in the world in which to live, learn, work and do business.

Key points

This submission by the Business Council of Australia provides comment on an important review by the Productivity Commission of the National Access Regime (NAR) and the Council of Australian Governments (COAG) 2006 Competition and Infrastructure Reform Agreement (CIRA). The BCA membership consists of businesses that are both major users and providers of Australia's economic infrastructure.

Australia is a high-investment economy with strong growth prospects linked to the growth of the Asia–Pacific region. The commission's review offers a timely opportunity to assess whether Australia's infrastructure policies are configured to capture those growth opportunities, promote efficient provision of infrastructure services and grow the long-term welfare of Australians.

In reviewing the National Access Regime (Part IIIA of the Competition and Consumer Act) the BCA makes these comments:

- The national access regime aims to promote competition by providing infrastructure users with a legal right of access to certain infrastructure facilities with natural monopoly characteristics. However, it also a highly complex policy regime that is difficult to apply in practice. Striking the right balance between competition and incentives to invest and ensuring the benefits of regulation exceed the costs are key to a successful national access regime.
- The experience to date points to high transaction costs, long decision-making timeframes and high risks to investor confidence where there is flawed or inconsistent decision making. It is, however, less clear that the regime delivers benefits to justify these costs. The review presents an opportunity to define the quantity and the benefits of the national access regime to date.
- The commission's question as to whether the NAR should continue is worth exploring further and stakeholders will be better placed to answer the question once the draft report is released, particularly if that report provides a detailed analysis of the costs and benefits of the regime that will enable a more informed assessment of its net economic impact.
- For now the NAR can continue to make a contribution. It provides a level of clarity around the application of access regulation that would be missing if relying solely on the misuse of market power provisions under section 46 of the Competition and Consumer Act 2010. It also provides a framework for certifying industry sector regimes. However, it should be used sparingly in access disputes. Industry-specific agreements and direct negotiation between parties should be given higher priority in resolving access issues.

- In our view the review can inform positive reforms to the national access regime by providing comprehensive analysis and recommendations that:
  - reduce the high risks and costs for investors from the potential for poor decision making and regulatory failure under the regime by:
    - ensuring the system operates in a way that achieves practical resolutions to access problems whereby declaration under the NAR is limited to cases of a clear, as opposed to marginal, net economic benefit, and in a way that fully takes into account risks to investment incentives
    - taking care when considering calls to make further changes to the 'private profitability' test so as to avoid further chopping and changing of the rules, especially given the new test seems a well reasoned approach to dealing with the problems of practical application and the high risks of regulatory failure (notwithstanding that as a recently introduced test it may warrant further analysis to fully understand its implications)
    - providing enhanced regulatory certainty for infrastructure investors and users through mechanisms that provide greater pre-investment certainty on whether, and in what way, access regulations will be applied post-investment; this should also help to reduce the potential for costly disputes
  - prioritise recommendations to lessen the administrative costs of the national access regime for all parties while ensuring the principle of high-quality decision making is not compromised. In addressing procedural costs it should be noted that minimum time limits can be a blunt instrument that will not always be appropriate for highly complex cases
  - improve the quality of decision making, noting again the complexity of this area of regulation and the high economic costs of inconsistent or flawed decision making. The review should make recommendations that will lift the consistency and quality of decision making by Australia's economic regulators including by consolidating the number of regulators and improving commercial and industry-sector expertise.

In reviewing the CIRA, our conclusion is that:

- the focus on nationally consistent rail and port access regulation is likely to have had a beneficial if modest impact on promoting a more consistent national approach to infrastructure regulation, and governments should continue to pursue opportunities for national consistency
- the CIRA, however, cannot be said to have delivered on its objective of promoting 'enhanced application' of competitive neutrality to Government Business Enterprises (GBEs). The BCA has concerns around the complaints process, lack of public reporting of complaints and the poor clarity of guidance materials. There is a need for governments to update policy settings and recommit to this important policy.

With the original competition principles agreement now approaching 20 years of age, coupled with the diminishing impact of the CIRA, we see an opportunity for the findings of the commission's review to start a discussion around how a new intergovernmental agreement on infrastructure policy could promote new and efficient investment in infrastructure over the next decade. A new infrastructure competition and regulation agreement could include commitments towards:

- nationally consistent third-party access regulation and consolidating and lifting the quality of decision making by Australia's economic regulators
- a renewed commitment to competitive neutrality to ensure that new and existing government-owned infrastructure businesses are operating efficiently and fairly, especially new GBEs
- a timetable for privatising government-owned infrastructure businesses to capture efficiencies from private ownership and unlock public funds for reinvestment
- reforms to pricing infrastructure that move towards full recovery of the efficient costs of infrastructure provision, including an adequate risk-adjusted return on investment, and grow infrastructure markets.

Introduction

The Productivity Commission has invited submissions to concurrent reviews of the National Access Regime, otherwise known as Part IIIA of the Competition and Consumer Act, and COAG's 2006 Competition and Infrastructure Reform Agreement.

By combining the NAR and CIRA reviews the commission invites a wider consideration of the current state of infrastructure regulation in Australia and whether it is appropriately configured to meet our future investment needs. Australia is an expanding and highly capital-intensive economy. Our population is growing consistently at around 1.4 per cent per annum, growing to 36 million by 2050, and investment to GDP is approaching 30 per cent driven by a pipeline of committed, planned and possible investment projects of close to $1 trillion.[1]

Ongoing investment in new economic infrastructure – broadly defined as transport, water, energy and communications infrastructure – will provide the critical services that will underpin the competitiveness of our domestic and export industries and improve living standards for Australians in our fast-growing cities and regions.

A further argument in support of regular investment in infrastructure where it is done efficiently is that it can lift productivity by embedding the latest technologies and innovations from around the world to improve safety and service performance.[2] And of course Australia's large land mass and long distances between cities and remote economic centres tend to require high volumes of infrastructure investment.

In our view this is an important context for evaluating current infrastructure policies and the trade-offs inherent in access regulation between promoting benefits from competition and avoiding the high administrative and other costs of regulation and adverse impacts on incentives to invest.

We conclude by stating that this review creates an opportunity to start a national discussion about the need to update and refresh competition policies relating to infrastructure. Governments should recommit to national competition policies that remain relevant to today's economic circumstances, and identify and pursue new reforms that will ensure infrastructure provision and use is growing economic output, lifting productivity and improving living standards.

The BCA looks forward to providing further comment on the commission's draft report later this year.

Review of the National Access Regime

The commission's review of the National Access Regime comes about 20 years after Professor Fred Hilmer's reforms were first introduced.

At the time of the Hilmer reforms many infrastructure services were provided by inefficient public monopolies, the high cost and poor quality of infrastructure inputs were holding back the competitiveness of businesses right across the economy and Australia's productivity rates were well behind international averages.

Australia's economy is more productive thanks in part to those reforms as well as privatisation and the development of Australia's infrastructure markets. The BCA was a strong supporter of the Hilmer national competition policy reforms in the early 90s but recognised the essential infrastructure access provisions as being a difficult area for policy. The BCA's position paper on Hilmer at the time said:

> An access regime should be framed so as to contribute significantly towards greater economic efficiency. It will also need to achieve a balance between promoting competition, not discouraging investment, recognising property rights in existing facilities and avoiding costly and needlessly intrusive regulation. ('Position Paper on the Hilmer Report', *Business Council Bulletin*, No. 110, July 1994)

1. Deloitte Access Economics, *Investment Monitor*, January 2013.
2. See W. Keller, 'International Technology Diffusion', *Journal of Economic Literature*, Vol. 42, No. 3, September 2004, pp. 752–782.

The BCA's 1995 position paper[3] also said that in designing the national access regime:

- it should be taken into account that private [infrastructure] firms including those with a degree of market power were already subject to misuse of market power and merger provisions under the TPA
- it agreed strongly with Professor Hilmer's view that the regime should ensure that 'wherever possible the likely obligations to provide access should be made clear before an investment is made'
- policymakers should favour certainty about where the regime will apply and prevent the processes for resolving access disputes becoming drawn out and legalistic [the paper presciently quotes a trade practices expert warning that delays of 5 to 7 years might occur on access matters]
- national and independent institutions are preferred with appointments and skills reflecting the objectives to enhance efficiency in national markets.

These observations remain relevant today in identifying the key issues to be considered in assessing the NAR. The comments below have been informed by discussions with a number of BCA member companies with experience of Australia's infrastructure access regimes.

Should the NAR continue?

The commission's issues paper asks a threshold question of whether the NAR is still needed. This is a question worth exploring in detail. In the time since its introduction there has been significant change including the development of industry-specific regimes in gas and electricity that take many access cases out of the realm of the NAR. Furthermore, the NAR was initially proposed at a time of widespread public ownership of Australia's infrastructure, whereas today many infrastructure projects are privately owned.

Access regulation should address a clear problem and provide a clear net economic benefit to Australia. Its function is to enable the use of monopoly infrastructure by third parties under the rationale that by doing so, economic benefits will arise from an increase in competition in related markets.

The NAR currently makes a contribution to determining access arrangements in Australia by:

- providing a framework for certifying industry-specific access regimes in a nationally consistent manner
- providing a regime for determining access in individual cases not covered by industry-specific regimes.

In serving these functions it can be argued that it adds clarity to the resolution of access to essential infrastructure that might otherwise be dealt with under section 46 of the Competition and Consumer Act.

The NAR is, however, a complex policy regime that creates economic costs in terms of the high costs of administering the regime and the high potential for regulatory failure that creates financial risks for investors and negative impacts on investment incentives. The experience to date points to evidence of high costs, long decision-making timeframes, and uncertainty for investors – but an unclear picture of what the benefits have been to justify these costs.

Striking the right balance between competition and investment incentives and making sure the benefits of the regime clearly exceed its costs are key to an effective regime. The review presents an opportunity to more clearly define the regime's benefits and enable stakeholders to make a considered view of its economic contribution.

3. Business Council of Australia, 'Giving Effect to the National Competition Policy', August 1995. Note the 'TPA' refers to the Trade Practices Act, which has now been replaced by the Competition and Consumer Act 2010.

It is probably not time to remove the NAR given the purposes it currently fulfils; however, it should continue to be used sparingly. Governments should continue to prioritise alternative ways of resolving infrastructure access through the certification of industry-sector regimes and by implementing regulatory frameworks that are less intrusive and more conducive to a negotiated outcome between access seeker and access provider.

If in time more progress can be made in these areas, or more immediately if the commission's analysis shows significant net economic costs, these may be triggers for a deeper consideration on whether it is time to remove or significantly reform the NAR.

Objectives of the NAR

The issues paper asks whether economic efficiency should remain as the objective of the NAR or some other objectives be introduced such as long-term interests of consumers.

A goal of economic efficiency is appropriate for access regulation. In principle, consumers will benefit when allocative, productive and dynamic efficiency are maximised, so over the long run this is broadly consistent with an objective to promote the long-term interests of consumers.

A consideration is whether the efficiency objective and framework sufficiently recognises that Australia's capital stock is not fixed and Australia must present itself as an attractive place to make long-term investments. The 'dynamic efficiency' element of the efficiency framework refers to timely investment in new capital stock but it could be clearer in stating that this should also ensure that Australia captures the optimal quantity of available global capital.

The quality and certainty of the regulatory environment play a key role in determining Australia's attractiveness for investors who assess the relative risk and return profiles of competing projects around the world.

These considerations, combined with the high potential for regulatory failure, mean that when seeking to meet the objectives of the NAR, regulatory interventions should be limited to cases where there is a clear rather than marginal net economic benefit; that is, in the context of defining the economic benefit under the allocative, productive and dynamic efficiency framework.

This approach is appropriate for safeguarding investors and is consistent with the intent of the Hilmer inquiry's original report.

For instance, there are different views on the new interpretation of declaration Criteria B which is that a private profitability test should decide whether it is uneconomic to duplicate infrastructure. Previously a 'natural monopoly' test applied which essentially defined 'uneconomic' as the case where it is less costly to meet the demand for the infrastructure service with one facility rather than two or more.

While the new private profitability test probably warrants further analysis to fully understand its wider implications, now that it is in place care should be taken if the commission is considering recommending changes so as to avoid further chopping and changing of the rules. This is especially so given it seems a well-reasoned approach to dealing with the problems of practical application and mitigating against the high risks of regulatory failure and can promote dynamic efficiency through infrastructure competition.

Addressing the high risks and costs of the NAR

The issues paper invites comments about the costs of the NAR and risks to investment.

As mentioned earlier, the feedback from BCA members who are familiar with the NAR process is that it is costly and time consuming, it adds risks to investment and it interferes with the commercial negotiation process.

There are considerable costs involved in participating in the NAR including the gathering of expert advice and detailed information and the time and steps involved in the decision-making process, including reviews.

Companies are generally willing to bear these costs because the material consequences for their businesses from a decision either way are so high.

For investors two ways in which declaration under the regime can introduce an element of risk and uncertainty for investors are through:

- imposing a lower weighted average cost of capital for the use of the infrastructure than was included in the original business case for the investment, thereby creating unanticipated capital loss
- impacting on the flexibility in the use of the asset by the owner, e.g. through less efficient scheduling.

The likelihood is that these costs and risks to investors will not be accurately built into the original business case in an uncertain regulatory environment. The consequence of uncertainty is that investors will be more disposed towards only investing in capacity to meet immediate needs and less inclined to invest in spare capacity for future growth or increased asset quality, which is potentially at odds with the needs of a growing economy. Uncertainty can raise hurdle rates of return, which impact on the decision to invest.

The regime needs to operate in ways that lessen direct and indirect costs in future. The priority for policymakers and regulators should be to design a system that gets access decisions right at the lowest economic cost.

A six-month decision-making time limit has recently been introduced in an effort to bring down the time of these processes. This is a blunt instrument and it is not clear this is the best remedy. While in some cases the certainty that the six-month decision time limit provides may be beneficial in terms of lower cost to business, it may not be appropriate in complex cases and risks imposing greater costs on business if a poor decision is made. Getting the decision right is preferred to rushing the determination process and risking regulatory failure that does immediate and long-term damage to investor confidence and business operations. Flexibility needs to be built into procedural timeframes to reflect this, and the commission could provide guidance here.

Options for reducing the costs and risk of uncertainty for investors in new projects should be prioritised. The review should make recommendations for policy that can ensure that investors in new greenfields projects are either well aware upfront of their likely future obligations to provide access under the NAR, or alternatively that can facilitate application for ‘ineligibility periods’ for new investments, so as to add to investor certainty.

There is a common view that better decision making will be made where measures can be taken to lift the commercial expertise and experience of Australia’s competition regulators. In relative terms Australia’s economic regulators often rank well against their international counterparts. Nevertheless, in this complex area of regulation we should be doing all we can to lift the consistency and quality of decision making. Capabilities are spread across a number of Commonwealth and state regulators that should be able to be consolidated. Furthermore, a common view is that the level of commercial acumen within our regulators could be improved. Inconsistent decision making across jurisdictions is also driving an uncertain regulatory environment for investors.

It would be helpful if the commission could look critically at the consistency, resourcing and expertise of Australia’s federal and state regulators and consider recommendations for institutional reform. These might include: consolidation of regulatory agencies to build a more concentrated and improved capability to deal with access issues across industries and jurisdictions; options to increase commercial expertise; and opportunities for increased exchange of knowledge and experience with other mature regulatory systems such as the UK and US.

Review of the Competition and Infrastructure Reform Agreement

A review of COAG's 2005 Competition and Infrastructure Reform Agreement is also part of the commission's inquiry. This is an important review in its own right as it covers a broader policy focus.

The main elements of the CIRA were:

- simpler and more consistent regulation of significant infrastructure
- consistent approaches to rail and port infrastructure
- enhanced application of competitive neutrality to Government Business Enterprises (GBEs).

The CIRA expanded on aspects of the original Competition Principles Agreement of COAG in 1995 and represented a commitment by governments towards enhancing infrastructure regulation.

The focus on nationally consistent rail and port access regulation has probably had a beneficial if modest impact on promoting a more consistent national approach to infrastructure regulation.

That said, the COAG Reform Council (CRC) has identified a number of loose ends in its application, including a delay in the certification of some state industry-sector access regimes by the National Competition Council and the completion of reviews of ports competition in some jurisdictions.[4]

However, the CIRA cannot be said to have delivered on its objective of promoting 'enhanced application' of competitive neutrality based on our concerns around weaknesses in the complaints process, inconsistent public reporting of compliance and complaints, and the lack of clarity in competitive neutrality guidance materials and processes. An ongoing commitment to competitive neutrality policy remains very important for promoting efficient investment and fair competition by public businesses against their private competitors and there is a need for governments to update policy settings and lift compliance.

While the CRC has found that agreed milestones for the application of competitive neutrality under the CIRA were met, this merely relates to a very narrow obligation to reporting competitive neutrality compliance to COAG on time (not publicly). More significantly, the CRC has noted that 'insufficient explanation of exceptions and variations to the competitive neutrality principles is a continuing problem'.

The next section provides specific comment on the effectiveness of the CIRA in relation to enhanced competitive neutrality.

Comment on the CIRA's enhanced commitment to competitive neutrality

The CIRA promoted ongoing commitment to competitive neutrality as important to the efficient investment and operation of government infrastructure businesses and for providing a level playing field for private businesses.

Competitive neutrality aims to ensure that GBEs do not receive a competitive advantage over other businesses due to their public ownership. This means GBEs should not receive favourable taxation or regulatory treatment, their cost of debt should be comparable to that of a similar private business and not that of the government, and their prices must be set to fully cover all costs and to make a commercial rate of return on the government's investment.

Under section 6.1 in the CIRA, governments agreed to 'enhance the application of competitive neutrality to government business enterprises', including these commitments to GBE objectives:

- that the enterprise has clear commercial objectives
- that any non-commercial objectives or obligations established for the enterprise are clearly specified and publicly reported.

4. COAG Reform Council, *Seamless National Economy: Report on Performance 2011–12*, pp. 131–144.

This distinction between commercial and non-commercial obligations and how they are funded is at the core of competitive neutrality policy. In short, the policy requires GBEs to earn market-based rates of return on operations that meet commercial objectives, with non-commercial objectives or obligations of GBEs clearly specified, publicly reported and funded transparently.

The BCA has concerns with the application of competitive neutrality in practice and sees this as an area where the CIRA has not delivered against its objectives for 'enhanced application':

- The guidance documentation for the application of competitive neutrality is dated and unclear around how the complaints investigation process should operate.
- Recent experiences of the application of the competitive neutrality complaints resolution process at the Commonwealth level raise questions about the commitment to competitive neutrality and the quality of public reporting around complaints.
- The timeliness of annual public reporting of competitive neutrality compliance by COAG has been poor.

Competitive neutrality remains very relevant today. Despite a wave of privatisations there remain many government businesses operating in Australia and new Commonwealth GBEs have also recently been established, for instance, NBN Co and the Moorebank Intermodal Terminal Company.

In part the use of the GBE model is attractive to governments wanting to invest in infrastructure as it can overcome budget funding constraints and potentially improve public infrastructure delivery through better corporate governance and a more commercial business model.

If governments are to create new GBEs to deliver infrastructure, it is sound practice to first undertake a rigorous and transparent cost–benefit analysis and then to apply competitive neutrality in full. Furthermore, governments need to carefully manage the conflicts that arise as both business owner and competition regulator.

The recent case of the investigation of a complaint by several private businesses against NBN Co by the Australian Government Competitive Neutrality Complaints Office (AGCNCO), housed within the Productivity Commission, highlights our concerns about the operation of the competitive neutrality policy in practice.

AGCNCO found a potential ex-ante breach of competitive neutrality in NBN Co's business model due to a lower than commercial rate of return and made these recommendations:

- 'The Australian Government should arrange for an analysis of the nature and magnitude of the non-commercial benefits required to be delivered by NBN Co. On receipt of the analysis, the Australian Government should put in place accountable and transparent community service obligation funding …
- To comply with competitive neutrality policy, NBN Co would need to adjust its pricing model by taking into account funding by the Australian Government for its community service obligations and would need to demonstrate that the adjusted pricing model is expected to achieve a commercial rate of return that reflects its risk profile.'[5]

The government's response was provided by the portfolio minister, the Minster for Broadband, Communications and the Digital Economy, who is also a joint shareholder in NBN Co. The minister said the AGCNCO was 'misguided' in its view, that 'while the company is to operate as a commercial entity, it is not expected to earn a private sector rate of return – rather, a modest return sufficient to fully recover its costs of funds' and 'the government does not agree with the AGCNCO's recommendations in these areas and will not be adopting the recommendations'.[6]

5. Australian Government Competitive Neutrality Complaints Office, 'NBN Co – Investigation No. 14', Canberra, November 2011, p. 34
6. Office of Senator the Honourable Stephen Conroy, 'Conroy Defends Uniform Pricing Model for NBN', Media Release, 8 December 2011.

This response raises concerns on several fronts:

- At the Commonwealth level competition policy is within the Treasurer's ministerial portfolio, yet the application of the policy allows for a portfolio minister to respond to an AGCNCO finding, although the guidelines are ambiguous on this responsibility.[7]
- The government dismissed the findings of its own independent expert about the application of one of its core economic policies (competition policy).
- There was a lost opportunity to potentially achieve more efficient investment in the telecommunications sector (as the competitive neutrality policy is designed to achieve).
- There are established private business owners and employees whose livelihood is affected when a new public company enters the market with an unfair advantage.
- Business confidence to invest rests on government regulations and policies being applied fairly, especially when they relate to the government's own operations and businesses.

In a separate investigation in April 2012 AGCNCO made recommendations to alter PETNET Australia's business following a competitive neutrality complaint. We can find no public ministerial response from the Commonwealth Government to this report.

More generally in the aim to achieve 'enhanced application' of competitive neutrality, a recent paper by the Victorian Competition and Efficiency Commission reveals that across the federation there remains scope for greater consistency in the institutional and procedural application of competitive neutrality and its enforcement.[8]

Another concern is that the reporting of competitive neutrality compliance via COAG has slipped in recent years. In recent years the reporting of the 'competitive neutrality matrix' on the COAG website has not happened for over a year or more after the end of the relevant financial year. The COAG Reform Council's concerns about the quality of the explanation of exceptions and variations to the competitive neutrality principles in those public reports also raises questions about how committed governments are to 'enhanced application'.

Based on these experiences and assessments and with government potentially re-emerging as an owner of new infrastructure businesses, we believe there is a need for all governments to recommit to the competitive neutrality policy and implement agreed procedures for the application of competitive neutrality that sets out:

- a clear process for how governments should respond to competitive neutrality disputes including which minister should respond and in what timeframe, with any exemptions endorsed and announced by the minister responsible for competition policy
- time limits for implementing the recommendations of the AGCNCO (or relevant state agency)
- transparent and easy-to-locate reporting on the government's response to findings by the AGCNCO (or relevant state agency) and remedial actions taken
- principles for identifying and specifying non-commercial objectives of government businesses and how those activities should be transparently funded

7. The guidelines for the complaints process in the 1995 *Commonwealth Competitive Neutrality Policy Statement* say that the Treasurer should lead the government's response to an AGCNCO finding within 90 days. The 1998 version of the *Australian Government Competitive Neutrality Guidelines for Managers* places the onus on the portfolio minister to decide whether to implement any changes but is less clear on how the government overall should respond to findings arising from the complaints process. The updated 2004 version *Australian Government Competitive Neutrality Guidelines for Managers* does not have a section on the complaints process but does say that the AGCNCO provides 'independent advice to the Treasurer on the application of competitive neutrality'. Furthermore, the guidelines state that 'in preparing your case for exclusion, or partial exclusion from CN [competitive neutrality], you must conduct an appropriate cost/benefit analysis and retain the documentation relating to your cost/benefit analysis as it may be required by the AGCNCO in the event of a complaint against you' (p. 14).
8. Victorian Competition and Efficiency Commission, *Competitive Neutrality Inter-Jurisdictional Comparison Paper,* February 2012

- guidance on how competitive neutrality should be applied to new, start-up government businesses, for example, on the matter of the length of time over which a commercial rate of return should be achieved.

Governments should also recommit to timely and comprehensive public reporting of the competitive neutrality compliance of their businesses, preferably within six months of the end of each financial year.

Next steps: a new infrastructure reform agenda

This review by the Productivity Commission, by considering both the national access regime and the Competition and Infrastructure Reform Agreement of COAG, can help to start a discussion about the next wave of national infrastructure reforms that Australia needs to raise the level and efficiency of infrastructure investment and use in the future.

With the original competition principles agreement nearing 20 years of age, and the impact of the CIRA diminishing, a new intergovernmental agreement (IGA) on infrastructure policy for the next 10 years should start to be considered by Australia's governments. A new agreement should include reforms that will promote new and efficient investment in infrastructure, including commitments towards:

- nationally consistent third-party access regulation and a consolidation and a lift in the consistency, capability and performance of Australia's economic regulators
- a renewed commitment to competitive neutrality to ensure that new and existing government-owned infrastructure businesses are operating efficiently and fairly, especially new GBEs
- a new timetable for privatising government-owned infrastructure businesses to capture efficiencies from private ownership and unlock public funds
- reforms to pricing infrastructure that move towards full recovery of the efficient costs of infrastructure provision, including an adequate risk-adjusted return on investment, and grow infrastructure markets.

Commitment to consistent national approach to access regulation

Governments should continue to commit to applying consistent and high-quality access regulation, to improve processes and work together to consolidate resources so that Australia has a strong body of commercial and regulatory expertise within government to resolve access matters.

The emphasis on more consistent rail and port regulation in the 2005 CIRA is still worthy of attention given the patchwork of access regimes that operate across jurisdictions in these sectors. This should also include possible consolidation of economic regulators in these areas.

A further review of the National Access Regime should be scheduled for 10 years time.

A new enhanced Commitment to Competitive Neutrality

Given the decline in the application of competitive neutrality and with government potentially re-emerging as an owner of new infrastructure businesses there is a need for a renewed commitment by governments to the competitive neutrality policy and to agree on procedures for the application of competitive neutrality which sets out:

- a clear process for how governments should respond to competitive neutrality disputes including which minister should respond and by when
- time limits for implementing the recommendations of the AGCNCO and state-based complaints units
- clear principles for identifying and specifying non-commercial objectives of government businesses and how those activities should be transparently funded

- guidance on how competitive neutrality should be applied to new, start-up government businesses, in for example the length of time over which a commercial rate of return should be achieved.

A new intergovernmental agreement should commit governments to reporting on competitive neutrality compliance within six months of the end of each financial year.

A website should be established for competitive neutrality complaints that makes available the investigation report and the government's formal response, including any remedies that were implemented.

New intergovernmental commitments to privatisation and pricing reforms

To lift productivity through a new wave of infrastructure reforms, we believe there are two areas that should be included in a new intergovernmental agreement – a timetable for the privatisation of government infrastructure businesses and the implementation of remaining infrastructure pricing reforms. Both initiatives would lift the efficient use and investment in Australia's infrastructure in parallel with improved access regulation and observance of competitive neutrality.

Further privatisation of infrastructure businesses offers further scope for gains. Infrastructure Australia has identified that more than $100 billion of commercial infrastructure assets on Australian government balance sheets.[9] The private ownership of infrastructure is generally preferred to government ownership for two key reasons:

- The private sector is better at innovating and running businesses and more likely to deliver better and more efficient infrastructure investments than government businesses.
- Government ownership of infrastructure locks up limited capital that could be used to fund other worthwhile infrastructure projects or other government services.

A new IGA could include a commitment to the privatisation of remaining infrastructure assets in government ownership. It is important, however, that private ownership is consistent with achieving policy objectives for efficient investment in infrastructure and protecting the interests of consumers. The public sector's role should be to set policy and regulation that achieves these aims.

The BCA suggests the following criteria might be considered for determining whether an asset is most appropriately owned privately or by governments:

- Governments should sell infrastructure assets where the private sector already owns other like assets and provides other like services (this effectively demonstrates adequate policies are already in place to protect consumers).
- Private ownership should be preferred where an appropriate and transparent price can be established for the infrastructure service in any of these three ways:
  - there is a market price set by an effective and contestable market for the infrastructure service
  - there is a regulated price that allows an adequate return on an efficient investment while also protecting the interests of consumers
  - there is a contract price implicit in the availability payments that a government makes to the owner of the infrastructure on behalf of public users (includes community service obligations).
- Government ownership should only be preferred where a public benefit test demonstrates that government ownership is necessary for achieving the social objectives of infrastructure provision.

Infrastructure pricing models should continue to be implemented that allow for the full recovery of the efficient costs of investment. It is noted that there may be instances where full recovery of costs is problematic where infrastructure provides external benefits, for example, in relation to commuter rail lines. Any government funding of shortfalls in these cases should be via explicit payments.

9. Infrastructure Australia, *Australia's Public Infrastructure – Part of the Answer to Removing Infrastructure Deficit*, October 2012.

A new IGA could include commitments to work towards:

- further movement towards full cost pricing for urban and rural water and removal of any barriers to trading water
- the states to ensure effective retail market competition and remove all price caps on electricity at the retail level
- better application of systemic and efficient road user charging models that also sustain road funding; for example, the implementation of the COAG Heavy Vehicle Charging and Investment reforms (formerly the COAG Road Reform Plan), which introduces efficient charging for heavy vehicles with revenue used to fund new and improved road provision.

Private investors will invest in projects when they can recover all of their costs and make an adequate return on the investment, adjusted for the risk of the project. If governments can enable the funding of public infrastructure projects through fully developed pricing models where they are not currently in place – as the reforms needed are mostly decisions of governments, not businesses – private investors are more likely to finance, deliver and operate the projects.

Conclusion

This submission by the Business Council of Australia provides comment on an important review by the Productivity Commission of the National Access Regime and the Council of Australian Governments 2006 Competition and Infrastructure Reform Agreement.

The experience of BCA members is that the National Access Regime is a costly, time-consuming and highly complex policy with many potential risks in its application. It is very important that the findings of the inquiry:

- strike the right balance between competition and investment incentives and making sure the benefits of the regime clearly exceed its costs
- promote investment by enhancing certainty for investors
- reduce the costs and risks that stem from inefficient procedures, poor decision making and regulatory failures.

Overall the CIRA would seem to have delivered mixed results. The focus on nationally consistent rail and port access regulation has probably had a beneficial if modest impact on promoting a more consistent national approach to infrastructure regulation. However, the CIRA cannot be said to have delivered on its objective of promoting ‘enhanced application’ of competitive neutrality, based on our concerns around weaknesses in the complaints process, inconsistent public reporting of compliance and complaints, and the lack of clarity in competitive neutrality guidance materials and processes.

The review creates an opportunity to start a national discussion about the need to update and refresh competition policies relating to infrastructure. Governments should recommit to national competition policies that remain relevant to today’s economic circumstances, and identify and pursue new reforms that will ensure infrastructure provision and use is growing economic output, lifting productivity and improving living standards.

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