

*This document is the European Union's (EU) proposal for the EU-Australia FTA. It has been tabled for discussion with Australia. The actual text in the final agreement will be a result of negotiations between the EU and Australia.*

**DISCLAIMER:** *The EU reserves the right to make subsequent modifications to this text and to complement its proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time.*

## CHAPTER [XX]

### **State-Owned Enterprises**

#### *Article X (Delegated Authority – to be placed in the Chapter on General Provisions)*

Unless otherwise specified in this Agreement, each Party shall ensure that any person including a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly that has been delegated regulatory, administrative or other governmental authority by a Party at any level of government, acts in accordance with the Party's obligations as set out under this Agreement in the exercise of that authority.

#### *Article X.1*

### **Definitions**

For the purposes of this Chapter:

- (a) "Arrangement" means the Arrangement on Officially Supported Export Credits, developed within the framework of the Organization for Economic Co-operation and Development (OECD) or a successor undertaking, whether developed within or outside of the OECD framework that has been adopted by at least 12 original WTO Members that were Participants to the Arrangement as of 1 January 1979;
- (b) "Commercial activities" means activities, the end result of which is the production of a good or supply of a service, which will be sold in the relevant market in quantities and at prices determined by the enterprise, and are undertaken with an orientation towards profit-making<sup>1</sup>;
- (c) "Commercial considerations" means price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale; or other factors that would normally be taken into account in the commercial decisions of a privately owned enterprise operating according to market economy principles in the relevant business or industry.
- (d) "Designate" means to establish or authorize a monopoly, or to expand the scope of a monopoly to cover an additional good or service.

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<sup>1</sup> For greater certainty, activities undertaken by an enterprise which operates on a non-profit basis or a cost-recovery basis are not activities undertaken with an orientation towards profit-making

- (e) "Designated monopoly" means an entity, including a consortium or a government agency, that in a relevant market in the territory of a Party is designated as the sole supplier or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant.
- (f) "Enterprise granted special rights or privileges" means any enterprise, public or private, that has been granted by a Party, in law or in fact, special rights or privileges; special rights or privileges are granted by a Party when it designates or limits to two or more the number of enterprises authorized to provide a good or a service, other than according to objective, proportional and non-discriminatory criteria, substantially affecting the ability of any other enterprise to supply the same good or service in the same geographical area under substantially equivalent conditions.
- (g) "Service supplied in the exercise of governmental authority" means a service supplied in the exercise of governmental authority as defined in GATS and, if applicable, in the Annex on Financial Services
- (h) "State-owned enterprise" means an enterprise in which a Party:
  - (i) directly owns more than 50 per cent of the share capital;
  - (ii) controls, directly or indirectly, the exercise of more than 50 per cent of the voting rights;
  - (iii) holds the power to appoint a majority of the members of the board of directors or any other equivalent management body; or
  - (iv) has the power to exercise control<sup>2</sup> over the enterprise.

## *Article X.2*

### **Scope**

1. This Chapter applies to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies, engaged in a commercial activity. Where they engage both in commercial and non-commercial activities<sup>3</sup>, only the commercial activities are covered by this Chapter.
2. This Chapter applies to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies at all levels of government.
3. This Chapter does not apply to situations where state-owned enterprises, enterprises granted special rights or privileges or designated monopolies act as procuring entities covered under each Party's annexes to Appendix I to the GPA and under [*Sub-Sections 1 and 2 of Section B of Annex 10*] to this Agreement for governmental purposes and not with a view to

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<sup>2</sup> For the establishment of control, all relevant legal and factual elements shall be taken into account on a case by case basis.

<sup>3</sup> such as carrying out a legitimate public service obligation

commercial resale or with a view to use in the production of goods or in the supply of services for commercial sale.

4. This Chapter does not apply to any service supplied in the exercise of governmental authority.

5. Article X.5 (Non-discriminatory treatment and commercial considerations) shall not apply with respect to the supply of financial services by a state-owned enterprise pursuant to a government mandate if that supply of financial services:

- (a) supports exports or imports, provided that these services:
  - (i) are not intended to displace commercial financing, or
  - (ii) are offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market; or
- (b) supports private investment outside the territory of the Party, provided that these services are:
  - (i) not intended to displace commercial financing, or
  - (ii) offered on terms no more favourable than those that could be obtained for comparable financial services in the commercial market.
- (c) is offered on terms consistent with the Arrangement, provided it falls within the scope of the Arrangement.

6. Article X.5 does not apply to the services sectors which are outside the scope of this Agreement as set out in [*exact reference*].

7. Article X.5 shall not apply to the extent that a state-owned enterprise, an enterprise granted special rights or privileges or a designate monopoly of a Party makes purchases and sales of goods or services pursuant to:

- (a) any existing non-conforming measure in accordance with [*Article x (Non-Conforming Measures) of Chapter X (Cross-Border Trade in Services)*] or [*Article y (Non-Conforming Measures) of Chapter Y (Investment)*] that the Party maintains, continues, renews or amends in [*Annex x*]; or
- (b) any non-conforming measure that the Party adopts or maintains with respect to sectors, subsectors, or activities in accordance with [*Article y (Non-Conforming Measures) of Chapter X (Cross-Border Trade in Services)*] or [*Article y (Non-Conforming Measures) of Chapter Y (Investment)*] as set out in its Schedule in [*Annex y*].

### *Article X.3*

#### **Relation to the WTO Agreement**

The Parties affirm their rights and obligations under paragraphs 1 to 3 of Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, as well as under paragraphs 1, 2 and 5 of Article VIII of GATS.

*Article X.4*

**General provisions**

1. Without prejudice to the rights and obligations of each Party under this Chapter, nothing in this Chapter prevents a Party from establishing or maintaining state-owned enterprises, designating or maintaining monopolies or granting enterprises special rights or privileges.
2. Neither Party shall require or encourage a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly to act in a manner inconsistent with this Chapter.

*Article X.5*

**Non-discriminatory treatment and commercial considerations**

1. Each Party shall ensure that each of its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies, when engaging in commercial activities,:
  - (a) acts in accordance with commercial considerations in their purchases or sales of a good or a service, except to fulfil any terms of its public service mandate that are not inconsistent with subparagraph (b) or (c); and
  - (b) in its purchase of a good or a service:
    - (i) accords to a good or a service supplied by an enterprise of the other Party treatment no less favourable than it accords to a like good or a like service supplied by enterprises of the Party; and
    - (ii) accords to a good or service supplied by a covered enterprise as defined in [*reference to Article on definitions in the Chapter on Trade in Services*] treatment no less favourable than it accords to a like good or a like service supplied by enterprises of entrepreneurs of the Party in the relevant market in the Party; and
  - (c) in its sale of a good or a service:
    - (i) accords to an enterprise of the other Party treatment no less favourable than it accords to enterprises of the Party; and
    - (ii) accords to a covered enterprise as defined in [*reference to Article on definitions in the Chapter on Trade in Services*] treatment no less favourable than it accords to enterprises of entrepreneurs of the Party in the relevant market in the Party.
2. Paragraph 1 does not preclude state-owned enterprises, enterprises granted special rights or privileges or designated monopolies from
  - (a) purchasing or supplying goods or services on different terms or conditions, including

those relating to price; or

- (b) refusing to purchase or supply goods or services,

provided that such different terms or conditions or refusal is undertaken in accordance with commercial considerations.

#### *Article X.6*

### **Regulatory framework**

1. The Parties respect and make best use of relevant international standards including, *inter alia*, the OECD Guidelines on Corporate Governance of State-Owned Enterprises.

2. Each Party shall ensure that any regulatory body or any other body exercising a regulatory function that the Party establishes or maintains

- (a) is independent from, and not accountable to, any of the enterprises regulated by that body, and

- (b) acts impartially<sup>4</sup> in like circumstances with respect to all enterprises regulated by that body, including state-owned enterprises, enterprises granted special rights or privileges and designated monopolies.<sup>5</sup>

3. Each Party shall apply its laws and regulations to state-owned enterprises, enterprises granted special rights or privileges and designated monopolies in a consistent and non-discriminatory manner.

#### *Article X.7*

### **Information exchange**

1. A Party which has reason to believe that its interests under this Chapter are being adversely affected by the commercial activities of a state-owned enterprise, an enterprise granted special rights or privileges or a designated monopoly (hereinafter referred to in this Article as "the entity") of the other Party may request the other Party in writing to provide information on the commercial activities of the entity related to the carrying out of the provisions of this Chapter in accordance with paragraph 2.

2. The requested Party shall provide the following information, provided that the request includes an explanation of how the activities of the entity may be affecting the interests of the requesting Party under this Chapter and indicates which of the following information shall be provided:

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<sup>4</sup> For greater certainty, the impartiality with which the body exercises its regulatory functions is to be assessed by reference to a general pattern or practice of that body.

<sup>5</sup> For greater certainty, for those sectors in which the Parties have agreed to specific obligations relating to such a body in other Chapters, the relevant provisions of those Chapters shall prevail.

- (a) the ownership and the voting structure of the entity, indicating the percentage of shares that the Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies cumulatively own, and the percentage of voting rights that they cumulatively hold, in the entity;
- (b) a description of any special shares or special voting or other rights that the Party, its state-owned enterprises, enterprises granted special rights or privileges or designated monopolies hold, where such rights are different from those attached to the general common shares of the entity;
- (c) a description of the organisational structure of the entity and its composition of the board of directors or of any other equivalent body;
- (d) a description of which government departments or public bodies regulate and/or monitor the entity, a description of the reporting requirements imposed on it by those departments or public bodies, and the rights and practices of those departments or any public bodies with respect to the appointment, dismissal or remuneration of senior executives and members of its board of directors or any other equivalent management body;
- (e) annual revenue and total assets of the entity over the most recent three year period for which information is available;
- (f) any exemptions, immunities and related measures from which the entity benefits under the laws and regulations of the requested Party; and
- (g) any additional information regarding the entity that is publicly available, including annual financial reports and third party audits.

3. [*To be checked against General Provisions:*] The provisions of paragraphs 1 and 2 shall not require any Party to disclose confidential information the disclosure of which would be inconsistent with its laws and regulations, impede law enforcement, or otherwise be contrary to the public interest, or would prejudice the legitimate commercial interests of particular enterprises.

4. If the requested information is not available to the Party, that Party shall provide the reasons for this in writing to the other Party who requested the information.

5. This Article does not apply to small and medium-sized enterprises.