Minerals Council of Australia

NORTHERN TERRITORY DIVISION

24 February 2017

Mr Stuart Peevor
Manager Pricing and Access
Essential Services Commission
GPO Box 2605
ADELAIDE SA 5001

Dear Mr Peevor

Submission on the 2017 ESCOSA Review of Guidelines for the Access Regime for the Tarcoola-Darwin Railway

The Minerals Council of Australia - Northern Territory Division welcomes the opportunity to make this submission on the Essential Services Commission of South Australia (ESCOSA) 2017 Review of Rail Guidelines for Access Regimes, including the Tarcoola-Darwin Railway.

The MCA is the peak industry association that represents the corporate minerals companies in Australia. The members of the MCA are engaged in mineral processing, mining, exploration, or the provision of services to the industry and account for more than 85% of mineral industry output in Australia.

The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

The MCA-NT Division represents the interests of members operating, exploring and providing services to the industry in the NT. The minerals industry has a large and diverse presence across the NT which comprises close to 20% of the NT's gross domestic product whilst employing approximately 4,400 across mining operations for a range of mineral commodities including manganese, iron ore, lead, silver, zinc, gold, bauxite and uranium.

Members of the MCA-NT Division are currently engaged in seeking rail transport solutions for their respective projects. As such MCA-NT Division is well positioned to provide comment on behalf of its members on this review, together with other relevant regulatory issues which we encourage ESCOSA to consider, both in developing its final position for the review and longer term suggestions of improvements to the regulatory framework.

The MCA-NT Division submission therefore seeks to highlight a number of fundamental issues with the current access regime (and associated administration) for the Tarcoola-Darwin Railway,

Specifically, the MCA-NT Division:

- Is of the view that the Tarcoola-Darwin Railway (TDR) is an asset of national significance, key to the economic prosperity of the Northern Territory

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- Believes there is a detrimental lack of transparency and also a presence of information asymmetry within the regulatory framework governing the TDR, together constraining the overall effectiveness of the regulatory regime. Consequently, the current framework is inadequate, has and will continue to jeopardise investment within the Northern Territory
- Is of the view that developers are in the process of securing the required financing to begin project development, but are frustrated with both a lack of transparency and a lack of certainty around infrastructure pricing and capacity, altogether hampering, if not constraining, global capital investment within NT projects and infrastructure

Our detailed submission (at Attachment A) includes four recommendations:

Recommendation 1:

The Code should be subject to a more comprehensive review, including identifying issues that might require legislative reform for satisfactory resolution of impediments to future investment and development of the resources sector, to ensure consistency with current competition principles in relation to significant transport infrastructure.

- In the absence of adequate regulatory oversight, a vertically-integrated monopoly (as exists in the Northern Territory) could exploit information asymmetry and lack of transparency to further leverage its market position at the expense of access seekers, for example by dictating the timing of investment to increase capacity or by using access pricing to lock out above rail competition.
- The Code was developed in 1999 in a vastly different economic climate to that prevailing now and should be assessed in the context of current competition principles, policies and agreements, including the 2012 National Compact on Regulatory and Competition Reform, the 2013 Review of the National Access Regime, the 2014 Harper Review and more recent reviews.
- A more robust method of regulation should be developed and implemented, for example rate of return based on the asset value determined by what GWAN actually paid for the asset rather than what it cost tax payers to build, price-cap or revenue cap forms of price control regulation.

Recommendation 2:

Regulatory review of the Code should be done to allow alternatives to the negotiate-arbitrate regulatory framework, including a requirement for GWAN to provide access and pricing undertakings and the option for approved standard access agreements, aimed at avoiding protracted negotiations and reducing the potential for unequitable risk transfer between the access seeker and access provider.

Recommendation 3:

Inadequate transparency and current information asymmetry (wherein the access provider has substantially greater access to information relevant to infrastructure pricing and capacity than access seekers) need to be redressed through provision of adequate information to access seekers to provide greater certainty in relation to capital investment for Northern Territory projects.

- A reasonable level of cost information is required to facilitate and expedite the negotiation phase of the regulatory framework. Supplying such information could increase the efficiency of negotiations while simultaneously achieving results expected in a competitive market.
- Additional information provided to access seekers in Queensland includes substantially more information about applying for access, a summary of the entire access process, copies of the conceptual operating plan and various access agreements, in addition to line diagrams, costing manuals and compliance reports.

Recommendation 4:

Lack of disputes should not be used as a criterion to assess the success of the negotiate-arbitrate framework, as access seekers could be unwilling or unable to test the dispute resolution process, because of potentially significant costs of arbitration.

- A more appropriate test of a successful dispute resolution framework (as well as the regulatory environment) is its impact on investment, growth and productivity, that together combine to foster continued competition and development.

The MCA-NT Division recognises the importance of the consultative regulatory process prescribed by ECOSA and welcomes any further opportunity to discuss the issues raised in our submission.

The remainder of our feedback is detailed in Attachment A.

Once again, the MCA NT commends ESCOSA on undertaking this important review. Should you have any questions regarding this submission, please do not hesitate to contact me directly on 08 8981 4486.

Yours sincerely,

Drew Wagner
Executive Director
Minerals Council of Australia – Northern Territory Division

MINERALS COUNCIL OF AUSTRALIA NORTHERN TERRITORY DIVISION

SUBMISSION ON REVIEW OF GUIDELINES FOR THE ACCESS REGIME FOR THE TARCOOLA-DARWIN RAILWAY

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24 FEBRUARY 2017

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EXECUTIVE SUMMARY

The Minerals Council of Australia Northern Territory Division (MCA NT) welcomes the opportunity to make this submission on the Essential Services Commission of South Australia (ESCOSA) Review of Rail Guidelines for Access Regimes 2017, for the Tarcoola-Darwin Railway.

The Minerals Council of Australia (MCA) is the peak industry association that represents the corporate minerals companies in Australia. The members of the MCA are engaged in mineral processing, mining, exploration, or the provision of services to the industry and account for more than 85% of mineral industry output in Australia.

The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

The MCA NT represents the interests of members operating, exploring and providing services to the industry in the NT. The minerals industry has a large and diverse presence across the NT which comprises 12% of the NT's gross domestic product whilst employing approximately 5,700 across mining operations for a range of mineral commodities including manganese, iron ore, lead, silver, zinc, gold, bauxite and uranium[1].

Members of the MCA NT are currently engaged in seeking rail transport solutions for their respective projects, and the MCA NT is providing feedback on their behalf for the ESCOSA review to ensure the access regime does not comprise a disincentive for future investment in and sustainable development of the minerals sector in the Northern Territory. The regime is intended to encourage commercial negotiation of access to the railway and establish procedures for conciliation and arbitration should access disputes arise. The current review has called for feedback on four guidelines under the AustralAsia Railway (Third Party Access) Act 1999, detailing the responsibilities of the regulator and industry participants, to ensure that the guidelines

- 'continue to provide effective protection to existing and prospective railway users while ensuring the regulatory costs are kept to a minimum;
- are clear and represent contemporary practice; and
- anticipate, as much as practicable, future changes in the rail industry.'

[1] Inflation adjusted, Northern Territory Government, Department of Treasury and Finance, Economic Brief, Gross State Product 2014-15, accessed at http://www.treasury.nt.gov.au/Economy/EconomicBriefs/Pages/GrossStateProduct.aspx

Although ESCOSA has indicated that it 'seeks views on improvements that might be made *within the limits of relevant legislation*,' some of the greatest risks to our industry from inadequacies in the current regime will require a review and amendment of current legislation, and our submission identifies these issues in relation to longer-term reform of the regulatory framework.

In response to the MCA NT's previous submission, on the 10-year Review of Revenues in which we raised these issues, ESCOSA in its final report (August 2015) suggested that issues raised by our organisation and other industry stakeholders could not be addressed by ESCOSA, as certain of these, including introducing standard access agreements as an alternative to the current negotiate-arbitrate framework, were outside ESCOSA's purview.[2] However, unless the suggested review of relevant legislation is done, the objectives of the Act and guidelines, as identified in the three dot points above, cannot be achieved.

The key issues the MCA NT wishes ESCOSA to acknowledge and address are as follows:

- The Tarcoola-Darwin Railway (TDR) is not only essential commerce-enabling major infrastructure for the current and future Northern Territory's resources sector but is an asset of national significance in the context of Australia's economic prosperity.
- Lack of transparency combined with asymmetry in relation to information available to the access provider compared to the access seeker within the regulatory framework governing the TDR constrains the overall effectiveness of the regulatory regime. These inadequacies have and will continue to jeopardise investment in the NT resources sector.
- In addition to these frustrations, current developers are being discouraged by a lack of certainty regarding infrastructure pricing and capacity, hampering and constraining global capital investment for NT projects and infrastructure.
- The Code should be subject to a more comprehensive review, including identifying issues that might require legislative reform for satisfactory resolution of impediments to future investment and development of the resources sector, to ensure consistency with current competition principles in relation to significant monopoly transport infrastructure.

[2] Essential Services Commission of SA, *Tarcoola-Darwin Railway: 10-year review of revenues – Final Report* (August 2015), p 15, available at http://www.escosa.sa.gov.au/ArticleDocuments/365/20150828-Rail-Tarcoola-Darwin-TenYearReviewOfRevenues-FinalReport.pdf.aspx?Embed=Y

The MCA NT appreciates the opportunity to again represent the views of our members in the context of the current ESCOSA review and welcomes the opportunity to further discuss with you the issues raised in our submission.

THE ECONOMIC IMPORTANCE OF THE TARCOOLA-DARWIN RAILWAY (TDR) TO THE NORTHERN TERRITORY

As a key piece of transport infrastructure within the Northern Territory, the Tarcoola-Darwin Railway (TDR) is of significant economic importance, as it terminates in the north with the Port of Darwin, transporting imports south and commodities (mineral, primary production, materials, and products, etc.) north to the Port. Located in the centre of Australia's northern coastline, the Port of Darwin is Australia's most northern deep water harbour and the closest port to Asia. Until 2016, the Port was owned by the NT Government; however, in 2016, the Government established a 99-year lease of the Port with the Chinese firm, the Landbridge Group. The Landbridge Group now operates the multi-user, mixed cargo and marine services port. The leased area includes land adjacent to the railway for future development.

In 2013-2014, total throughput for all Australian ports totalled 1,220 million tonnes (MT), with the Port of Darwin one of the smaller contributors, with 4.60 MT of throughput during that same period.[3] Of this, 62% of all throughput was bulk freight, with iron ore (1.88 MT) and manganese (0.92 MT) the main commodities.

A substantial decrease in dry bulk exports from Port Darwin reflected very significant falls in exports of mineral concentrates, primarily iron ore and manganese:

2010 – 2015 STATS FOR EXPORTS FROM PORT DARWIN (in Million Tonnes, MT)[3],[4]

YEAR	TOTAL CARGO TRADE	DRY BULK EXPORTS	IRON ORE DARWIN	MANGANESE DARWIN
2010-11	3,835,354	2,226,668	1,288,658	882,804
2011-12	3,511,007	2,218,521	1,084,607	833,193
2012-13	4,299,009	2,560,362	1,668,432	888,765
2013-14	4,597,933	2,816,967	1,881,773	924,946
2014-15	3,423,680	1,534,475	735,513	791,970
Decrease from 2013-14 to 2014-15	26%	46%	61%	14%

Territory Iron and OM Manganese, which both shut down in 2015-16, had been exporting their ores through Port Darwin. It is possible that excessively high rail freight charges contributed to their

[3] Ports Australia, 2015, Trade Statistics – Total Throughput (mass tonnes) for 2012/13, available at www.portsaustralia.com.au

[4] Darwin Port Corporation, 2015. 2015 Trade Report – Positioning for the Future, available at http://www.darwinport.com.au/sites/default/files/images/DPC_2015_A-R_trade_report_web.pdf

operations becoming uneconomic during the lower price period of the cycle. (Note: OM Manganese is in the process of re-starting.)

The minerals sector was the second largest contributor to the Territory's economy in 2014-15, comprising 12% of the Territory's Gross State Product and $2.75 billion to the Territory's income.[1] In 2015-16, the Territory's most valuable commodities were as follows (as forecasted by the NT Department of Mines and Energy)[5]:

- Manganese $1,052 million
- Zinc/Lead concentrate $ 411 million
- Gold $ 545 million
- Uranium $ 270 million
- Other minerals $ 480 million

As the TDR transports the largest share of bulk exports into the Port of Darwin, the railway remains of significant economic importance not only for the mining industry but also for the Port of Darwin and the Territory as a whole.

In a 2014 submission to a national inquiry into Infrastructure Planning and Procurement, the Northern Territory Government indicated that the TDR

> *…is a crucial and necessary link in a comprehensive national freight and passenger rail network. It has been and continues to be the key to unlocking this region's economic growth potential.*[6]

The Australian Government, in its June 2015 publication, 'Our North, Our Future: White Paper on Developing Northern Australia, indicated that

> '*The north is fast developing as a trade gateway for all of Australia. The Darwin-Adelaide Railway has helped lift the volume of exports through Darwin Port to be thirteen times larger in just 10 years.'*

It has demonstrated its commitment to the development Northern Australia by announcing in the Australian Government's 2015 Budget a new $5 Northern Australia Infrastructure Facility to provide concessional loans for the construction of major infrastructure such as ports, roads, and rail.

5 Department of Mines and Energy Annual Report 2014-15, accessed at https://minerals.nt.gov.au/__data/assets/pdf_file/0006/258936/DME-Annual-Report-14_15_Final.pdf

6 NT Government, 2014, Submission from the NT Government to the Standing Committee on Infrastructure and Communications inquiry into Infrastructure Planning and Procurement, pg.4, 30th April 2014, available at www.aph.gov.au

THE CODE, REGIME AND REGULATORY FRAMEWORK

Subject to the third-party intra-state rail access regime (Regime), the governance of the TDR was established under the AustralAsia Railway (Third Party Access) Code (Code), a schedule to the AustralAsia Railway (Third Party Access) Act 1999 (ARA).

The Regime operates under a negotiate-arbitrate regulatory framework that encourages both the access seeker and access provider to reach agreement on the pricing of access to the asset; however, the MCA NT considers that the effectiveness of the negotiate-arbitrate regulatory framework rests upon the fundamental elements of transparency, adequate information and information symmetry, i.e. that information available to both the access provider and the access seeker. The Productivity Commission, in its 2014 submission to the Competition Policy Review, identified these fundamental elements as pre-requisites for efficient market outcomes.[7]

The MCA NT believes that inadequacies in these factors are affecting the efficient operation of the TDR, in particular the lack of adequate information and the presence of information asymmetry between the access provider and access seeker. The adverse impacts of information asymmetry on the efficient operation of the TDR are explained in the Productivity Commissions 2014 submission:

> *One possible consequence is 'adverse selection' — a bias toward entering into a transaction that provides a lower quality or higher risk for the other party. Another potential problem is 'moral hazard', which is another form of risk transfer and occurs when a party exploits an information advantage and this affects the probability or magnitude of a payment from another party*.

In the negotiate-arbitrate regulatory framework of the TDR, MCA NT believes there is potential for inequitable risk transfers between the access seeker and access providers based upon a lack of transparency, adequate information and information asymmetry. This potential could be mitigated by a number of different options, for example through the availability of regulatory approved standard access agreements, aimed at avoiding protracted negotiations, limiting information asymmetry and ensuring that outcomes are not unfairly biased towards that of network operator or access provider. Whilst the MCA NT recognises costs would be incurred in establishing such agreements, we also believe that any costs would be small when compared to the costs involved in drafting, negotiating and implementing numerous stand-alone agreements.

The availability of adequate information would be significantly improved if the Genesee & Wyoming Australia (North)(GWAN), an accredited rail service provider in six Australian States (all but Tasmania) supplied a reasonable level of cost information to facilitate and expedite the negotiation

[7] Productivity Commission 2014, Submission to the Competition Policy Review, 10th June 2014, available at www.pc.gov.au

phase of the regulatory framework. Supplying such information could increase the efficiency of the negotiations whilst simultaneously achieving a result for all parties that would be expected in a competitive market.

To demonstrate the current inadequacy of available information for access seekers, the GWAN website has only two documents available for access seekers to use in preparation of negotiations: a three-page 'Access Application Form' and a one-page page 'General Information Sheet', with only thirteen short lines of text indicating that standard pricing components may include a combination of flag-fall and variable rates, a variable rate, or a fixed charge based on time, usage or operating parameters.[8,] Compare this to Queensland Rail's website which contains information about applying for access, a summary of the entire access process, copies of the Conceptual Operating Plan and various Access Agreements, as well as all line diagrams, costing manuals and compliance reports.[9] Considering that GWR owns or leases 120 freight railroads worldwide, employs approximately 7,700 staff, and services close to 2,500 customers[10] and states in its 2014 Annual Report that it relies

> …on information technology in all aspects of our business [where] the performance and reliability of our technology systems is critical to our ability to operate and complete safely and effectively[11]

the MCA NT questions why such limited information is available to access seekers and potential customers in the Territory.

GWAN could argue that increased information availability and transparency would breach confidentiality and jeopardise market competitiveness; however, symmetry is required when competing interests of the access provider and access seeker are encountered, where such balance protects and respects the confidential business information of the access provider, yet also publicly releases relevant material that would assist the access seeker. The key term within this recognition is 'balance', and when historically assessing available information, a sense of balance is something that access holders and seekers within the NT have seen little of. As stated by the Productivity Commission

> *'Access pricing inevitably involves information asymmetry between the access provider, the access seekers and the relevant regulatory authorities. Regulators will be unable to perfectly value the assets used to provide access. Short-run and long-run cost information will not be*

[8] GWR, Operations – Railroads – Australia – Access Seekers, available at www.gwrr.com/operations/railroads/australia/genesee_wyoming_australia/access_seekers
[9] Queensland Rail, Network Services – Access and Regulation, www.queenslandrail.com.au
[10] GWR, About Us, available at www.gwrr.com/about_us
[11] GWR, 2015, 2014 Annual Report, pg. 31, available at www.gwrr.com

easily available and the access providers who are most likely to know relevant cost figures will often have little incentive to correctly provide this information to regulators.[12]

For these reasons, the lack of transparency and the presence of information asymmetry are considered by the MCA NT to adversely impact investment confidence in the mining and resources sector. Because of uncertain access pricing arrangements, mine feasibility studies would need to take into account the possibility of increased and uncertain future transportation costs. By way of example, without the protection of a revenue or price cap mechanism that one might find in the regulated coal railways of Queensland or NSW, and the fact the GWAN could charge access prices based on the actual construction cost of the rail asset as opposed to what GWAN paid for the lease (approximately 20 cents in the dollar), the risk for a minerals investment is that whilst an initial access contract may be acceptable, it is possible that upon renewal and after considerable investment has been made in mining and processing infrastructure, GWAN could seek excessive rents and great economic cost to the project. With commodities and resources prices under sustained pressure, increasing and uncertain future costs could prove a significant disincentive for current as well as new resource projects, resulting in an inability to secure essential support.[13] As these projects fail to gain the required investment support, Governments will also receive less royalties and revenue, with communities and taxpayers required to pay more for vital infrastructure.

The MCA NT maintains that a lack of disputes is not a valid indicator of the success of a negotiate-arbitrate framework. For example, access seekers could be unwilling or unable to test the dispute resolution process, wary that arbitration can involve significant costs and, with many emerging and junior resource companies usually operating under limited funds supplied by shareholders, raising disputes could prove cost prohibitive. None of the proposed minerals developments in the Norrthern Territory that will need to utilise the Tarcoola to Darwin railway are in the hands of major mining companies e.g. BHP Billiton, Rio Tinto, Glencore. These projects are all owned by junior companies that are trying to attract domestic and foreign capital to fund development. But once concepts of limited transparency and information asymmetry are thrown into the equation, access seekers could have their abilities further limited in accurately designating their foundations for the dispute under Division 2 – Access Disputes and requests for arbitration of the ARA. Hence the MCA NT believes that without the right amount of regulatory oversight and an access and pricing regime that finds the balance between efficient capital returns and operating costs that underpin investment in projects that utilise the railway, a vertically integrated monopolist could exploit such impediments, exercising its monopoly power and further leveraging its market

[12] Productivity Commission, 2000, Achieving Better Regulation of Services, pg. 83, 27th June 2000, available at www.pc.gov.au

[13] AustralAsia Railway Corporation (ARC), 2014, Annual Report 2013/2014, 8th September 2014, available at www.aarail.com.au

position. A vertically integrated operator could, for example, dictate the timing of investment to increase capacity or use access pricing as a lever to restrict competition on above rail services.

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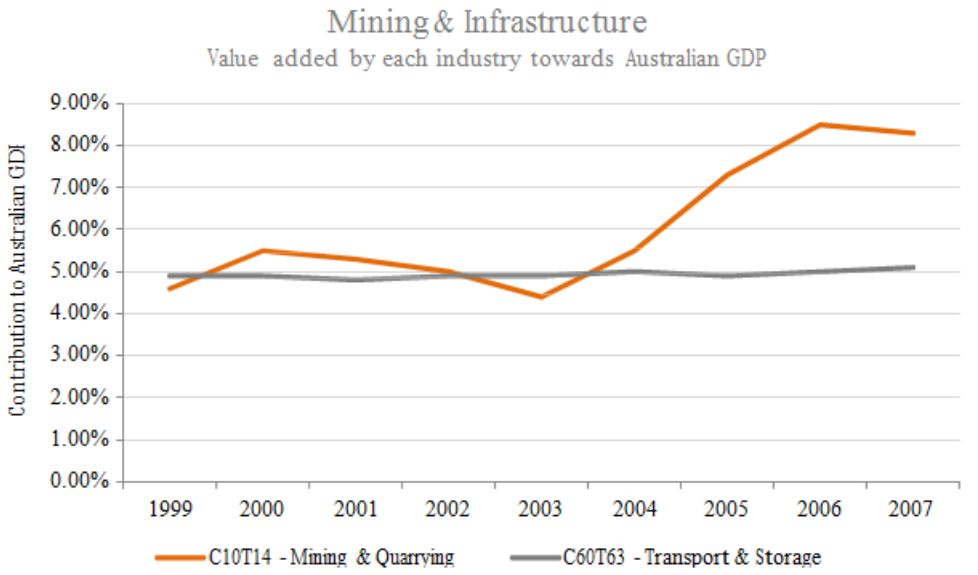
It is therefore the view of the MCA NT that the true test of a successful dispute resolution framework – as well as the regulatory framework – is its impact upon investment, growth and productivity, which altogether combine to foster continued competition and development within the Northern Territory's resource, commodity and infrastructure sectors. This is particularly important in the current economic climate that has seen substantial decreases in resource and infrastructure investment in recent years.

Inappropriate regulation and investment

As indicated in the previous section (on the economic importance of the TDR), the minerals sector was the second largest contributor towards the Territory's economy in 2014-15, comprising 12% of the Territory's Gross State Product and $2.75 billion to the Territory's income.[1]

Infrastructure and mining are also of national significance, where, since 1999, infrastructure has contributed approximately 5.0% year on year to Australia's Gross Domestic Product 'GDP). Mining and quarrying have delivered similar benefits, but as the resources boom gained momentum, so did the industry's contribution, as indicated in Figure 1 below.



Source: Organisation for Economic Co-Operation and Development, STAN Database, Value added by industry towards GDP, available at www.oecd.org

Figure 1. Comparison of mining and quarrying with infrastructure contribution to Australian GDP.

Nonetheless infrastructure and commodities are often erroneously viewed in isolation; however, both share a causative relationship that should not be ignored: commodities require infrastructure to be transported and traded, whilst equally, infrastructure requires the demand of commodities to drive construction and development, so that infrastructure owners and operators are able to earn a return on their investment. Yet to sustain both markets and provide risk-based returns to investors within both industries, a balancing of interest needs to be achieved.

Although both Commonwealth and State governments have privatised assets since the 1990s, economic research has shown that privatisation is no guarantee of productivity.[14] For example, simply privatising a Government-owned business or corporation that retains vast economic inefficiencies and waste only creates privately owned firms with the same inefficiencies and waste.[15] Effective regulation is therefore absolutely essential to ensure such productivity declines are not transferred throughout downstream and upstream markets. More to the point, if productivity issues or adverse monopoly characteristics are not addressed, detrimental impacts could be felt not just through the entire supply chain, but also through other interrelated industries. As stated in an Australian Competition and Consumer Commission (ACCC) submission to the Senate Economics References Committee,

> *Assets with monopoly characteristics, however, are likely to raise competition concerns regardless of who acquires or operates the asset -- that is, market structure cannot be used to address potential monopoly issues such as high pricing or poor service quality. In these instances, the ACCC is of the view that there needs to be sufficient regulatory oversight to ensure that competition in upstream or downstream markets is not hindered*.
>
> *Without an adequate regulatory regime (covering access and/or pricing), monopoly infrastructure, service providers would be capable of earning monopoly profits or foreclosing competition. Benefits would therefore flow to investors, at the expense of users of the asset and, ultimately, end consumers. Inadequate economic regulation can also dampen investment in markets that depend on access to the monopoly asset, thereby denying at least some of the benefits the community could obtain from greater competition.*
>
> *In the ACCC's experience, appropriate economic regulation will be more likely to promote competition by providing efficiency benefits and aligning operations and investments across supply chains related to the monopoly asset. In turn, this will improve national and state productivity and benefit those in the supply chain and consumers. The ACCC notes, however, that the appropriate form of economic regulation and the mechanism used to implement the*

[14] Kay, J.A. & Thompson, D., 1986, Privatisation: A Policy in Search of Rationale, The Economic Journal, Volume 86, No. 381, March 1985, pages 18-32, available at www.jstor.org

[15] King, S. & Pitchford, R., 1998, Privatisation in Australia: Understanding the Incentives in Public and Private Firms, The Australian Economic Review, Volume 31, No. 4, December 1998, pages 313-328.

arrangements will depend on the type of market and the nature of the competition concerns relevant to the circumstances. This is not a 'one size fits all' exercise.

The ACCC's view is that access and pricing issues are best addressed through access undertakings under Part IIIA of the Act, which is the primary legislation governing Australia's National Access Regime. Part IIIA is designed to address concerns through a public assessment process in industries where an infrastructure asset with natural monopoly characteristics forms a bottleneck for firms operating in upstream or downstream markets. The access undertaking provisions of Part IIIA are flexible and can be adapted to be made 'fit-for purpose' such that the level of access or price regulation can be tailored to the level of market power held by the acquirer or operator.[16]

The Queensland Competition Authority (QCA), expressed similar views in its submission to the 2014 Competition Policy Review (also referred to as the 'Harper Review'), where the QCA acknowledged

…that poorly designed or implemented access regimes could lead to under-investment in infrastructure. The QCA agrees that, as markets change, the nature and scope of access regulation should be reassessed to ensure efficient regulation.

Additionally, the QCA also highlighted the impacts of unsound regulatory frameworks

…the underlying market failure addressed by access regimes - the capacity of natural monopoly owners to extract rents through aggressive pricing and restricting supply- continues to exist. While markets have evolved since 1995, misuse of monopoly power by owners of essential facilities can still damage competition in upstream and downstream markets. These risks are evident in many infrastructure sectors, such as rail, water, ports, telecommunications, electricity and gas. Access regulation, or the plausible threat of an access declaration, mitigates these risks.[17]

As such, poorly designed and unsound regulatory frameworks remain a large disincentive for investors to make continued and/or new investment.[18, 19,20] When considering the current economic climate of resource, energy and infrastructure projects, these regulatory, economic and financial disincentives for investment could have very serious consequences for the minerals sector in

[16] ACCC, 2015, Privatisation of state and territory assets and new infrastructure – Submission to the Senate Economics References Committee, 29th January 2015, available at www.aph.gov.au

[17] QCA, 2014, Competition Policy Review – Submission, 17th November 2014, pg. iv, available at www.qca.org.au

[18] Brown, A.C., Stern, J., Tenenbaum, B.W. & Gencer, D., 2006, Handbook for Evaluating Infrastructure Regulatory Systems, pg. xii, World Bank Publications, available at www.worldbank.org

[19] ACCC, 2014, ACCC submission to the Independent Cost Benefit Analysis – Review of Regulation Telecommunications Regulatory Arrangements Paper (s.152EOA Review), 14th April 2014, available at www.accc.gov.au

[20] OECD, 2012, Measuring Regulatory Performance – The Economic Impact of Regulatory Policy: A literature review of Quantitative Evidence, 12th August 2012, available at www.oecd.org

the Northern Territory. Such has been the case for the 2014 closures of Territory Resources Frances Creek mine, Sherwin Iron's iron ore project within the Roper River region and Western Desert's Roper Bar project.

Regarding new projects, the Australian Department of Industry, Innovation and Science has indicated that the total number of Australian resource, energy and infrastructure projects has been declining, and as is evident from the half-yearly Project Listing publications and quarterly report from the Chief Economist[21] (since the half-year ending October 2012), the total number of projects has decreased by approximately 40% (Figure 2).

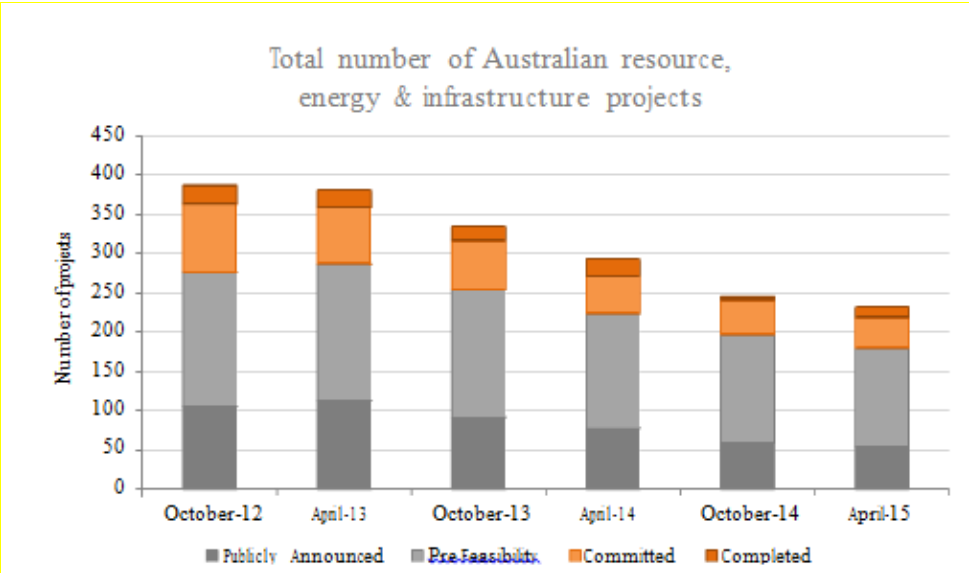


Figure 2. Total number of Australian resource, energy and infrastructure projects (2012 – 2015)

As indicated in the December 2016 quarterly report from the office of the Chief Economist,

> *A year on from the release of our last publication, the value of committed projects — those where a final investment decision has been taken and construction activity is likely underway — has fallen by 12 per cent.*
>
> *Producers are diverting their focus from developing new projects to reducing costs and ensuring the commercial viability of existing assets. Final investment decisions for many projects have been delayed to 2017 or later, with producers weighing up factors such as the price cycle, access to infrastructure, business conditions, and cost competitiveness in Australia.*

[21] Department of Industry, Office of the Chief Economist – Publications – Resources and major energy projects, available at www.industry.gov.au/Office-of-the-Chief- Economist/Publications/Pages/Resources-and-energy-major-projects.aspx

These trends can be seen in Figure 3 below, from the December 2016 Appendix to Resources and Energy Quarterly (Vol. 5, No. 5):

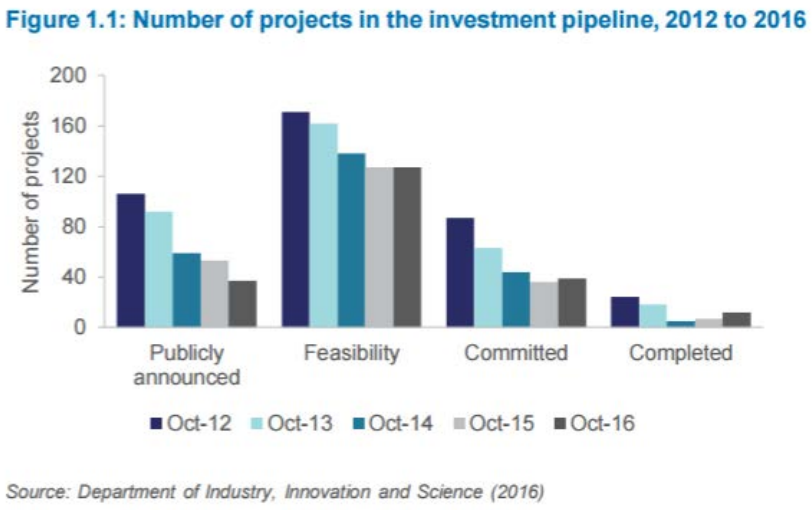


Figure 3. Number of projects in the investment pipeline, 2012 to 2016 (Australia-wide)

While such data indicate that the Australian resources boom began to wane from 2012, the MCA NT believes that the Territory has yet to experience its own boom. Specifically, as indicated by the NT Department of Mines and Energy (now the NT Department of Primary Industry and Resources, DPIR),

- In the 24 months prior to June 2014, six mining development projects were likely, under construction or being commissioned;
- In the next 12 months after June 2014, a further six mining development projects were considered pending or considered likely; and
- Over the next 48 months after June 2014, an additional 15 mining development projects were considered as potential starters.[22]

Despite this very encouraging prospective outlook, in fact *none* of these have come on line and seven Tier One mines closed during the period of 2012-2016

- Western Dessert Resources,
- Sherwin Iron,
- Territory Iron
- ABM,
- Australian Ilmenite Resources
- Merlin Diamonds
- OM Manganese,

although Merlin and OM Manganese have re-opened or will soon re-open.

[22] NT Government, 2014, Mining Developments in the Northern Territory, June 2014, available at www.nt.gov.au

A range of expenses can underlie high production costs that can make a project uneconomic; however, unacceptably high fixed transport costs can also cause an operating company to go under or result in highly prospective projects not being able to go into production. Territory Iron and OM Manganese had been transporting their bulk ores to and through Port Darwin. It is possible that excessively high rail freight charges contributed to this.

Low commodity prices remain as the single most critical factor in closures and a slow-down in the minerals sector in general. However, quality mineral assets combined with efficiently priced transport systems should ideally be capable of surviving down periods of the pricing cycle.

Because of the project pipeline, the MCA NT understands that pending and potential developers are in the process of attempting to secure the required financing to begin project development but are frustrated with both a lack of transparency and a lack of certainty regarding infrastructure pricing and capacity. As financial capital is global in scope, Australian projects are at a substantial disadvantage compared to those projects in other jurisdictions than can offer certainty and transparency (as well as lower costs). Consequently, the MCA NT believes that the deficiencies in regulatory and access regime for the TDR are hampering, if not constraining, investment in mineral projects and infrastructure in the NT.

For these reasons, all possible and reasonable steps should be undertaken by governments, regulators, asset owners, operators and customers to enhance certainty and continue to drive continued economically-justified and prudent investment into the various industries, not just within the Northern Territory, but across all of Australia.

The MCA NT therefore recommends that ESCOSA consider a number of issues in relation to the Regime, Code and the ARA. For example, the Code was originally written in 1999 and applied to a vastly different economic environment to that present. For this reason, the regulator should assess the current effectiveness of the Code and into the foreseeable future. Under the Code, what objective is the regulator ultimately seeking and does that promote the efficient use and operation of and investment in significant infrastructure, thereby promoting effective competition in upstream or downstream markets? Further, does the objective of the Code continue to be consistent with infrastructure access regimes being applied nationally and in other jurisdictions?

The 1995 COAG Competition Principles Agreement (CPA) aimed to deliver substantial reform within competition and regulatory streams to improve Australian productivity. In relation to the regulation of infrastructure, the agreement was undertaken to drive a more consistent national approach, where the agreement contained object clauses that sought to

> *…promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets….*

and ensure that where regulated prices are set, that they

- *generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;*
- *allow multi-part pricing and price discrimination when it aids efficiency;*
- *not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and*
- *provided incentives to reduce costs or otherwise improve productivity.*[23]

In the same year (1995) under s.45A(1) of the ode, ESCOSA conducted a review of the TDR Regime. Three particular issues were of key consideration within the issues paper published in November 2007. Subsequently and following the May 2008 Draft Decision, ESCOSA issued its Final Decision in September 2008 and concluded that

- *Regarding to Guideline No.1: Access Provider Referencing Pricing and Service Policies – there was no need to impose Australian Rail Track Corporation (ARTC) reference tariff pricing;*
- *Regarding Guideline No. 2: Arbitrator Pricing Requirements – the value of the TDR would be determined via an asset roll forward approach, rather than periodic revaluations; and*
- *Regarding Guideline No.3: Regulatory Information Requirements – it was not at this time considered appropriate to vary the guidelines to reflect changes to ARTC's Interstate Access Undertaking. In addition, the Commission accepted that variations were not necessary or appropriate to achieve objectives of the Competition and Infrastructure Reform Agreement (CIRA).*

ESCOSA also stated that, as the Regime had been declared an effective access regime, it suggested that

> *…objectives of the Code are aligned with those underlying clause 6 of the Competition Principles Agreement. In essence, the clause 6 principles:*
>
> - *identify the type of infrastructure services that should be subject to access regulation; and*
> - *establish principles that the regulatory framework should embody.*[24]

[23] COAG, 2005, Competition Principles Agreement, 13th April 2007, available at www.coag.gov.au/node/52

[24] ESCOSA, 2008, pg. 3

Yet it should be highlighted that clause 6 of the CPA is far more expansive than the two in-essence statements made by ESCOSA. For example, clause 6(c)(1) states that for a State or Territory access regime to conform to the principles set out in this clause, services provided by means of significant infrastructure facilities where

> *…access to the service is necessary in order to permit effective competition in a downstream or upstream market; and*
>
> *…the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.*[25]

The MCA NT recommends that a review of the Code that considered matters possibly requiring changes to regulation be undertaken by ESCOSA. This is in light of the 2012 National Compact on Regulatory and Competition Reform, the 2013 Review of the National Access Regime, the 2014 Harper Review and more recent reviews, including the 2015 South Australian Rail Access Regime Review and the 2015 Western Australia Railways (Access) Code Review. The World Bank provides support on this approach, indicating that

> *…the best way to avoid getting stuck with poorly performing regulatory systems is to subject them to ongoing and periodic reviews to make sure they are fully functional and reflective of social and economic realities, and help to achieve the government's objectives for the sector. What is desperately needed are independent, objective, and fully informed analyses of existing regulatory systems.*[26]

The World Bank goes on to highlight that the aim of the evaluation process is to improve the regulatory system, focusing on elements that would clearly lead to better outcomes for the sector; however, this assumes that the stakeholders are able to make fully informed decisions on the performance of the regulatory system. In the case of GWAN and the TDR, the MCA NT does not believe that this is the case. To our knowledge, nothing has been supplied to indicate the performance of GWAN is operating and maintaining the TDR in a way that reflects the prudent and efficient costs. For example,

- How many train services were there during a month, quarter or year?
- Where these train services bulk minerals or freight?
- What were the percentage of services that reached their destination on time?
- Of those services that did not reach their destination on time, who or what was this attributable to?

[25] Council of Australian Governments (COAG), 1995, Competition Principles Agreement, available at www.caog.gov.au/node/52
[26] Brown, A.C., Stern, J., Tenenbaum, B.W. & Gencer, D., 2006, Handbook for Evaluating Infrastructure Regulatory Systems, pg. xii, World Bank Publications, available at www.worldbank.org

- Why did these services experience delays?
- What were the above and below rail transit times?
- How many train cancellations were there?
- Of those services that were cancelled, who was this attributable to?
- How many safety incidents were there?
- How many gross tonne kilometres were haul and by what type?
- How many train paths were available?
- How many train paths were contracted?
- How many train paths were allocated to maintenance, planned or unplanned?
- What were percentage of train paths available were not used?

These are essential performance measures that indicate the overall state of the network. This information could be used by independent observers to assess GWAN's performance.

The World Bank's Evaluating Infrastructure Regulatory Systems handbook then goes onto to indicate possible bad elements of regulatory systems, including:

- Having no accounting system for calculating costs and tariffs; and
- Specifying a tariff-setting system for an initial five-year period and then providing little or no guidance as to the tariff-setting system that will be used in future tariff periods.[27]

The World Bank handbook[28],[29] then outlines principles for the independent regulator model of regulatory governance as well as critical standards for effective infrastructure regulation. This includes:

Principles for the Independent Model of Regulatory Governance[42]	Critical Standard for Effective Infrastructure Regulation[43]
Independence	Legal Framework
Accountability	Legal Powers
Transparency and Public Participation	Property and Contract Rights
Predictability	Clarity of Roles in Regulation and Policy
Clarity of Roles	Clarity and Comprehensiveness of Regulatory Decisions
Completeness and Clarity in Rules	Predictability and Flexibility
Proportionality	Consumer Rights and Obligations
Requisite Powers	Proportionality
Appropriate Institutional Characteristics	Regulatory Independence
Integrity	Financing of Regulatory Agencies
	Regulatory Accountability Regulatory
	Processes and Transparency Public
	Participation
	Appellate Review of Regulatory Decisions
	Ethics

[27] Brown, A.C., Stern, J., Tenenbaum, B.W. & Gencer, D., 2006, pg. 46.

[28] (=42 in table above) Brown, A.C., Stern, J., Tenenbaum, B.W. & Gencer, D., 2006, pg. 59

[29] (= 43 in table above) Brown, A.C., Stern, J., Tenenbaum, B.W. & Gencer, D., 2006, pg. 63

Until issues within the current framework are addressed or until national alignment of the Code and ARA is achieved, the future economic productivity of the TDR will continue to be compromised, jeopardising not only GWAN's overall investment of $334 million, but also the economic prosperity of the Northern Territory, as future resource and commodity investment within the Territory will continue to be hampered.

As a result, the MCA NT strongly believes that if the current issues within the regulatory framework are to be addressed, a more robust method of regulation should be implemented, be it the rate of return, price-cap or revenue cap form of price control regulation.

Accordingly, MCA NT recommends ESCOSA consider undertaking a review of the regulatory framework whilst adhering to commonly accepted regulatory impact assessment guidelines.

Regime certification

As per Part IIIA of the Competition and Consumer Act 2010 (Cth) (CCA), certification of access regimes is undertaken on case by case basis. For a regime to be effective though, a set of principles needs to be established and adhered to. Established within Clause 6 of the CPA, the principles relate to negotiated access, regular reviews, reasonable endeavours, access terms, independent dispute resolution, binding decisions, principles for dispute resolution and the promotion of efficiency by pricing.

Yet when certified as effective on 23 March 2000, the TDR Regime was exempted from the additional Clause 6 principles, as the TDR was considered an entrepreneurial greenfields project. As per the 2000 Final Determination by the National Competition Council (NCC), the consortium (at the time being APTC and FreightLink), intending to construct and upgrade the TDR, were required to generate considerable demand if the project was to be profitable. Consequently, the NCC believed the consortium was taking on considerable risk. This concern was borne out when the consortium proved unsuccessful. As stated by the NCC

> *…even though this risk has been substantially mitigated by Government contributions. In a number of ways, this [the TDR] differs from an established infrastructure facility or a facility built to serve an established market.*
>
> *Regulation of entrepreneurial greenfields projects needs to deal appropriately with the ex-ante risks facing the investor. Ignoring these risks will undermine incentives to invest in new infrastructure projects. Regulation therefore needs to balance the interests of the access provider and access seekers. While access arrangements must not deter investment, they must promote access and promote competition in related markets.*

> *The AustralAsia Railway Regime now incorporates a balanced approach to access. It provides a framework for access negotiations that gives investors sufficient certainty to proceed with the project, while ensuring access on terms and conditions that could be expected in a competitive market.*[30]

Although the TDR Regime was certified effective in 2000, under certain conditions and following a recommendation from the NCC, Ministers are afforded discretion to revoke or modify certification of the access regime, for example, modification of conditions where fundamental amendments have been made to the Regime or competition principles, or alternatively, where the practical application of the access regime is not as originally anticipated.

MCA NT strongly believes that significant change has occurred to competition principles as a result of recent reviews and reforms and, in particular, the fact that GNW purchased the asset for 20 cents in the dollar, the notion of greenfield, entrepreneurial risk is no longer applicable. Furthermore, GWA's purchase of the railway occurred at the beginning of the largest mineral boom in Australia's history. The Northern Territory did not attract its share of minerals development investment during this period, indicating that the rail access regime may have been a factor in limiting investment. Australia is now in a period of cyclic lows where attracting investment has become more challenging. Accordingly MCA NT believes that the practical application of the certification has changed and, based on these events, recommends an evaluation of the TDR access regime.

[30] National Competition Council (NCC), 2000, AustralAsia Railway Access Regime – Final Recommendation, February 2000, available at www.ncc.gov.au

RECOMMENDATIONS

Recommendation 1:

The Code should be subject to a more comprehensive review, including identifying issues that might require legislative reform for satisfactory resolution of impediments to future investment and development of the resources sector, to ensure consistency with current competition principles in relation to significant transport infrastructure.

- In the absence of adequate regulatory oversight, a vertically-integrated monopoly (as exists in the Northern Territory) could exploit information asymmetry and lack of transparency to further leverage its market position at the expense of access seekers, for example by dictating the timing of investment to increase capacity or by using access pricing to lock out above rail competition.
- The Code was developed in 1999 in a vastly different economic climate to that prevailing now and should be assessed in the context of current competition principles, policies and agreements, including the 2012 National Compact on Regulatory and Competition Reform, the 2013 Review of the National Access Regime, the 2014 Harper Review and more recent reviews.
- A more robust method of regulation should be developed and implemented, for example rate of return based on the asset value determined by what GWAN actually paid for the asset rather than what it cost tax payers to build, price-cap or revenue cap forms of price control regulation.

Recommendation 2:

Regulatory review of the Code should be done to allow alternatives to the negotiate-arbitrate regulatory framework, including a requirement for GWAN to provide access and pricing undertakings and the option for approved standard access agreements, aimed at avoiding protracted negotiations and reducing the potential for unequitable risk transfer between the access seeker and access provider.

Recommendation 3:

Inadequate transparency and current information asymmetry (wherein the access provider has substantially greater access to information relevant to infrastructure pricing and capacity than access seekers) need to be redressed through provision of adequate information to access seekers to provide greater certainty in relation to capital investment for Northern Territory projects.

- A reasonable level of cost information is required to facilitate and expedite the negotiation phase of the regulatory framework. Supplying such information could increase the efficiency of negotiations while simultaneously achieving results expected in a competitive market.
- Additional information provided to access seekers in Queensland includes substantially more information about applying for access, a summary of the entire access process, copies of the conceptual operating plan and various access agreements, in addition to line diagrams, costing manuals and compliance reports.

Recommendation 4:

Lack of disputes should not be used as a criterion to assess the success of the negotiate-arbitrate framework, as access seekers could be unwilling or unable to test the dispute resolution process, because of potentially significant costs of arbitration.

- A more appropriate test of a successful dispute resolution framework (as well as the regulatory environment) is its impact on investment, growth and productivity, that together combine to foster continued competition and development.