

13 February 2012

Patricia Scott and Angela MacRae  
c/o Carole Gardner  
Admin Coordinator  
National Access Regime  
Productivity Commission  
LB2 Collins Street East  
Melbourne VIC 8003

Level 14, BOQ Centre  
259 Queen Street  
Brisbane, Queensland 4000  
GPO Box 164  
Brisbane, Queensland 4001  
Australia  
Tel + 61 (0) 7 3225 5500  
Fax + 61 (0) 7 3225 5555

Dear Ms Scott and Ms MacRae

## **Submission to the Productivity Commission review of the National Access Regime (NAR)**

### **1 About Peabody**

Peabody Australia Mining Pty Ltd is a subsidiary of Peabody Energy Australia Pty Ltd (**Peabody**).

Peabody currently has 11 mining operations in Australia, including 3 mines in New South Wales extending from Newcastle to Wollongong. In Queensland, Peabody has 8 mines in both the Bowen and Surat basins.

These large-scale mining operations produce a broad range of metallurgical and thermal coals which are transported by rail to ports in Queensland and New South Wales for export. Peabody's current total export capacity of coal is 30 million tonnes per annum.

In New South Wales, Peabody currently holds a long-term contract with the Australian Rail Track Corporation (**ARTC**) for the provision of rail access rights in the Hunter Valley. Peabody also has rail access rights to rail infrastructure regulated under the Queensland Competition Authority (**QCA**) (and certified as effective by the National Competition Council (**NCC**)), for its Queensland operations.

### **2 Introduction**

Peabody wishes to comment on a number of practical issues with respect to the NAR rather than address all of the issues outlined in the *Issues Paper* released in November 2012.

As a general statement, Peabody fully supports the multi-layered regulated access framework for third party rail access arrangements at both the Commonwealth and State/Territory levels.

Peabody recognises, however, that the regulated access framework, while providing a level of transparency and certainty to all parties, does not go far enough with respect to levelling influence between the third party access seekers / users of the infrastructure and the owners of the infrastructure.

There are particular shortfalls relating to the planning, funding and execution of extensions and expansions to the infrastructure network.

In addition, the declaration process fails to act as a useful incentive to ensure that owners of unregulated infrastructure negotiate access arrangements fairly outside of the regulated access framework.

### **3 Submissions**

Peabody sets out its submissions to the Productivity Commission for its review of the NAR in the following sections.

#### **3.1 Support of regulation and the NAR**

Overall, the regulation of access to rail has positive benefits in ensuring a certainty of process and a relative impartiality in the manner in which infrastructure owners are able to act. Under the NAR:

- the efficient application process provides a certainty of process for applicants;
- regulation of pricing reduces the opportunity for monopoly infrastructure owners to engage in price gouging, reduces negotiation timeframes by avoiding commercial negotiations on price, and provides relative certainty of pricing for access seekers (being highly important in today's market); and
- the inclusion of standard terms in access regimes has removed unnecessary time wastage and cost in negotiation of standard terms and conditions.

Peabody therefore supports the continuance of the NAR and the State and Territory based regulatory frameworks.

The objective of the NAR to promote the '*economically efficient operation of, use of and investment in the infrastructure*' is still currently relevant and supported by Peabody.

#### **3.2 Extension and expansion planning**

With respect to shortfalls in the regulation of access to infrastructure, the regulated access framework currently does not encourage infrastructure owners to be anything other than conservative with respect to forward planning of extensions and expansions to the rail infrastructure network.

The inclusion of requirements both for access to information on existing network capacity by users and a consultative and transparent planning process for capacity expansion that is inclusive of the infrastructure owners, access holders and access seekers would facilitate growth of the network and, in turn, increase the efficiency of the rail network and the coal industry itself. Such measures would certainly facilitate investment in the rail infrastructure.

Further to this, the inclusion of a prescriptive process to provide for user-funded extensions and expansions to the rail network would be beneficial. A regulated regime for user-funded capacity expansions would encourage genuine competition for additional infrastructure, more efficient outcomes generally and, more particularly, fairer pricing for all parties, than is available under the unregulated system in place at this time.

#### **3.3 Negotiating the cost of extension**

In our experience generally, where a process is more prescriptive, it is more efficient.

The QCA regulated rail network undertaking, for example, does not contain price guidance for extensions to the existing infrastructure meaning that each extension price must be negotiated on an individual basis. As a consequence, the process is slow and inefficient.

In relation to the NAR, Peabody is of the view that the inclusion of more prescriptive processes, such as those outlined above, would improve the practical efficiency and transparency of the regime generally.

#### **3.4 User risk and cost v owner control**

Within the existing regulated access framework, where extensions or expansions are funded by the user, the infrastructure owner takes little or no risk for the infrastructure extension or expansion. The funder users, however, take all risk and cost but have little control over the infrastructure itself, or the construction and use of it.

There is a need for risk mitigation measures with respect to rebalancing control held by the infrastructure owner with the need for some control proportional to the level of risk taken and costs borne by the user funders.

### **3.5 Declaration as an incentive to fair negotiation**

In situations where an owner of unregulated infrastructure fails to negotiate fairly and transparently, the threat of declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is not seen to be a genuine threat to the infrastructure owner. The timeframe for the process is currently so long that it places no incentive on the infrastructure owner to avoid this risk by negotiating fairly, commercially and in good faith.

Shortened timeframes and reduced complexity of the declaration process would benefit access negotiations to both undeclared and declared infrastructure assets.

## **4 Summary**

Peabody fully supports the existing regulatory framework for third party rail access arrangements at both the Commonwealth and State/Territory level. However, specific and practical areas of concern that should be addressed are:

- the inclusion of an open and transparent planning process for extensions and expansions of the rail infrastructure;
- the inclusion of a regulated regime for user-funded capacity expansions;
- the inclusion of price guidance for extensions/expansions;
- the inclusion of risk mitigation measures to assist in balancing the user risk and cost with the owner's level of control; and
- the reduction of timeframes for the declaration process as a means to encourage fair access negotiations for unregulated assets.

Yours sincerely

**Rodney Dyer**  
Senior Vice President  
Infrastructure, Project Planning and Land  
Peabody Energy Australia Pty Ltd