



Australian Government
Department of Resources
Energy and Tourism

Level 1, 25 Constitution Avenue
Canberra City ACT 2601

GPO Box 1564
Canberra ACT 2601 Australia

Phone: +61 2 6213 7520
Facsimile: +61 2 6213 7818

Web: www.ret.gov.au

ABN: 46 252 861 927

Ms Patricia Scott
Presiding Commissioner
Inquiry into the National Access Regime
Productivity Commission
Locked Bag 2, Collins St East
Melbourne VIC 8003

Dear Ms Scott,

Thank you for the opportunity to comment on the National Access Regime Issues Paper, released on 30 November 2012. The Department of Resources, Energy and Tourism (RET) have considered the Issues Paper and attended your consultation meeting on 20 November 2012. In general, we support the current regime and would like to comment on some of the matters identified in the Issues Paper.

RET provides advice and policy support to the Australian Government regarding Australia's resources, energy and tourism sectors. The Department develops and delivers policies to increase Australia's international competitiveness, consistent with the principles of environmental responsibility and sustainable development.

In general, RET is of the view that the development of mineral provinces will benefit from access to export infrastructure is available to access seekers who are willing to pay commercial terms for that access. RET supports the creation of the most efficient and timely process, (taking into account the potential complexity of issues) and, where possible, the need to establish an open access regime to allow for the full exploitation of Australia's mineral assets and to prevent the creation of stranded assets. RET notes that access to export infrastructure benefits low-volume high-value minerals in particular where those products are not the main driver for infrastructure development, and where development of dedicated infrastructure cannot be justified for that market alone.

Overview

In considering some of the key issues around the national access regime as it applies to Australia's mining provinces it is important to bear in mind the different approaches that have been adopted in different parts of Australia. In regards to coal and iron ore, which are our major bulk commodity exports, and which have generally driven development, this can best be simplified into 'east coast' and 'west coast' approaches.

West coast and east coast rail and ports ownership structures, and thus access arrangements, are fundamentally different for historical and geographical reasons. The iron ore province of the Pilbara was developed in a sparsely settled area with little existing infrastructure, while the east coast coal regime was developed in, or required access through, more densely settled areas with existing infrastructure. In many cases existing rail lines which served other community and economic needs were already in place. These differences in ownership and operation of major west and east coast operating and proposed rail and ports are summarised in Attachment A.

It is important that the regime remains flexible enough to handle these differences. Suggestions on prescriptive regulation intervention should be treated with caution as it could result in undesirable outcomes and fail to have flexibility to deal with different cases. Market forces reflected in private commercial negotiation are a better approach and should be encouraged by the possibility of regulatory intervention through declaration and arbitration by regulator under the current regime if private negotiation fails.

For the west coast integrated single owner infrastructure, the key issue raised by private infrastructure owners is what constitutes a fair price for access, while for the east coast's multi-user infrastructure, the lack of competitive advantage to some extent drives down investment, especially in rail. These issues and the implication of High Court's interpretation of the criterion (b) will be discussed in this letter.

East Coast Background

Queensland

In Queensland, Aurizon (formerly QR National) manages and operates the central coal rail network. The network includes:

- Blackwater system based around the Port of Gladstone
- Goonyella system based around the Port of Hay Point and Dalrymple Bay
- Moura line to the Port of Gladstone
- Newlands line to Port of Abbot Point

The operation of Aurizon's central coal rail network is governed by a 2010 undertaking under the certified state regime and is due to expire on 30 June 2013. Aurizon is currently negotiating a new undertaking with the Queensland Competition Authority. There are a total of four ports with six coal terminals currently servicing Queensland's coal industry. The structure and ownership of these ports are summarised in Table 1 in Attachment A.

In Queensland, the development of greenfield mines in the Surat Basin and the Galilee Basin has resulted in a number of user-funded rail and port investment proposals. This includes: rail and port development proposals at Abbot Point by Hancock/GVK, Adani and Waratah Coal for the Galilee basin; and Wiggin Island port development (industry consortium) and associated rail lines from Xstrata, Aurizon and ATEC Rail Group for the Surat basin. While the proposed Hancock/GVK railway in the Galilee Basin will be an open access facility, the Queensland Government has also selected the Hancock/GVK proposed corridor as a multi-user north-south rail corridor for the Galilee basin. This approach was put in place in response to proposals which would have seen multiple rail corridors running across the same region from Hancock/GVK, Adani, Waratah Coal and Aurizon. Such an approach would have created a number of issues including an increased need for land acquisition and increased community concern. The single multi-user corridor approach will still allow different proponents to build their own rail tracks in the absence of agreement to cooperate.

While NSW has established the Hunter Valley Coal Chain Coordinator (HVCCC) to coordinate the logistics and planning for its coal supply chain, Queensland does not have a similar central coordination and planning body as its coal export infrastructure is more dispersed. In Queensland, there are four coal rail network systems each of which serves different ports along the Queensland coast for a specific coal producing region. Inter-connection between the different rail networks is possible with the completion of missing rail links (i.e. the completed northern missing link, which now connects the Goonyella and Newlands rail network systems and the southern missing link, which will connect the Western and Moura rail network systems). As well as being more dispersed interaction in port areas and the need to balance with other rail users is generally less complex than in NSW partly as Hay Point and Abbot Point ports are dedicated coal ports and Gladstone is a large industrial centre.

New South Wales (NSW)

The NSW coal industry is serviced by three coal terminals at the Port of Newcastle – the Port Waratah Coal Services (PWCS) Carrington Terminal, PWCS’s Kooragang Island Terminal and the Newcastle Coal Infrastructure Group (NCIG) Kooragang Island Terminal and one coal terminal at Port Kembla.

While the coal loaders are owned by PWCS and NCIG, most of the track in and around the terminals is leased by Australia Rail Track Corporation (ARTC) and all train operations are controlled by ARTC. ARTC also manages the Hunter Valley coal rail networks (Newcastle Ports to Werris Creek, Muswellbrook to Ulan and Werris to Narrabri – see Attachment B for the map).

There are now four above-rail operators in the Hunter Valley coal business: Pacific National; Aurizon; X-Rail (owned by Xstrata); and Southern Shorthaul.

The HVCCC, incorporated in 2009, is responsible for planning all coal exports for Hunter Valley coal to maximise export opportunities through a coordinated approach to planning. Membership was open to any existing and future service providers of transport and port infrastructure in the coal chain. This supply chain is currently servicing approximately 11 producers with 40 mines.

East Coast - Undertaking under the National and State Regime and High Court decision

Ownership and operation of east coast rail and ports is more diverse with the majority being multi-user rather than single-user facilities. In many cases infrastructure was originally built by the state for multi-user purposes and is now operated by private or State owned entities which provide multi-user facilities. However, within this ownership structure it is not uncommon for a Port to have individual terminals that are privately owned. Examples of this include the Hay Port Coal Export Terminal where port facilities are privately owned and operated by a private company BHP Billiton Mitsubishi Alliance and the Port of Newcastle coal terminals, which are owned and operated by industry consortium group.

Rail third party access is governed by the undertaking provision of either the National Access Regime (e.g. the Hunter Valley coal rail network) or the Certified State Regime (e.g. the Central Queensland coal rail network). For ports, it is a combination of undertakings (e.g. the Dalrymple Bay Coal Terminal at Hay Point) and ports which are funded, operated and used by a consortium of industry stakeholders.

Multi user regimes such as those on the east coast bring their own significant access challenges especially in the provision of new expansion and investment to the existing rail network by infrastructure owners or users. Aligning the different interests of infrastructure owners, operators and users has been problematic and can delay timely investment and affect the efficiency of the whole coal supply chain.

This misalignment of interests led to the need for HVCCC for the NSW to plan and co-ordinate the cooperative daily operation and long term capacity alignment for the Hunter Valley coal supply chain and industry agreement not to compete on rail prices. The need for this came about as conflicting interests amongst parties using the Hunter Valley coal supply chain meant resulted in inefficient use of infrastructure assets and consequently long ship queues at the Port of Newcastle. This case demonstrates the level of complexity in a multi-user system with misaligned interests, and how an open regime alone may not be sufficient in addressing such issue. The HVCCC and other initiatives such as the Capacity Framework Agreement for Port of Newcastle (2009) and ARTC's 2011 undertaking have improved the operation of the Hunter Valley coal supply chain.

However, misalignment in commercial interest continues to be an issue for the east coast. For example, it is in the commercial interest for the facility users (e.g. coal producers) to maximise profits in the seaborne coal market by maintaining low production costs (including freight costs) and delivering expansion that aligns with the world's demand for coal. Meanwhile the commercial return for an infrastructure provider or an operator from its facility and further expansion, while to some extent depend on the coal seaborne market, is also influenced by its ability to extract a higher rate of return from users. Furthermore, a slightly higher rate of usage may not justify the additional level of investment, particularly if there is a lack of willingness of users to pay the additional costs. The Commission may wish to examine this issue in more detail, possibly by examining incentives for parties to compromise their differences, or a robust dispute resolution framework.

The High Court construction of declaration criterion (b), apart from having an effect on declaration and any revocation of declaration, may also have an effect on ineligible service determinations, applications for certification, existing certified access regimes that contain similar criteria to Criterion (b). The private profitability test needs to be carefully applied and should not be the sole determinant, especially for the east coast. While it may be possible for an incumbent to demonstrate it is profitable for them to duplicate or extend a facility using their leverage over an existing facility, this may not be the case for a new entrant especially in a situation where duplication of a portion of the facility to an existing facility is only profitable when access to the existing facility is available (e.g. a section of railway to link into an existing rail network). Duplication of facilities on the east coast may be profitable but not practical as it may be constrained by other issues such as land access, environmental approval and community resistance. East coast coal rail and port development is a good example of how the duplication may be economically possible but difficult to realise in reality. In Queensland, for example, there has been significant pressure to confine activities to a limited number of ports in the Great Barrier Reef World Heritage Area.

West coast (iron ore exporting)

The west coast iron ore exporting facilities in the Pilbara were privately built as single user facilities. There has been little third party access to the existing iron ore export facilities on the west coast under the regime. While RET notes the Goldsworthy railway, owned by BHP Billiton, has been declared, we understand that no third party access negotiation has proceeded

or been initiated. The Department further notes there is a haulage service agreement between BC Iron and Fortescue Metals Group through a private commercial negotiation in the Pilbara.

In terms of new facility development, there are consortiums of emerging medium iron ore producers developing multi user port facilities at South West Creek within the Port Hedland Inner Harbour, Oakajee Port and Rail and Anketell Port. However, it is difficult to comment on the operation of the regime in relation to these multi-user facilities as they are currently only proposals.

Pilbara Railways Case – Declaration process and High Court’s Decision

We have an interest in the inquiry in relation to the Pilbara Railways from the point of view of efficient use of, and investment in, rail and ports export infrastructure. While Pilbara Railways cases are rare, and by their nature, limited, they provide a good example of how the process can be lengthy and complicated. Given the dynamics in the resources sector, where access seekers are likely to be emerging entities with limited resources, this lengthy timeframe and complicated process can itself be a barrier for smaller players to gain access to the infrastructure and promote competition in upstream and downstream markets.

In this regard, RET believes further consideration of ways to collapse the steps in the current declaration/appeal processes of Part IIIA under the *Competition and Consumer Act 2010 (CCA)* without impacting on the integrity of the regime and the quality of declaration decision would be of value. RET understands this has partly been addressed by the repeal of the *Trade Practices Act (1974)* and its replacement by the CCA in 2010 which limits the Competition Tribunal merit review processes to the material that has been presented to the Treasurer and additional information which the Tribunal can request from the National Competition Council (NCC). However, this will mean access seeker and facility owners will need to provide considerably more information to the NCC than in the past.

The High Court’s decision in 2012 also concluded that the Tribunal had acted beyond its power by conducting a de-novo hearing as the Act stands, before the amendment in 2010. The High Court’s decision and the amendment to the act should provide clarity on the role of the Tribunal and the materials which can be considered by the Tribunal under the Act.

The majors in the mining industry, including BHP Billiton, have supported the Tribunal and the merit for it to conduct hearings and analysis on critical complex issues as discussed in their submissions to this inquiry. They have also raised concerns regarding NCC’s lack of resources and expertise to make the right recommendation for a declaration. BHP Billiton further suggested the Tribunal should have the prime function in deciding whether a facility is subject to declaration with the NCC providing a supporting role and that the Treasurer should only be involved when Criterion (f) regarding public interest is the deciding criteria for a declaration. It is RET’s view that regardless of whether or not the current functions of the NCC, Tribunal and/or the Minister are retained or amended, the process itself should not act as a barrier for anyone who has a legitimate access case that supports the objectives of the regime.

Private Profitability test

RET further notes the High Court’s decision in relation to the declaration of the Hamersley and Robe Railways and its endorsement of the use of the private profitability test for Criterion (b). This is a position where the High Court interpreted the term ‘uneconomical’ as meaning that for anyone (including the incumbent operator of the facility to which access is sought) to develop another facility to provide the service was ‘unprofitable’. RET believes the private profitability

test will result in a higher threshold for access seekers, especially if the term ‘anyone’ is to include the incumbent operator and owner of the facility and is irrespective of market dynamics and time.

The private profitability test asserts that where an alternative facility can credibly be built, private negotiations will necessarily result in efficient outcomes or, will at least achieve efficient outcomes more readily than regulation. However, the private profitability test can make economically rational assumptions that may not always apply. There is an argument that unlike the natural monopoly test, the private profitability test could deny access when there is an existing monopoly but entry is nonetheless regarded as privately profitable. This would force the access seeker to seek a less profitable alternative facility which may be not competitive, but still technically profitable.

In the resources sector, commodity prices are dynamic and projects such as the mining project and the duplication of a facility require very long lead times. The economics of a project can vary significantly between initial planning and final operation. While project modelling should take into account the price variation over time and financing should be developed accordingly to reduce this sort of risk, the capacity of smaller operators (often the access seeker) to finance and manage this risk and carry losses from temporary slumps may be limited.

RET is also concerned that while it may be possible for a facility to be duplicated in a commercially profitable sense, it is wasteful from an operational, usage and investment perspective if the demand for services can be met with one facility with lower costs compared to multiple facilities at reasonable entry price. This view is consistent with objective clause (a) under Section 44AA of the Act, that is the National Access Regime should ‘*promote the economically efficient operation of, use of and investment in the infrastructure which services are provide, thereby promoting effective competition in upstream and downstream markets*’. Furthermore, as discussed earlier for the east coast, the cost of duplications such as land access, environmental concerns and community resistance, which may limit the practicality of such duplication even though it is economically sound.

Based on this view, there may be merit in re-considering the natural monopoly test. RET notes both the Tribunal and NCC in the past have adopted the natural monopoly test. However, we recognise no single test in perfect, especially in regard to a complex issue. In determining whether a facility should be considered as a natural monopoly, attention also needs to be paid to the practicality and potential costs involved in an open access regime, which by its nature may require compromise by some or all users, in terms of efficiency of access or use of certain equipment. In this regard, we recognise there is merit in having a net benefits/costs analysis incorporated in the declaration process, This could fall under Criterion (f) to ensure costs of access, such as inefficiencies caused by third-party access to the operation of the facility and risks taken by the facility owner, is appropriately taking into consideration.

If the private profitability test is to be retained as the test for criterion (b), we suggest there would need to be an assessment conducted to determine whether a facility which may be profitable to duplicate by anyone would still make an operation uncompetitive if pursued by a new party.

There is a counter argument that while the access seeker’s project may be profitable, but not competitive with an existing project due to higher costs, it could still gain market share. This perspective needs to be balanced against the ability of such a project to gain financing where investors may be expected to allocate capital towards a more profitable venture. However, the details of this argument cannot be generalised as they are dependent on the specific market and

projects. In competition with a large iron ore miner for example, a group of investors may be willing to take lower profits simply to gain access to the market.

RET agrees that the issues considered under the net social benefit test proposed for criterion (b) can be addressed under criterion (f) where the public interest test is adopted.

The second stage of the declaration process, negotiation and arbitration, is still untested for iron ore related port and rail infrastructure as no third party access case has reached that stage but the Commission may wish to consider the experiences from other sectors on this matter to further enhance the process.

RET looks forward to engaging further with the Commission in relation to this inquiry into the National Access Regime.

~~Yours sincerely,~~

Chris Stamford
Acting Head of Resources Division

11th April 2013

Attachment A

Table 1: structure of ownership and operation of major operating rail and ports in the west and east coasts.

Facility	Owner	Operator	Access	Status
West coast iron ore rail facility				
Newman Railway	BHP Billiton	BHP Billiton	Single-user - not declared	Operating
Goldsworthy Railway	BHP Billiton	BHP Billiton	Single-user - Declared to 2028	Operating
Hamersley Railway	Rio Tinto	Rio Tinto	Single-user - not declared	Operating
Robe Railway	Rio Tinto	Rio Tinto	Single-user - not declared	Operating
FMG's railway	FMG	FMG	Single-user - currently provide haul service to BC Iron through a private commercial agreement.	Operating
West coast iron ore port facility				
Port Hedland Inner Harbour (Nelson Point and Finucane Island)	BHP Billiton (under a lease or licence agreement with the Port Hedland Port Authority)	BHP Billiton (under a lease or licence agreement with the Port Hedland Port Authority)	Single-user	Operating
Port Hedland Outer Harbour	BHP Billiton	BHP Billiton	Single-user	Proposed
Port Hedland Inner Harbour (Utah Bulk Loading Facility)	Port Hedland Port Authority	Port Hedland Port Authority	Multi-user	Operating
Herb Elliot Port (at Port Hedland Inner Harbour's Anderson Point)	FMG	Pilbara Infrastructure Pty Ltd (owned by FMG)	Multi-user	Operating
Port Hedland Inner Harbour South West Creek	North West Infrastructure (under a lease or licence agreement with the Port Hedland Port Authority)	North West Infrastructure	Multi-user	Proposed

Facility	Owner	Operator	Access	Status
	Authority)			
Port Hedland Inner Harbour South West Creek	Roy Hill Infrastructure (under a lease or licence agreement with the Port Hedland Port Authority)	Roy Hill Infrastructure	-	Proposed
Port Dampier and Cape Lambert	Rio Tinto	Rio Tinto	Single-user	Operating
Anketell	Aquila	Aquila	Multi-user	Proposed
Oakajee	Mitsubishi	Mitsubishi	Multi-user	Proposed
East coast rail facility				
Aurizon Central QLD coal rail network	Aurizon (under a 99 years lease from the state government)	Aurizon	Multi-suer - undertaking in place under QCA (State regime)	Operating
Hunter Valley Coal rail network	ARTC	Pacific National; Aurizon; X-Rail and Southern Shorthaul	Multi-user - undertaking under the National Access Regime	Operating
East coast port facility				
Abbot Point Coal Terminal 1	Adani (under a 99 years lease from the North Queensland Bulk Port Authority)	Abbot Point Bulkcoal Pty Ltd (a subsidiary of Xstrata)	Multi-user	Operating
Abbott Point Coal Terminal T2 (BHP Billiton)	BHP Billiton	BHP Billiton	-	Proposed
Abbott Point Coal Terminal T3 (GVK/Hancock)	GVK/Hancock	GVK/Hancock	-	Proposed
Hay Point – Hay Point Service Coal Terminal	BHP Billiton Mitsubishi Alliance	BHP Billiton Mitsubishi	Single-user	Operating
Hay Point – Dalrymple Bay Coal Terminal	Prime Infrastructure (under long term lease from Queensland Government entity, DBCT	DBCT Pty Ltd (user group)	Multi-user	Operating

Facility	Owner	Operator	Access	Status
	Holdings P/L)			
Port of Brisbane	Q Port Holdings consortium via a 99-year lease from the QLD Government	Queensland Bulk Handling Pty Ltd	Multi-user	Operating
Gladstone RG Tanna Coal Terminal	Gladstone Ports Corporation	Gladstone Ports Corporation	Multi-user	Operating
Gladstone Barney Point Coal Terminal	Gladstone Ports Corporation	Gladstone Ports Corporation	Multi-user	Operating
Gladstone Wiggins Island Coal Terminal	WICET Consortium via lease from Gladstone Ports Corporation	Gladstone Ports Corporation	Multi-user	Proposed
Port of Newcastle - Carrington Terminal	Port Waratah Coal Services (PWCS)	PWCS	Multi-user	Operating
Port of Newcastle – PWCS’ Kooragang Island Terminal	PWCS	PWCS	Multi-user	Operating
Port of Newcastle – PWCS’ Kooragang Island Terminal Expansion (T4)	PWCS	PWCS	Multi-user	Proposed
Port of Newcastle - Newcastle Coal Infrastructure Group’s (NCIG) Kooragang Island Terminal)	NGIG	NCIG	Multi-user	Operating
Port Kembla Coal Terminal (PKCT)	PKCT industry consortium via lease from The Port Kembla Port Corporation	BHP Billiton manages the terminal on behalf of the PKCT industry consortium	Multi-user	Operating

Attachment B

