11 October 2007

Mr Mike Woods
Commissioner
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Commissioner

Annual Review of Regulatory Burdens on Business: Primary Sector – Supplementary Submission

The Minerals Council of Australia (MCA) welcomes the opportunity to contribute further to the Productivity Commission's study of the regulatory burdens on mining and minerals processing by commenting on the Draft Research Report. This supplementary submission focuses on four areas in the order in which they are covered in the report. These relate to access to land, labour skills and mobility, Part IIIA of the Trade Practices Act and safety and health.

1. Access to land

Resourcing Native Title Representative Bodies

A number of reforms have recently been made to Native Title legislation. Overall these reforms are consistent with the MCA's policy position to provide for the efficiency and operability of the system without diminishing Indigenous rights. Thus the proposal in Draft Response 4.8 for a review of the recent amendments to the Native Title Act within five years of their implementation (ie by 2012) appears appropriate for assessing their success whilst also providing a degree of stability in the system.

The MCA remains concerned that the reforms do not adequately address the resourcing needs of Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate (PBCs). The MCA considers that the systemic shortage of resources (financial, staffing and other key capacity requirements) is adding unnecessary costs to business and impeding industry's ability to negotiate effectively with Indigenous communities. This is resulting in project delays and the undue requirement for business to meet overhead costs associated with engagement with NTRBs and PBCs.

While individual NTRBs may record a surplus at the end of a financial year, the MCA understands that existing restrictions on funding allocation and use impacts NTRBs' ability to engage (eg. by having available skilled staff) and to negotiate on future acts.

Government has suggested that industry could provide additional funding that is necessary to support the effective operation of PBCs particularly, but also NTRBs. Whilst the MCA considers that there are some costs that are legitimately borne by industry, in terms of costs directly related to a specific commercial negotiation, it is paramount that government provides core funding to these organizations to ensure their effective functioning. This, for three key reasons:

- impact on independence of negotiations (real and perceived): the minerals industry has strong concerns that external parties would not consider the negotiations to be independent if they are fully funded by a minerals company, and that this would have impacts on the size of companies that are able to afford to engage;
- capacity of PBCs to engage with industry: PBCs need to be established and capable of engaging with companies where there are potential projects in Greenfields areas. Without some initial funding by government these organisations will simply exist as shelf-companies and will not have the capacity to engage. Agreements will only be relatively easily negotiated in those areas where existing economic enterprise is providing a funding base to PBCs to enable them to operate;

- sustainable Indigenous communities: the Government desires to assist Aboriginal people to translate their rights in land into economic opportunities – and specifically to gain individual benefit from their lands. Without the provision of core funding, PBCs will not have the capacity to consider the development of independent economic enterprise, and will be restricted to their only economic development opportunities coming essentially from mining or pastoralist activities – this is counter to the MCA's objectives on regional development and does little to build economic independence and respect in Indigenous communities.

MCA members have consistently raised with the Minister for Indigenous Affairs specific instances where this has occurred due to NTRBs and PBCs funding limitations.

Recommendation 1

The MCA recommends Draft Response 4.8 be reworded to recommend appropriate and flexible resourcing of NTRBs and PBCs to build institutional capacity in the native title system.

Cultural Heritage

The Draft Report acknowledges that cultural heritage identification and assessment processes differ across the nation. This unnecessarily adds transaction and other costs to business in ensuring that they meet regulatory requirements whilst also providing effective protection of sites and artefacts.

The MCA reiterates there is a need for a single, consistent, national approach for cultural heritage identification and assessment and supports consideration of this issue through the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* reforms.

With regard to Draft Response 4.9, the MCA supports the suggestion for Indigenous cultural heritage information to be made accessible through a single, consolidated, national portal, as this will facilitate more comprehensive, simplified and more cost effective access to information for companies. The portal would be based on:

- clearly established rules and guidelines designed to promote consistency in the listing, collection and presentation of consolidated information and regarding access;
- the protection of knowledge required to be kept secret by Aboriginal and Torres Strait Islander tradition or for other relevant purposes; and
- maintaining a record of those who have accessed the register for legal reasons.

Such an approach would be consistent with the environmental heritage protection arrangements as defined under the *Environmental Protection and Biodiversity Conservation Act*, which includes the provision of a single, searchable national register of sites of State/Territory and national environmental significance.

It would also be important that a clear statement is provided to users each time they access different jurisdictional information to make sure:

- they understand the purpose of each jurisdiction's contribution to the national portal in the context of that jurisdiction's legal system; and
- that while efforts are being made to develop greater consistency, an indication is provided of where key difference exist.

The Commission is separately undertaking a study of performance benchmarking of Australian business regulation. For the first year it will be examining the quality and quantity of regulations by jurisdiction and in subsequent years is likely to examine project approval and land development matters. This should include an assessment of how Australia can work towards a consistent, national approach in relation to Indigenous cultural heritage, and particularly in relation to heritage identification, listing and management processes.

Recommendation 2

To promote an efficient and nationally consistent cultural heritage system:

(a) governments should seek to align heritage identification and management processes; and

(b) a single consolidated portal be developed based on agreed principles and practices.

2. Labour skills and mobility

The MCA concurs with the Commission's finding that labour shortages, particularly of trades and other skills, while particularly severe in the minerals sector are not confined to that sector or the broader primary sector, which is the focus of the current inquiry. As a consequence, policy responses should aim to address the wider issue as they will clearly impact more generally across the economy.

The MCA has been active for many years in the area of addressing labour and skill shortages. The MCA's strategic framework for education and training is based upon:

- raising awareness of industry careers opportunities through the industry's own proactive initiatives and in collaboration with all levels of the education and training system;
- improving attraction of employees to the industry by addressing cultural and structural impediments to participation by women, mature age and Indigenous people;
- increasing retention of employees by addressing impediments to long term employment in the industry, specifically in choice and flexibility in workplace arrangements, upskilling of existing employees and recognising skills acquired on the job;
- building institutional capacity through policy advocacy for a flexible and market driven national education and training system and through collaborative partnerships with institutional providers – especially the universities, other industry sectors and government to grow the pool of skilled employees capable of meeting industry needs in regional Australia; and
- utilising skilled migration as an acute strategy to a short-term requirement as the industry and government gear to reinvigorate the national education and training system to meet long-term human resource needs of the industry.

The MCA requests the Commission amend Draft Response 4.18 to capture not only the need for accelerated implementation, but also the intent of the MCA policy position on education and training as summarized in bullet points 3, 4 and 5 in Box 4.4 at page 168 of the Draft Report. This is because accelerated implementation in our view does not address all of the points raised.

Recommendation 3

The MCA recommends the Commission's Draft Response 4.18 be reworded as follows:

- While reforms in the Vocational Education and Training area, that are being implemented or under consideration, have the potential to alleviate skills shortages, progress has been slow and there needs to be a commitment to accelerated implementation ***particularly where structural impediments impede flexible delivery modes***.

3. Transport infrastructure – Part IIIA of the Trade Practices Act 1974

Bulk commodity export industries operate in highly competitive world markets and producers are essentially price-takers for their final output. As a result, Australia's export chains are exposed to world market disciplines requiring them to be efficient.

In the Pilbara iron ore industry the operations of mining, land transport and ship loading are highly integrated, which has produced very high levels of efficiency. These efficiencies are a major source of competitive advantage for Australia's globally traded iron ore. In fact, this integration has become so advanced that the facilities operate as a unified production process. The Reserve Bank in its Statement on Monetary Policy in February 2005, the Prime Minister's Exports and Infrastructure Taskforce report, May 2005 and the Australian Bureau of Agricultural and Resource Economics' study, *Export infrastructure and access: key issues and progress*, June 2006, recognised that this model has been the most responsive to changes in market demand.

This 'ideal' situation cannot be replicated in every other export industry. However, where it does operate in iron ore it has led to the Pilbara producers ramping up private property capacity – which has been developed over a forty year period – through investments in infrastructure. The Productivity Commission should understand that this model can be put at risk by imposing an access regime under Part IIIA of the Trade Practices Act that threatens operational efficiency and the attractiveness of further private investment.

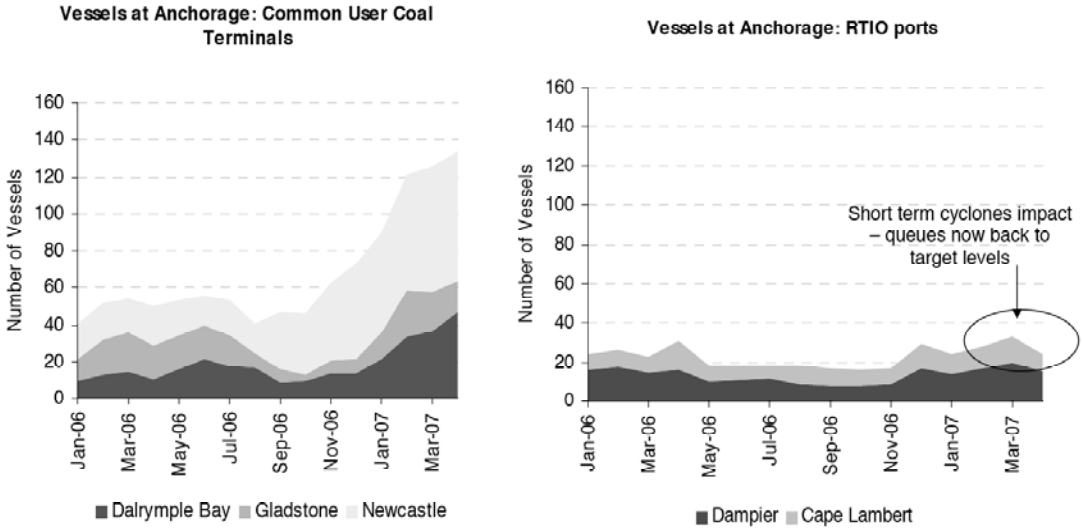
After consideration of the facts, the Prime Minister's Taskforce suggested that Part IIIA be amended in order to protect vertically integrated, tightly managed logistics chains (and especially those related to export industries) from third party access and thereby preserve their efficiency. This position was reached after analysis of the superior efficiency performance of the vertically integrated iron ore over multi-owner coal export infrastructure chains to the remarkably strong growth in world demand for iron ore and coal since 2005 (see Figure 1). However, the Australian Government did not take this on board in amendments to the Trade Practices Act subsequently introduced into Parliament.

The MCA has strongly supported the Prime Minister's Taskforce Report as achieving the right regulatory balance:

- system efficiency is best served by market based solutions in the first instance;
- regulation should only be applied where the market is demonstrably failing; and
- a national regulator is preferred where there is a failure in national consistency and timely response across existing State regulators.

In addition, where state based regimes comply with National Competition Principles they should be recognised as meeting the access requirements.

FIGURE 1



- Source: M. Spreadborough, Rio Tinto Iron Ore, *Financial community visit presentation*, 12 June 2007

Part IIIA

The fundamental role of Part IIIA is to ensure access regulation contributes to, rather than detracts from, economically efficient outcomes and Australia's economic performance.

Part IIIA contains a number of important safeguards to ensure that creating an enforceable right for third parties to negotiate access will promote economic efficiency and not unduly interfere with the rights of service providers. These include requiring that, to be eligible for declaration, services be provided through infrastructure facilities of national significance that would be uneconomic to duplicate. Infrastructure services covered by Part IIIA are limited by a "production process" exclusion that aims to ensure that the access regime is not too broad in its application. The declaration criteria also include a public interest test, as do the matters that must be taken into account by the Australian Competition and Consumer Commission when arbitrating access disputes. There are also a number of protections afforded to service providers in the arbitration process.

A number of enhancements to the regime have recently been made, including:

- the insertion of an Objects Clause;
- establishing more timely and less costly regulatory procedures, including the introduction of target time limits for regulatory decisions and certifying all Commonwealth and State third party access regimes; and
- introducing limited merits review to reduce delays in any review.

It has been suggested that no further legislative amendments are necessary at this time and that the scope of the production process exclusion in Part IIIA is a matter for the Courts to decide on a case-by-case basis as the case law is still evolving. While this exclusion aims to protect the legitimate interests of owners of essential infrastructure facilities and preserve incentives for investment in such facilities, the development of case law and associated legal processes takes many years.

Moreover, the number of access cases addressed by the courts is very small, is not likely to increase significantly in the next five years or so and is leading to greater uncertainty due to different legal interpretations of the law, including against essentially the same facts. Although the 2006 legislative amendments included insertion of an Objects Clause in Part IIIA, as predicted by the Australian Bureau of Agricultural and Resource Economics 2006 report, this has not improved the situation regarding interpretation of the scope of the exclusions.

Of particular note, five Federal Court judges have now ruled on two cases regarding access to Pilbara iron ore railway systems. This has resulted in four conflicting decisions (including the minority decision in the latest full Federal Court case) on essentially the same facts. This situations creates unnecessary investment and operational uncertainty and clearly indicates confusion about the intent of Part 111A – a confusion that needs to be remedied as a matter of urgency preferably through the legislative process.

It is also notable that:

- the Objects Clause is something regulators and courts/tribunals must have *regard to* but do not have to *satisfy;*
- Part IIIA defines a service in section 44B (copied in the Attachment) to include, inter alia, the permanent way (i.e. below rail service) and the handling and transporting of goods and people (above rail transport) as well as port infrastructure. There is insufficient legal clarity in the intended meaning of the term "service" and the proper construction to be given to the legislated exclusion of a service that constitutes "the use of a production process";
- under Part IIIA, an infrastructure service can be declared if doing so will promote a *material increase* in competition in at least one market other than the market in which the service itself is provided. No guidance is given as to what is meant by "material";
- even if the entire impact of declaration is to provide gains to foreign buyers (at the expense of Australian producers), the regulatory apparatus can be brought into play;
- the Act requires that "access would not be contrary to the public interest" – this is stated in the negative and there is no guidance as to what is meant by "public interest" significantly narrowing the test's transparent application;
- Part IIIA lacks any authorisation mechanism based on efficiency that could be used to limit the scope of access;
- many areas are excluded as they are dealt with under separate laws (eg state owned infrastructure and the regimes for gas, telecommunications and other energy infrastructure);
- while there is an exemption provided for "production processes" in Part IIIA, that term is not defined, nor is any guidance given as to the purpose and scope of the exemption; and
- the current access regime draws heavily on the recommendations of the Hilmer Committee of Inquiry into Competition Policy. Its report stated that "The general rules proposed are intended to cover essential facilities, irrespective of ownership" (p. 250) but:
  - recognised the need to "carefully limit the circumstances in which one business is required by law to make its facilities available to another" (p. 248);
  - emphasised that access "should be essential, rather than merely convenient" (p. 251);
  - noted that "it would be appropriate to ensure that an obligation to provide access does not unduly impede an owner's right to use its own facility, including any planned expansion of utilisation or capacity"; (p. 256); and
  - stated that a "frequent feature" of facilities and industries likely to meet appropriate criteria for declaring a facility would be those where there was "traditional involvement of government in these industries, either as owner or extensive regulator" (p. 251).

The proposed review in 2011

This discussion underlines the fact that processes that systematically and regularly review the objectives and rationales for competition policy regulatory arrangements, and the relative merits of different options for meeting them, are critical to informed public policy. They can also play a pivotal role in promoting public awareness of the tradeoffs of different policy approaches, thereby facilitating broader acceptance of change.

Draft Response 4.20 proposes that the 2011 review of Part IIIA is the appropriate forum to assess the national access regime. The MCA is very concerned with this proposal as it would unnecessarily delay consideration of the issue. This is clearly illustrated by the six-year period involved the last time this area of the law was reviewed (see Table 1). On that basis, any amendment recommended in the 2011 review may not pass into Commonwealth law until 2017 and into State laws even later.

TABLE 1: THE PROCESS OF LEGISLATIVE AMENDMENT WILL BE EXTENSIVE

11/10/2000	Assistant Treasurer referred clause 6 of the Competition Principles Agreement and Part IIIA to the *Trade Practices Act 1974* to the Productivity Commission for inquiry and report.
28/9/2001	Productivity Commission Inquiry Report No 17 released.
2/6/2005	*Trade Practices Amendment (National Access Regime) Bill 2005* introduced into the House of Representatives. Made amendment to give effect to the bulk of the Productivity Commission's recommendations as accepted by the Australian Government.
8/9/2005	Senate Economics Legislation Committee report on Bill.
10/2/2006	COAG agreed to a Competition and Infrastructure Reform Agreement. It includes agreement that all third party access regimes for services provided by means of infrastructure facilities will include consistent, regulatory principles.
18/8/2006	Date of assent to *Trade Practices Amendment (National Access Regime) Act 2006*
No later than 2010	As part of the COAG process, "Objects clauses that promote the economic efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets will be inserted in relevant legislation by no later than 2010". (Competition and Infrastructure Reform agreement, page 5, 42 and 43 of COAG communiqué 10/02/06).

Clearly competition regulation is a highly complex and technical field. As we look to the future there is a need to continually refine the competition regulatory frameworks with a view to the inevitability of regulatory error, with greater recognition of the risks to necessary future investment and with an acceptance of the virtue of not intervening unless a nationally significant efficiency payoff is clearly in prospect.

Rather than relying on the slow, uncertain, costly and confusing process of litigation, there is a need to amend the law to address continuing uncertainty around access to a company's private, purpose-built, integrated infrastructure.

Recommendation 4

The MCA recommends that the first sentence of Draft Response 4.20 be deleted and the following inserted:

- To ensure access regulation contributes to economically efficient outcomes and Australia's improved economic performance, the Productivity Commission be asked to assess how to amend the definition of a "service" and "production process" in Section 44B of the Trade Practices Act to provide certainty in the law and limit the need for recourse to the courts – including through exemption of private, vertically integrated, tightly managed, export infrastructure chains (both rail and port).
- Integral to this, the Commission study overseas legislative approaches to infrastructure access issues and how Australia could improve the competitiveness, economic efficiency and application of Part IIIA of the Trade Practices Act.

4. Safety and health

National Mine Safety Framework

There has been significant progress towards a nationally consistent occupational health and safety (OH&S) legislative framework since the Ministerial Council for Minerals and Petroleum Resources establishment the tripartite National Mine Safety Framework (NMSF) Steering Group and appointed former Western Australian Mines Minister, the Hon Clive Brown, to chair the Group:

- overarching legislative principles, consistent with the minerals industry's preferred OH&S regulatory model has been endorsed
- a business case for regulatory reform has clearly been established, based on improved safety and health outcomes, greater efficiency for companies operating across jurisdictions and enhanced international competitiveness; and
- agreement has been reached to develop and implement strategies to improve regulator and industry competence, compliance and enforcement.

The MCA public policy position is to advocate for and support the development of a nationally consistent legislative framework for OH&S. The minerals industry is not looking to establish a single national body for OH&S regulation of the industry.

At page 186 (paragraph three from the bottom) the Draft Report incorrectly refers to the MCA's emphasis in its submission that "the ultimate goal should be a single national regulatory body replacing the existing state bodies, and a single piece of national legislation supplanting the existing state legislative frameworks."

The MCA's original submission to this inquiry (at pages 15 and 16) raises concerns with the current approach to OH&S regulation in the minerals sector as being based on eight separate State/Territory legislative regimes resulting in inefficiency, unnecessary cost, complexity and uncertainty for industry.

The MCA supports:

- current efforts to establish and implement a nationally consistent OH&S legislative framework, within existing regulatory regimes; and
- the current focus on finalising and implementing the NMSF as providing the best opportunity to achieve the nationally consistent and effective approach sought by most stakeholders.

The industry is extremely concerned at the inconsistent approach to the increasing use of prosecution as a first response enforcement measure to breaches of OH&S laws. Current inconsistencies across jurisdictions include penalties, length of jail terms, the nature of an offence subject to prosecution, the availability of defences and the basic rights of appeal. The MCA is particularly concerned with the OH&S laws and their application in NSW, and supports a policy platform for further reform specific to that State.

The NMSF Steering Group is focused on national consistency, not delivery of a single national regulatory body, and has the full support of the Minerals Council of Australia.

While the NMSF originally focused solely on industry competency, the current focus is very much on enhancing the competence of regulators, as the best means of creating independent and competent regulatory regimes - critical to achieving improved safety outcomes.

Recommendation 5

The MCA supports the first three points made in draft response 4.22. The MCA recommends the final sentence be amended as follows:

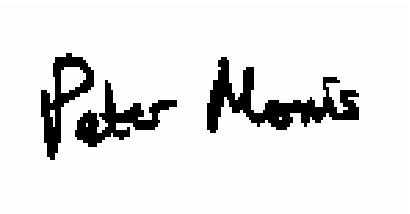
- Despite in principle agreement between Ministers, reform in this area is taking too long. Governments should maintain a strong commitment to the implementation of the National Mine Safety Framework as soon as possible. Transparent, clear and staged timelines should be agreed and adhered to. Further, initiatives undertaken by individual jurisdictions should not undermine efforts to achieve a nationally consistent and effective approach.

Competency support

Regarding the comment about the shortage of mine managers at page183 (fifth dot point) it should be made more clear this relates primarily to the views of industry operating in NSW.

Given the importance of safety and health in the industry, it is suggested that the discussion of safety and health should form section 4.2.

Yours sincerely



Peter Morris
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Declaring a "service" under the Trade Practices Act (TPA)

To be declared, a service must satisfy a number of criteria, including that:

- access would promote competition in another market;
- it would be uneconomic to develop another facility to provide the service;
- the facility is nationally significant;
- access can be provided without undue risk to human health and safety;
- access would not be contrary to the public interest; and
- the service is not already covered by an effective access regime – where an 'effective' access regime already exists, declaration is not available and an access seeker must use the effective regime

Section 44B of the TPA defines certain key words and expressions for the purposes of Part IIIA as follows:

> *In this Part, unless the contrary intention appears:*
>
> ***provider**, in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service.*
>
> ***service** means a service provided by means of a facility and includes:*
>
> *(a) the use of an infrastructure facility such as a road or railway line;*
>
> *(b) handling or transporting things such as goods or people;*
>
> *(c) a communications service or similar services;*
>
> *but does not include:*
>
> *(d) the supply of goods;*
>
> *(e) the use of intellectual property; or*
>
> *(f) the use of a production process*
>
> *except to the extent that it is an integral but subsidiary part of the service.*
>
> ***third party**, in relation to a service, means a person who wants access to the service or wants a change to some aspect of the person's existing access to the service.*