



MINERALS COUNCIL OF AUSTRALIA
SUBMISSION ON THE PROPOSED NATIONAL PORTS
STRATEGY MAY 2010

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The Minerals Council of Australia is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, and environmentally and socially responsible attuned to its communities' needs and expectations.

MCA member companies produce more than 85 per cent of Australia's annual minerals output, and will account for about 60 per cent of Australia's merchandise exports in the year to June 2009.

The minerals industry recognises that its past success and future prosperity is dependent on a sound and expanding national economy, an educated and cohesive society and a sustainable natural environment.

For this reason, the minerals sector supports public policy settings aimed at the following objectives:

- sustainable economic growth characterised by low inflation, low interest rates, fiscal prudence, and a skilled and productive workforce;
- a sound, fair and stable society, where effort is encouraged and rewarded and a helping hand extended to those in need; and
- a sustainable natural environment, reflecting national consistency and balance in policy settings.

The MCA recognises that the future of the Australian minerals industry is inseparable from the global pursuit of sustainable development. Through the integration of economic progress, responsible social development and effective environmental management, the industry is committed to contributing to the sustained growth and prosperity of current and future generations.

The Australian minerals industry is an industry of considerable size and economic and social significance, benefiting all Australians both directly and indirectly.

The mining and minerals processing sector:

- underpins vitally important supply and demand relationships with the Australian manufacturing, construction, banking and financial, process engineering, property and transport sectors;
- has contributed over \$600 billion directly to Australia's wealth over the past 20 years;
- is in the top five producers of most of the world's key minerals commodities, including
 - the world's leading producer of bauxite, alumina, rutile, ilmenite, zircon and tantalum;
 - the second largest producer of, uranium, lead, zinc and lithium;
 - the third largest producer of gold, diamonds, iron ore, manganese, nickel and niobium;
 - the fourth largest producer of black coal and silver; and
 - the fifth largest producer of aluminium, brown coal and copper.
- directly and indirectly employs some 320,000 Australians, many of whom are in sparsely populated, remote and regional Australia; and
- is responsible for significant infrastructure development – since 1967, the industry has built 26 towns, 12 ports and additional port bulk handling infrastructure at many existing ports, 25 airfields and over 2,000 kilometres of railway line.

Introduction

The Minerals Council of Australia welcomes the opportunity to provide this submission to Infrastructure Australia and the National Transport Commission in response to the “The Proposed National Ports Strategy”. The commitment to develop an overarching strategy for governments is supported by the MCA given the important contribution ports make to Australia’s mining and mineral processing sectors.

Ports represent integral links in the export supply chain as well as providing the means of obtaining competitively priced imports for Australia’s minerals industry.

MCA members are both customers and owners of ports. In the export sector their objectives are more aligned than in other commercial sectors, namely: ensuring these critical export and import gateways are functioning efficiently. Industry therefore considers that any proposed National Ports Strategy must achieve the following objectives:

1. Provision of a policy framework that removes unnecessary Government barriers to the timely and efficient develop of ports for the minerals sector - industry’s maintains that governments should not prevent port and terminal operations to be controlled by entities which are aligned to the interests of industry; and
2. Clearly articulates the role of government to address demonstrated market failures, including planning and co-ordination matters – governments should not seek to inject themselves into commercial and operational matters, these are best addressed by industry.

These objectives underpin the Minerals Council of Australia’s approach to a National Ports Strategy.

Competitive and commercially focused frameworks best promote efficient performance of logistics supply chains – more recently, co-ordination and communication in complex export related supply chains has been a particular challenge, industry participants best placed to address these matters, rather than direct government intervention.

Critically, the MCA considers that terminal operations should not be within the scope of the development of any national strategy in terms of bulk export operations, rather the focus should be on the development of port land and locations specifically.

Governments should be considering what they can do to fast-track major infrastructure proposals, including improving regulatory approval processes to ensure that industry infrastructure capacity can be built to meet demand. In terms of metropolitan container ports, there is clearly a role for Government to facilitate the complex task of long-term planning for transportation corridors and distribution interfaces. MCA welcomes this focus from *Infrastructure Australia and the National Transport Commission’s* draft National Port Strategy.

Response to Draft National Ports Strategy Exposure Draft

The primary object of a ports strategy should be to drive the considerable investment that will be needed to meet the supply challenge of the next 20 years.

While there may be policy reasons for public expenditure, the task is overwhelmingly one for the private sector. Policy, then, must be geared to giving the private investor confidence in that investment.

For bulk export ports, private investor(s) should be able to operate the infrastructure as envisaged at the time of investment, with issues of access and expansion considerations grounded in commercial drivers delivered through market arrangements. Confidence in the commercial and regulatory framework is an essential element for major infrastructure investment from industry's perspective.

Governments have a critical role in ensuring timely and effective regulatory processes and, strategically, providing some initial investment risk in key infrastructure projects. Direct industry investment must be the primary means of funding the development of export port facilities in the minerals sector.

Regulatory agencies (both Departmental and statutory) must perform their functions both decisively and efficiently, with a considered focus on industry needs and expectations. In this regard, the timing of regulatory approvals (for example environmental authorities and permits) must be expeditious and work within the commercial requirements of industry.

Australia's growth and prosperity depends on the continuing investment in the development of its natural resources. Given the large upfront capital commitments, the long life of assets and long lead times to profitability, fiscal stability and predictability in taxation and regulatory arrangements is a key determinant of investment decisions in minerals resources development projects.

Australia's comparative advantage in natural endowment does not automatically equate to competitive strength and attractiveness to local and foreign direct investment. The number of global project options is actually increasing and Australia is competing for the strategic deployment of capital within the global resources market.

The following information is provided to assist understanding industry's perspective relating to:

- **Multi-user, multi-owner export infrastructure** – the linkage to the development of the proposed national draft strategy reflects the importance of industry addressing co-ordination and supply chain planning, with government focusing on planning and development approvals for bulk export ports.
- **Private infrastructure needs investment confidence and stability**– and the importance of governments using competition policy to promote, rather than stifle investment in infrastructure.
- **Specific Issues** – around the development of port plans, governance and consistency in environmental and planning rules.

Multi-user, Multi Owner Export Infrastructure

For infrastructure that has many users and/or many owners the primary and immediate reform imperative is to address the systemic failures in the current regulatory systems which are inhibiting investment.

The regulatory system should allow for robust commercial frameworks underpinned by contracts that align performance accountability with system capacity.

The Minerals Council of Australia, through its Infrastructure Taskforce made up of representatives of major companies (BHP Billiton, Rio Tinto, Xstrata, Newcrest, Loy Yang Power) through the rest of the industry (through its associates the Queensland Resources Council, the Chamber of Mining and Energy Western Australia and MCA Victorian and Northern Territory divisions), has created a strategic framework of reforms centred on market-based solutions:

- The primacy of the market in the provision and operation of export infrastructure;
- Where government intervention is only justified in cases of market failure and the demonstrable capacity to remedy;
- Minimum effective, nationally consistent regulation implemented in a timely fashion;
- Whole of system coordinated planning; and
- Commercial arrangements that deliver capacity and efficiency, and provide certainty of access to export infrastructure.

The principles, which are a public document and may be used as such, are outlined in Appendix A attached. MCA would urge consideration of these principles to guide the Strategy. These principles would be superior to the proposal of endorsing the model of regulation from one port (Newcastle and the Hunter Valley coal and grain supply chain).

Private infrastructure needs investment confidence and stability

Competition policy seeks to ensure efficiency through downward price pressure which ultimately benefits consumers. This has been the value to Australia of bi-partisan competition policies over the past twenty years. In export commodity markets, prices are set internationally and Australian law can have no effect. For export infrastructure, the benefit to the nation comes from increasing volumes – higher exports, more royalties to the States, greater returns to shareholders and with it income tax revenue to the Commonwealth - and thus the focus should be on the efficiency of the supply chain.

Part IIIA of the Trade Practices Act - the access regime - has run its course in its present form.

While there will always be scope for some regulation to ensure there is competition in contestable markets, the specific Part IIIA provisions governing third party access were born of an economic time and designed for a specific purpose now largely passed. The Part IIIA statutes were an attempt to reflect the intentions of the Hilmer Report which recommended the introduction of a system of statutory access rights in Australia, which, *inter alia*, assiduously recommended the criteria under which one business should be required by law to make its private facilities available to another business. They were designed for specific circumstances where the privatisation of government enterprise would manifestly reduce competition. With a few exceptions the tasks envisaged by the legislators have been completed. Instead, there is a real danger that policy will fall victim to “mission creep” – increased regulatory intervention driven by the institutions charged with its administration.

The economic investment challenge facing Australia is massive. During the last growth phase, from 2002 to 2007 Australia lost market share in five major commodities despite strong growth in production. Capacity constraints were the main cause of that missed opportunity. In the latest assessment of minerals sector projects, the Australian Bureau of Agricultural and Resource Economics listed \$40.55 billion of advanced minerals projects and \$122.3 billion other potential minerals projects on the books (out of a total including oil and gas of \$249 billion). Realising these projects and ensuring Australia grows its market share over the coming decade will depend on the confidence of investors.

The access regime in its present form is a “chill” on investment. The uncertainty created by the ability of a competitor to seek access to a developer’s infrastructure in the future hinders decisions made today. As the recently retired Chair of BHP Billiton, Don Argus AO, said in October 2009, “*mandated third party access deters investment by under rewarding infrastructure owners for the risk they endure*”. The upside to the investor is curtailed and the down side remains the same because access to infrastructure is only sought in good times and because the access seeker may decide to renew or not renew the access contract, he said, and then concluded:

Since regulators in Australia typically use the ‘building block approach’ based on net present value and the weighted average cost of capital, one could see a scenario where investors will defer investment and wait for an opportunity with a higher expected return. That means infrastructure investment will be delayed.

Mandated access to infrastructure may help to achieve economies of scale where costs have already been sunk into infrastructure and there is plenty of spare capacity. However, in the resources sector, where expansion and growth remain a priority, mandated access works against our ability to achieve much needed scale in export oriented bulk commodities in particular.¹

¹ Chairman of BHP Billiton, Don Argus AO, Melbourne Mining Club, October 22, 2009, p14..

The MCA argues that the law should distinguish between access to infrastructure that was formerly publicly-owned and have considerable market power after privatisation and private, closely integrated supply chain infrastructure that is geared to exports. Reform should be based on four principles:

- competition be promoted in a market that is substantial and of national significance, other than the market in which the service is being provided, before the service is declared;
- the declared service be truly essential to competition in the market in which competition will be promoted, where 'essential' means indispensable as a practical matter for participation in that market;
- the production process exemption prohibit or strictly limit access where doing so would disrupt a vertically integrated production process; and
- the decision-maker be satisfied that granting access is in the public interest and in so doing, that the decision-maker takes account of the costs and risk of regulatory error.

These principles are expanded at Appendix B with suggestions for potential areas of amendment. Again the content of this appendix are public. The MCA contends that the reforms would maintain the integrity off access regimes in the domestic economy while providing confidence for investors in export infrastructure to build for growth.

Specific issues

As mentioned above, the MCA has made comments to earlier drafts. The following are particular issues of note:

Governance: The retention of State responsibility for ports is appropriate. The interaction of ports with other State institutions and rules – transport, local government and a like – means it is efficient to maintain this traditional arrangement.

States and the Northern Territory need, however, to maintain a commitment to reform. In line with the MCA's policy principles, placing ports on a commercial footing is vital. This may be either through corporatisation or privatisation, though the latter should not see a repeat of arbitrary past practices that excluded industry and those with direct interest in the supply chain from participation. The Council of Australian Governments must maintain its drive for best practice governance in our ports of national significance.

National consistency in environmental and planning rules: Greater consistency between jurisdiction through consultation and agreement is a welcome goal. It is part of the natural evolution of policy in more globalised and integrated commercial world.

Greater consistency is itself in line with the need for co-ordination between levels of government and government agencies, which in turn engender better planning and co-ordination from industry. Governments must act first, if not only for practical reasons as the ubiquitous participant, but also for commercial reasons. Companies have obligations whether under corporations or trade practices law which are designed to foster competition. This is appropriate. Policymakers have rightly been cautious of allowing companies to act together in ways that might give rise to anti-competitive behaviour. But it is also true that competition is a means to an end, not an end in itself. In a globalised market, the efficiency of supply chain in Australia is critical to this nation's competitive performance against other nations. In seek to balance these themes, governments, which are not players in the commercial field, have the ability to improve the framework through co-ordination and planning that, in turn, facilitates greater efficiency and improves Australia's competitive standing against other commodity nations.

Plans: Any proposals for planning documentation at a precinct level must mindful of obligations under corporations and trade practices law. For privately-owned and operated ports, typically under a board of management, the proposals should not require a level of specificity or an obligation under a plan that goes beyond what is commercially prudent. In as much as the Strategy envisages filling an information gap that for too long has led to discrepancy between users of a supply chain and providers of infrastructure and services, these moves are welcome. The ultimate must "triggers" for investment must be contracts and commercial arrangements. MCA considers that terminal operations should not be within the scope of the development of any national strategy in terms of bulk exports, rather the focus should be on the development of ports specifically.

Conclusion

The MCA appreciates the opportunity to share these industry views with Infrastructure Australia. Overall, industry considers that any national port strategy should be focused on providing the policy environment, especially in terms of planning and regulatory approvals, that helps and encourages the private sector to continue to make the large investments that are necessary for the development of new export terminals and related infrastructure.

Minerals Council of Australia
28 May 2010

Appendix A

MINERALS COUNCIL OF AUSTRALIA IN-PRINCIPLE STRATEGIC FRAMEWORK FOR SUSTAINABLE OPERATION OF MINERALS INDUSTRY MULTI-USER, MULTI-OWNER EXPORT INFRASTRUCTURE

THE PROBLEM...

Australia's multi-user, multi-owner export infrastructure chains – track, trains and ports – are currently, and forecast to remain for several years to come, a supply capacity constraint limiting Australia's ability to fully capture the opportunities of the strongest global market growth in a generation. These export systems struggle to efficiently and effectively meet the increasing global demand for mineral products incurring significant demurrage and lost export opportunities. The inefficiencies inherent in these multi-user supply chains also create delays and a disincentive to investment in future supply chain capacity. There is a need for a significant improvement in the current approach to regulation to facilitate a significant increase in public and private investment in capacity.

The current economic regulatory framework is adversarial, cumbersome and complex, leading to inefficient and sub-optimal outcomes. Regulatory systems fail to adequately take into account the consequential impact of regulatory decisions on the market. In some instances, regulations fail to be justified in the material consideration of "market failure" and that government intervention, prima facie, will be demonstrably effective in remedying market failure.

Australia's multi-user, multi-owner export supply chains are characterised by:

- Lack of timely investment in rail and port system capacity;
- Poorly coordinated and disparate interests in the utilisation of existing and planning for future capacity;
- Suboptimal alignment of track, train and port system capacity and economic interests;
- Regulatory induced delays to new investment and delays to the introduction of new technologies and work practices; and
- No or ineffectual contractual arrangements that result in the misalignment system capacity with performance, leading to poor accountability for performance, no differentiation in pricing, and inequitable sharing of risk and reward.

These circumstances give rise to a lack of certainty for Australia's mineral exporters of reliable access to export infrastructure capacity, which is not only causing large and immediate losses to Australia's export earnings, but also risks stifling and constraining on-going investment in future upstream mining infrastructure.

REFORM IMPERATIVE...

The primary and immediate reform imperative is to address the systemic failures in the current regulatory system which are inhibiting investment. Private capital is not, nor potentially, the limiting factor in building capacity and operating it efficiently and effectively.

The regulatory system should allow for robust commercial frameworks underpinned by contracts that align performance accountability with system capacity.

The Minerals Council of Australia (MCA) proposes a strategic framework of reforms centred on market-based solutions:

- The primacy of the market in the provision and operation of export infrastructure;
- Where government intervention is only justified in cases of market failure and the demonstrable capacity to remedy;
- Minimum effective, nationally consistent regulation implemented in a timely fashion;
- Whole of system coordinated planning; and
- Commercial arrangements that deliver capacity and efficiency, and provide certainty of access to export infrastructure.

STRATEGIC FRAMEWORK – PRINCIPLES...

Primacy of the Market and minimum effective regulation

- Industry ownership and commercial arrangements in preference to public sector ownership and government regulation of operations.
- Industry sector provision and operation of export infrastructure – with explicit industry involvement allowed where there is the opportunity for privatisation or private investment;
- Operational issues relating to export infrastructure access and pricing are best left to the market through commercial negotiation between infrastructure providers and users and given effect through commercial contractual arrangements;
- Regulation in the context of export infrastructure provision be confined to investment facilitation and other non supply chain functions such as project and environmental approvals;
- Market intervention should be based on a proper cost/benefit analysis with all the costs of regulation fully accounted for; and
- If regulation is required, access protocols provide certainty of access rights for existing users and provide the environment that gives appropriate incentives for infrastructure expansions necessary to create access for new projects in a timely manner.

Whole of System Master Planning (in supply chains where appropriate)

- Coordinated system planning for facilitation of alignment of capacity and performance with economic interests, identifying responsibilities and interests of all parties in multi-user, multi-access public-private infrastructure. This planning to be given effect through contractual arrangements between infrastructure providers and users.
- Evaluation and identification of the most efficient investment options (from loadpoints to port to system rules, contingent upon anti-competitive considerations) for increasing chain capacity from a cost and risk perspective and guide/inform capital investments in new infrastructure.

Commercial Arrangements (including commercial drivers in Regulation)

Commercial arrangements are a matter best dealt with by individual companies in order to reflect their own commercial requirements.

A framework for commercial contracts may include:

- Clear and binding obligations on both parties;
- Performance based arrangements;
- Flexibility to respond to market and operational conditions; and
- Resolution of disputes to be resolved in the marketplace and/or through common law (ultimately to the determination of the courts), in preference to a regulator.

Public Sector involvement in Infrastructure

- Government business enterprises (GBE's) as owners/operators of public infrastructure be parties to master planning and adopt Commercial Arrangements above in the planning and operation of infrastructure;
- Government owned entities provide adequate and timely investment in expanding and improving efficiency of system capacity (including technological innovation), in coordination with the rest of the export chain;
- Government to provide alternative rail corridors and port sites to promote facilities-based competition; and
- Ensure competitive neutrality between transport modes – transparent and equitable arrangements for access.

Minerals Council of Australia
September 2008

Appendix B

Reform of Part IIIA (access regime) of the Trade Practices Act

Extract from Submission to the Senate Standing Committee on Economics into the Trade Practices Amendment (Infrastructure Access) Bill

There is a strong case that the access regime, which was created to essentially deal with the market power of privatised government monopolies, has run its course.

The 2005 Prime Ministerial Taskforce on Export Infrastructure called on the then Federal Government to consider an “efficiency override”: a mechanism that would allow the NCC to limit the scope of access on the basis of efficiency (that is, cost to the owner and disruption to its operation). At present such assessments are undertaken by either the Australian Competition Tribunal or the Australian Competition and Consumer Commission *after* access has been granted and there is an arbitrated dispute over the charges for access.

“Efficiency” was added to the Objects clause of Part IIIA as a result of these recommendations, but not directly into the relevant sections of the Act. A genuine efficiency override would require the NCC take account of the cost of any access declaration during its initial deliberations.

Accordingly, the Minerals Council of Australia recommends that reforms should be made to Part IIIA (access regime) of the Trade Practices Act to more accurately reflect the intentions of the Hilmer Report in recommending the introduction of a system of statutory access rights in Australia which, *inter alia*, assiduously recommended the criteria under which one business should be required by law to make its private facilities available to another business, including a competitor.

The MCA holds that:

- competition be promoted in a market that is substantial and of national significance, other than the market in which the service is being provided, before the service is declared;
- the declared service be truly essential to competition in the market in which competition will be promoted, where ‘essential’ means indispensable as a practical matter for participation in that market’;
- the production process exemption prohibit or strictly limit access where doing so would disrupt a vertically integrated production process; and
- the decision-maker be satisfied that granting access is in the public interest and in so doing, that the decision-maker takes account of the costs and risk of regulatory error.

These policy principles should be realised in amendments to Part IIIA. Such amendments would reduce the risk that declaration results in outcomes that are costly and inefficient without a material increase in competition justifies the regulatory intervention. Accordingly the MCA recommends that amendments be formulated such that Part IIIA:

- Amend criterion (a) – that access (or increased access) to the services would promote competition in at least one market – to require that any improved competition would be both likely, substantial and occur in an important market.

At present even small or speculative improvements in competition are sufficient to justify declaration of a facility; even improvement in small or unimportant markets is sufficient to justify declaration of a facility.

Decision makers at present have wide latitude which means that the mere possibility rather than likelihood of an improvement means that small improvements can justify a decision. It has also means that relevant 'markets' have been defined to include trivial and unimportant markets.

- Amend criterion (b) – that it would be uneconomical for anyone to develop another facility to provide the services – to strictly limit the circumstances when a competitor may seek access to an infrastructure facility such that the facility is essential to competition or could not be developed in the absence of a declaration.

At present, third party access need not be "essential" for competition for a service to be declared.

There is no requirement at present that access to a facility be 'essential' in the sense that it represents a 'bottleneck' without which competition cannot take place. Instead the law as stands holds that access to a competitor's facilities need only be 'convenient', in the sense that the access seeker would avoid some costs as a result of the declaration.

- Formulate the 'production process exemption' as an explicit threshold criterion for declaration, taking into account closely integrated infrastructure/facilities.

The scope of the production process exemption has been narrowed since its introduction so that most large infrastructure facilities are a risk of declaration, even in circumstances where they form part of what is plainly an integrated process production.

As presently drafted, the production process exemption appears incidental to the declaration process under Part IIIA - rather than forming an explicit declaration criterion, it is implicit in the definition of services. Also the exemption is formulated in terms of the type of service in question (such as roads and railways), rather than with reference to the economic characteristics of a facility, in terms of risks and disruptions and lost efficiencies to tightly integrated supply processes.

- Amend criterion (f) – that access or increased access to the service would not be contrary to the public interest – to require that declaration is demonstrably in the public interest and the explicit application and independent scrutiny of a public interest test.

The public interest test, which requires a balanced overall assessment of the benefits and costs of declaration, effectively plays no role in the decision about whether to impose mandatory third party access.

An amendment would insure that declaration is in the public interest rather than merely not harmful to the public interest.

Minerals Council of Australia

December, 2009