The Productivity Commission's National Access Regime Inquiry

The Department of Infrastructure and Transport's Submission

Contents

Introduction

The Department of Infrastructure and Transport (the Department) provides policy advice to the Minister for Infrastructure and Transport. It also delivers a variety of programs on behalf of the Australian Government (the Government), including: infrastructure planning and coordination; transport safety, including land transport; civil aviation and airports; maritime transport (including shipping); and major projects facilitation.

The Inquiry Terms of Reference ask the Productivity Commission (the Commission) to:

1. examine the rationale, role and objectives of the National Access Regime (NAR), and Australia's overall framework of access regulation;
2. assess the performance of the NAR in meeting its rationale and objectives;
3. report on whether the implementation of the NAR adequately ensures that its economic efficiency objectives are met;
4. provide advice on ways to improve processes and decisions for facilitating third party access to essential infrastructure;
5. review the effectiveness of the reforms outlined in the Competition and Infrastructure Reform Agreement (CIRA), and the actions and reforms undertaken by governments in giving effect to the CIRA; and
6. comment on other relevant policy measures, including any non-legislative approaches, which would help ensure effective and responsive delivery of infrastructure services over both the short and long term.

This submission provides:

- the broader policy and regulatory context within which the nationally significant airports (major capital city airports), rail, ports and road networks operate;
- reflection on the experience of these transport sectors with the NAR; and
- the Department's view on a number of key questions flagged in the Commission's Issues Paper.

Policy and Regulatory Context

Beginning in the early 1980s, successive Australian (Federal and State) Governments have actively been pursuing microeconomic reform across a number of areas to make the Australian economy more responsive and efficient. The aviation, roads and rail (land freight), ports and shipping sectors have been a major part of the reform process. More recently, the focus has included major public infrastructure, including intermodal terminals. The Department has been an integral part of national policy efforts to improve the overall efficiency, competition and productivity of Australia's transport networks, including through funding nationally significant transport infrastructure.

The Department's policy interest has been to encourage investment in infrastructure by keeping regulatory burdens to a minimum and enabling a reasonable return on investment. In this way the Department has supported an approach of 'light handed regulation', favouring negotiated access agreements that balance the commercial needs of all parties, with the reserve NAR regulatory power available as a last resort.

Airports

The Australian Government (the Government) recognises that Australia's airports are a major component of our national transport infrastructure and make a significant contribution to Australia's overall economic prosperity. Efforts should be made to ensure the aviation

industry generally, and our airports specifically, continue to provide access to national and international aviation services, and that infrastructure meets the broad range of passenger needs and expectations. The Government's Aviation White Paper (December 2009) notes that a degree of regulatory oversight is required to minimise the potential misuse by airports of their market power, the capacity for airports to provide services below community expectations or to neglect the maintenance of essential national infrastructure. The Government also recognises that regulatory stability is important for airports as they make long-term investment decisions.

Where airport operators and users (such as airlines) are not able to reach commercial agreement on the terms and conditions, for use of, and price paid for airport facilities users may resort to part IIIA of the *Competition and Consumer Act 2010* (CCA) to seek access to these facilities. The Department believes that such action should only be seen as a last resort and that reaching an agreed outcome through commercial negotiation is preferable. We note that the Australian Competition and Consumer Commission's (ACCC) annual price monitoring of airport pricing behaviour and quality of services is conducted in accordance with Part VII of the *Competition and Consumer Act 2010* (CCA).

Rail

Access regimes for rail infrastructure services were introduced as part of the National Competition Policy reform process to promote above-rail competition, encourage market diversity and prevent abuse of market power. While the NAR was introduced as part of section IIIA of the then *Trade Practices Act 1974* (TPA), most State Governments have also established access regimes for rail infrastructure. Each regime sets out principles by which access seekers negotiate with infrastructure providers to attempt to reach agreeable terms and conditions. Each regime also contains provisions and mechanisms for dispute resolution where parties are unable to reach agreement. These provisions and mechanisms vary across regimes.

At the national level, the Inter-Governmental Agreement signed in November 1997 leading to the establishment of the Australian Rail Track Corporation (ARTC) included a requirement that the ARTC provide an access undertaking to the ACCC allowing third party access to its interstate freight track network. An access undertaking from ARTC was approved by the ACCC in 2002 for the interstate rail network covering those parts of the network linking Kalgoorlie (WA), Tarcoola (SA), Broken Hill (NSW), Melbourne (Vic) and Wodonga (Vic) to apply for five years.

At the national level the ARTC (as the track manager) is structurally separated from the above rail operators. State/Territory approaches to structural separation vary, with differing levels of vertical unbundling and of disaggregation and privatisation (public enterprises through to private firms) applying. For example, Aurizon (formerly QR National) is a vertically integrated private company which operates above and below rail track in Queensland, and the Pilbara rail networks are owned and operated by mining companies.

Interstate Access Undertaking 2008 (IAU)

ARTC submitted a replacement undertaking in December 2007 that extended the IAU to the newly leased tracks on the interstate network in NSW, as well as to tracks on the interstate network in Victoria and South Australia. The ACCC accepted this undertaking on 30 July 2008. These arrangements apply for 10 years.

The IAU sets out the principles and processes under which ARTC, as an infrastructure provider of rail, will be obliged to provide access to businesses wishing to run trains on ARTC's interstate rail network. The interstate rail network covers the mainline standard gauge track linking Kalgoorlie in Western Australia, Adelaide, Wolseley and Crystal Brook in South Australia, Melbourne and Wodonga in Victoria and Broken Hill, Cootamundra, Albury, Macarthur, Moss Vale, Unanderra, Newcastle (to the Queensland border) and Parkes in NSW. The ACCC is currently considering an ARTC request to vary the IAU to include the recently completed Southern Sydney Freight Line. A final decision on this application is due on 17 April 2013.

Hunter Valley Access Undertaking 2011 (HVAU)
In 2004 ARTC entered into a lease arrangement with the NSW Government for parts of the NSW intra-State rail network, including the Hunter Valley lines (i.e. the coal rail network). The ACCC accepted an access undertaking from ARTC for the Hunter Valley rail network on 29 June 2011, which applies for 5 years.

ARTC first lodged its voluntary HVAU with the ACCC on 23 April 2009 to replace existing access arrangements that were subject to the NSW Rail Access Undertaking administered in NSW by the Independent Pricing and Regulatory Tribunal. Following consultation and negotiations with industry, primarily coal producers, ARTC lodged a revised HVAU on 7 September 2010.

Note that the HVAU provides for access contracts with coal producers rather than with rail operators. This is significantly different to the NSW's Independent Pricing and Regulatory Tribunal regime and the IAU (where ARTC contracts with rail operators) and has allowed ARTC to enter into 10 year take-or-pay contracts with coal producers. The ACCC decided under section 44ZZA(3) of Part IIIA of the CCA to accept HVAU on 29 June 2011.

Ports

Australian commercial seaports operate under a number of ownership structures, with some fully privatised commercial entities, and others owned by State governments. In addition, many have been moved to a 'landlord model', responsible for the management of land and berths, while contestable services (such as piloting, dredging and stevedoring) are provided by private contractors. Similar to Australian airports, seaports are not traditionally vertically integrated. They generally do not operate upstream heavy vehicle or rail infrastructure and downstream shipping services. Port operators have strong incentives to approve access to either upstream or downstream customers. As a result, Australian ports have not faced the same issues under Part IIIA as vertically-integrated infrastructure operators.

Under the 1995 Competition Principles Agreement, provision was made in the NAR for State governments to seek approval for a State access regime, provided that regime effectively met the national principles. Where a state regime operates, an application cannot be made to the National Competition Council under the NAR.

There are two State access regimes in operation. A South Australian regime applies to Port Adelaide, Port Giles, Port Pirie, Port Lincoln and Thevenard. These ports are operated by Flinders Ports Pty Ltd. The other regime applies to the Dalrymple Bay Coal Terminal in Queensland.

Other ports operate under State-based price regulation, or are subject to 'light-handed price monitoring' rather than explicit price regulation, with oversight by State economic regulators, such as the Victorian Essential Services Commission for the Port of Melbourne. In addition, container stevedoring at Australia's ports is price monitored by the ACCC.

Roads

Australian roads are owned by state and local governments and are traditionally not provided on a 'commercial' basis (that is, fees and charges applied to heavy vehicles, while based on a cost-recovery model, do not reflect the commercial costs of providing road infrastructure). Road infrastructure is not vertically integrated with upstream or downstream services. The Department is not aware of any case where a road asset owner also operates heavy vehicles. As a result, state and local governments do not have a commercial incentive to deny access to heavy vehicle operators. The Department understands that Part IIIA is designed to address issues where access is denied by an infrastructure owner and competition in a related market would be improved by providing access to that infrastructure, not to address situations where access cannot be provided for technical, safety or engineering reasons.

Across Australia, heavy vehicles up to 42.5 tonnes in weight and up to 19m in length that satisfy registration conditions (road-worthiness, applicable insurance etc.) are allowed unrestricted access to use the road network and are normally referred to as "general access vehicles". Since the road network is available to all users under these conditions, no heavy vehicle operator can claim that they are unable to "access" the road network per se. Instead, operator concerns generally relate to the inability to use a preferred vehicle combination on a desired route, primarily for commercial reasons.

As such, operators have legitimate concerns with the limited road network available for non-general access combinations (also referred to as Higher Productivity Vehicles) such as B-triples[1] and Road Trains[2]. However, in order to grant such access, the roads must be suitable for the larger vehicle combinations. Providing access to larger vehicle combinations may require widening intersections, strengthening pavements or bridges and lengthening turning lanes. This presents a significant cost for road asset owners, and at present there is little scope to match road demand with road supply. Based on the findings and recommendations of the Commission's 2006 Road and Rail Freight Pricing Inquiry, the Heavy Vehicle Charging and Investment (HVCI) reform (formerly known as the COAG Road Reform Plan) is directly addressing this issue – please see www.roadreform.gov.au.

Therefore, in some cases, heavy vehicle operators may claim that they are unable to 'access' the Australian road network in particular locations, and may suggest to the Commission that this is the type of issue that Part IIIA might be used to address. However, the Department's experience is that decisions about the level of road access available to Higher Productivity Vehicles are generally made for safety, technical or engineering reasons, rather than competition reasons.

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[1] A B-triple is a B-double with an additional trailer at the front. A B-double consists of of a prime mover towing two semi-trailers, where the first semi-trailer is connected to the prime mover by a fifth wheel coupling and the second semi-trailer is connected to the first semi-trailer by a fifth wheel coupling.

[2] A road train is vehicle combination made up of a prime mover towning two semi-trailers known as a double road train, or a prime mover towing three semi-trailers known as a triple road train. The first semi-trailer is connected to the prime mover by a fifth wheel coupling. The subsequent semi-trailer/s are supported by a converter dolly which is coupled to the trailer in front by a drawbar and tow coupling.

Experience with current Regulatory Framework

Aviation

The Department believes that the current airport economic regulatory system under the *Airports Act 1996* supported by the CCA, effectively restrains the misuse of market power by any one player. In this instance the NAR provides an important reserve legislative power to encourage private negotiation between the parties as the preferred approach to setting terms, conditions and prices for access to infrastructure at airports.

The 2011 PC Inquiry into the Economic Regulation of Airport Services found the system was working well, and supported maintaining the key aspects of the current NAR, with some adjustment to resolve some criticism of the slow and resource intensive processes associated with declaration of infrastructure.

An example of the criticism of the processes is illustrated through Virgin's successful declaration of airside services at Sydney Airport. This was a 3-year process from the time of application for the services to be declared, which was drawn out through various merit reviews, judicial reviews and appeals, finally resulting in a 5-year declaration starting in 2005. However, following the declaration, Virgin and Sydney Airport successfully concluded negotiations without needing to resort to ACCC arbitration.

Commercial negotiations

Since the privatisation of airports during the 1997-2003 period, airport economic regulation has evolved to support a strong commercial approach to airport operators, while maintaining safeguards to ensure reasonable prices and quality of service. The NAR is a key element of these safeguards.

The Department's preferred approach to setting terms, conditions and prices at airports is through commercial negotiation between relevant parties. The airport economic regulatory system involves a series of checks and balances contained in the *Airports Act 1996*, airport leases and broader competition regulation to restrain abuses of market power by any one player. Invoking provisions of the CCA should be a last resort but also needs to be seen as a credible threat. If commercial negotiations fail to provide acceptable outcomes for both parties, the NAR provides an important backstop to the regulatory system.

An example of how the current NAR acts to facilitate commercial negotiations is evidenced at Brisbane Airport, where the airport is seeking airline contributions to the capital costs of a new parallel runway well ahead of its proposed completion. While negotiations continue, the initial position of airlines is to reject any increased charges ahead of the runway coming into service. Should negotiations fail, the airport may consider utilising the NAR provisions.

While prices for aeronautical services have increased since privatisation, the Department notes that prices have been negotiated with the airlines and reflect significant investment in aviation infrastructure, totalling almost $4 billion since privatisation. These airline-airport agreements fix prices and services between airports and participating airlines for periods that typically range from three to five years and in some cases as long as 15 years.

The likelihood of capacity constraints at some airports in the next decade has the potential to lead to an increase in access disputes. Airports approaching maximum capacity may be able to charge prices above optimal levels and reduce competition. The NAR may be called upon

more frequently if this situation eventuates. The Department believes that while plans for new runway and terminal facilities at Brisbane, Melbourne and Perth will address capacity constraints over time, it will be important to have a credible NAR to back up negotiations.

In its submission to the Productivity Commission Inquiry into Airport Economic Regulation of Airport Services (30 March 2012), the ACCC suggested that an airport-specific arbitration regime, activated by deemed declaration of airport services under Part IIIA of the CCA, should be introduced. The PC recommended against this, and the Government response did not support the ACCC proposal. The Government response also expressed the view that fast-tracking access to ACCC arbitration side steps the checks and balances of the declaration process and could undermine the maturing commercial negotiation processes.

As the Commission has recently concluded its inquiry into airport economic regulation and found the regulatory system was working well, the Department supports maintaining the key aspects of the current NAR. Some of the benefits include the ability for both airports and airlines to use the provisions of Part IIIA of the CCA, the existence of significant, but not insurmountable hurdles to avoid vexatious or trivial applications and the use of independent arbitration should it be needed.

Rail

The Department has portfolio responsibility for overseeing the Government's holdings in the ARTC. In addition to a significant rail network in the Hunter Valley, ARTC controls Australia's interstate rail network and gains its revenue from access agreements, with above rail operators and rail freight users, regulated by the ACCC. The Department's interest is to achieve effective regulation in this area, which balances the need for the Government to capture a return on its investment in the rail network, while ensuring that pricing does not act as barrier to access the rail network or growth in rail freight volume.

The Department considers that approach of vertical structural separation of above and below rail operators supported by the negotiated-arbitrated access regime under part IIIA of the CCA for rail is effective in limiting adverse effects from monopoly power held by the ARTC, in a largely efficient and cost effective manner. The Department also considers that the close competition from road and sea freight transport acts to effectively limit the monopoly power able to be exercised by ARTC. For example, in the recent draft ACCC determination on the Southern Sydney Freight Line it was noted that close competition from the road sector would be the most effective force in limiting ARTC over pricing of services.

Ports

Current evidence suggests that Part IIIA is neither an effective, nor appropriate, regulatory mechanism for addressing the key issues in port infrastructure. Given the lack of incentives for port operators to deny access to upstream or downstream customers, the lack of applications for declaration of port infrastructure under the NAR is unsurprising. Moreover, Part IIIA is not a 'fit-for-purpose' tool for issues about bargaining power or pricing where access has been offered by ports.

In addition, Part IIIA is not suited (and does not contain powers) to address investment concerns in port infrastructure if and where they exist. Augmenting the NAR to facilitate such outcomes would be a significant departure from the original 1995 Competition Principles Agreement on which the access regime is based. Nor does it provide a framework for ensuring a coordinated approach to planning or funding such infrastructure.

Australia's major rail network can be broadly divided into three separate markets, the interstate rail market, the largely self-contained stand-alone rail markets built around mineral extraction (for example the Hunter Valley or Pilbara rail networks) and seasonal grain lines. National ownership and operation of the interstate rail network by the ARTC has been the primary driver of the current national access regime, rather than the application of policy or regulatory frameworks. Additionally, intermodal terminals are an issue, albeit historically there has been a limited role for the Australian Government.

Key Issues

What is the problem that the NAR should address?

A key concern from the Department's perspective is that the NAR's effectiveness has been gradually watered down – particularly as companies use the court system and multiple appeal avenues to either frustrate access, or by users not fully committing to commercial negotiations. Further efforts need to be made to streamline and tighten the NAR's decision-making processes to improve the timeliness, certainty and credibility of NAR's purpose and outcomes.

While the Department does not believe that the current NAR has significantly increased uncertainty for investors in Australia's rail infrastructure, the Department proposes that greater flexibility in approaches to pricing may encourage greater private sector investment in rail. In particular, investments in ARTC's rail networks could be encouraged by:

- Investigation of measures such as loss capitalisation to allow capital costs unable to be recovered through access charges in the short term be repaid in future periods by pricing above the regulated ceiling once markets have matured; and
- At a micro level, allowing differential pricing for different markets on the same line, so long as prices are under the price ceiling. This would enable the ARTC to offer lower rates to encourage new rail freight customers into the market without those rates becoming standard across the line as a whole and limiting a reasonable return on investment in the line.

The Government has invested in the development of intermodal terminals in areas where they are likely to represent critical infrastructure, such as Moorebank Intermodal Terminal. The Government has designed these terminals to be operated on a common user basis. While some terminals operate as common user, or open access terminals, in reality there maybe perceptions of, or actual, impediments where intermodal terminal operators also have transport, in particular rail or port interests.

From a rail sector perspective, Australia's rail network is a key piece of Australia's strategic infrastructure and provides services to markets that are dependent on them to compete. For example, rail is a vital link in the coal supply chain in the Hunter Valley without which coal producers would be unable to access ports and therefore downstream markets. As the primary below rail interstate operator, the ARTC also has a dependent market of above rail operators and intermodal and port terminals to service.

As such, equitable access to rail is important for national and local economic development and the Department is supportive of the NAR's continuing operation and application to both interstate freight rail and major airports sectors. Consistent regulation, where appropriate, is important for national productivity. At the same time, that regulation also needs to be fit for

purpose regarding the industry sector that it seeks to address. In fact, a degree of customisation should be expected. Therefore, the Department recommends that the focus should be on how the NAR could further complement existing regulatory arrangements in the rail and aviation sectors, rather than subsume those industry regimes.

A pivotal question that the Commission has asked in this Inquiry is whether there is a need for a national access regime - that is, a national standardised regime? The case for a "national" approach needs to be set against the case for retaining existing industry-customised regulatory approaches that apply the principle of forced access. The Department considers that, while a National Access Regime should be maintained and made more efficient, a standardised (i.e. one size first all) approach across all sectors, is undesirable because such an approach is costly[3] and can discourage infrastructure investment.

The Commission's Issues Paper itself notes that various governments agreed to implement a consistent system of rail access regulation for the interstate railway network, but that the intrastate regulation would be considered on a "case by case basis" (PC, P. 27). It could reasonably be argued that the extent of (necessary) existing customisation to accommodate the diversity of ownership structures, funding, traffic (levels and types), and investment issues associated with providing infrastructure (see Attachment A for examples) is such that applying a "national" standardised regime across all sectors is questionable.

It's also worth acknowledging that there are numerous and diverse circumstances where third party access occurs voluntarily, reflecting the different circumstances for the infrastructure owner. Despite the absence of regulators, companies establish voluntary agreements to share access because of mutual benefits. Indeed, given the very high infrastructure construction and operating costs, it must be presumed that the infrastructure manager will be amenable to, or actively encourage, third parties. A range of examples are summarised at Attachment B.

Do we need a NAR (e.g. as a reserve power/regulatory deterrent)?

ARTC notes that they have a monopoly on interstate rail, but they argue that sea and road transport are close substitutes, thereby mitigating the monopoly power ARTC has in terms of pricing. As such, they should be subject to limited regulatory interventions. The Department generally agrees with ARTC's position on this matter. However, the Department believes that ARTC's rail networks are essential infrastructure and having the NAR as a reserve power is necessary. The approach of vertical structural separation of above and below rail operators, supported by the negotiated-arbitrated access NAR under Part IIIA for ARTC is effective in limiting adverse effects.

It should be noted that ARTC has previously raised concerns about the length of ACCC review processes. The Department is supportive of faster and more streamlined processes for the ratification of undertakings under Part IIIA of the CCA. ARTC considers that the exhaustive nature of the review has meant that the ACCC could be indirectly regulating other interlinked coal supply chain activities through its direct regulation of the ARTC, rather than focusing on the regulation of the rail track monopoly itself. The Department does not wish to comment on these claims, at this point.

From an aviation transport perspective, as noted earlier in this submission, the Department's preferred approach to setting terms, conditions and prices at airports is through commercial

[3] For example, BHP Billiton have spent around $50 million per annum on lawyers and consultants in its Pilbara 3rd party access dispute (Australian Financial Review, 9 December 2009, p50)

negotiation between relevant parties. However, the likelihood of capacity constraints at some airports in the next decade has the potential to lead to an increase in access disputes. Airports approaching maximum capacity may be able to charge prices above optimal levels and reduce competition. The NAR may need to be called upon more frequently, if this situation eventuates. While current plans for new runway and terminal facilities at Brisbane, Melbourne and Perth will address capacity constraints over time, if commercial negotiations fail to provide acceptable outcomes for both the airports and the airlines, the NAR provides a credible backstop to the industry-specific economic regulatory system.

What should the NAR cover (given the many state and industry-based schemes)?

The Department supports the application of a national access undertaking for interstate rail through the NAR. As discussed earlier, the Department notes that state and industry regimes can be effective and co-exist with the NAR.

Should principles (not the Part IIIA Objects and Criterion) now determine those nationally significant infrastructure facilities that should fall under the NAR?

The Department reserves its position, at this point, on whether principles rather than the Part IIIA Objects and Criterion would better determine those nationally significant facilities that should fall under the NAR in future. The Department is of the view that the current dual approach, which draws on the strengths of both the generic NAR and industry-specific approaches, continues to provide the most flexible and appropriate mix of regulatory tools to governments and the rail and aviation industries.

Effectiveness of the NAR - The Declaration Process

Declaration of an infrastructure service gives access seekers the right to negotiate access with an infrastructure service provider – it does not provide an automatic right to use that service. Once an infrastructure service has been declared, a provider and access seeker negotiate the terms and conditions of access. Failing agreement, the ACCC can arbitrate and make an access determination.

The timeliness of Part IIIA processes has been criticised from a federal transport perspective. Airlines, in their response to the 2011 PC inquiry into the Economic Regulation of Airport Services, argued Part IIIA processes take too long to resolve and are too resource intensive to be relevant to their negotiations with airports. If it takes too long to get a result, its value as a credible threat is reduced.

The Commission's discussion paper flags that the NAR should include provisions which alleviate disparities in terms of the ability of weaker parties to follow through with seeking declaration. The Department supports in principle addressing this issue, but notes that there should continue to be checks and balances in the declaration process to discourage vexatious or frivolous claims and to discourage the early abandonment of commercial negotiations.

Despite the absence of regulators, companies establish voluntary agreements to share access because of mutual benefit: indeed, given high infrastructure construction and operating costs, it must be presumed that the infrastructure manager will be amenable to alternative Regulation methods.

Conclusion

The Department is supportive of the continuation of the current NAR for rail and airports. The NAR provides an important reserve legislative power to encourage private negotiation between the parties as the preferred approach to setting terms, conditions and prices for access to nationally significant infrastructure. The Department believes refinements to the processes for settling declaration and undertaking applications could generate savings of time and cost for all parties involved, without necessarily affecting the quality of the undertaking reached. Finally, The Department considers that a standardised (i.e. one size fits all) approach across all industry sectors is undesirable because such an approach is costly and can discourage infrastructure investment. It could reasonably be argued that the extent of (necessary) existing customisation to accommodate the diverse industry approaches to ownership structures, funding, traffic (levels and types), and investment issues associated with providing infrastructure is such that applying a "national" standardised regime across all industry sectors is questionable at best (see Attachment A for examples).

ATTACHMENT A

VARIETY OF RAIL AND PORT ACCESS REGIMES

Rail Operations

No two railway operations have similar access regimes:

- **Example 1: ARTC railway regimes.** The distinctly different ARTC interstate and Hunter Valley access regimes indicates that customised, not nationalised, prescription is required – even within a single infrastructure entity;
- **Example 2: Interstate railway regimes.** Similarly, the access regime for the AustralAsia Railway ([Tarcoola-] Alice Springs-Darwin) is an interstate railway with an access regime that differs markedly from ARTC's interstate regime; and
- **Example 3: Intrastate railway regimes.** Railway access regimes across the different networks are not consistent, reflecting their need to accommodate diversity of ownership types, funding, traffic (levels and types) and investment issues. TasRail, V/Line, Queensland Rail, RailCorp ARTC and the urban passenger networks are publicly-owned, and have different access regimes. Aurizon, Arrium, Alinta, Fortescue, Rio Tinto, BHP Billiton, Genesee & Wyoming (with separate AustralAsia and intrastate regimes) and Brookfield Rail are private entities with disparate regimes, not least because Brookfield is a vertically-separated, part government funded, infrastructure manager.

Port Terminal Facilities

Similar diversity applies to port terminal facilities, for various reasons:

- **Example 4: Bulk terminals at the Port of Newcastle.** At the Port of Newcastle, the two coal terminals owned by Port Waratah Coal Services (PWCS) at Kooragang and Carrington are owned by coal mining companies, but are built on State government land, use of which requires the PWCS to provide its infrastructure as common-user facilities.

  The newer coal terminal, dating from 2009-10, is owned by Newcastle Coal Infrastructure Group, a consortium of coal-mining companies and is used exclusively by its members. Both terminal operators are part of the capacity distribution system, which allocates capacity within the Hunter Valley coal supply chain. This system is authorised and regulated by the ACCC; and
- **Example 5: Bulk terminals at the Port of Hay Point.** At the Port of Hay Point, the Dalrymple Bay Coal Terminal facility is a common-user facility, leased from the State government and regulated by the Queensland Competition Authority. The terminal operator is jointly-owned by a majority of the mines that use the terminal. The adjacent Hay Point Coal Terminal is not regulated and is owned and operated by the BHP Billiton Mitsubishi Alliance of coal mining companies.

ATTACHMENT B

THIRD PARTY ACCESS OCCURRING VOLUNTARILY

Since the NAR has been operating, a range of examples have arisen indicating a capacity for industry participants in the Rail and Port space to find alternative commercial arrangements to establish and operate major infrastructure. Some examples of these include:

Joint Ventures: These mechanisms internalise the track capacity and operational tensions that underlie shared infrastructure usage, while providing the dividends of spreading the heavy financing, funding and operational costs of infrastructure:

- *BC Iron/Fortescue joint venture*: Fortescue bought an interest in BC Iron's Nullagine mining project and has provided BC Iron with rail haulage as well as port-handling and ship-loading facilities;
- *Rio Tinto and Hancock*: In 2005, the two companies became 50:50 partners in the development of the (erstwhile Hancock) Hope Downs iron ore deposits. This included construction of a spur line from the mine site to Rio Tinto's main line and, then, port facilities; and
- *Rio Tinto and Iron Ore Holdings (IOH)*. In 2009, Rio agreed to purchase ore from Iron Ore Holdings; the ore is railed along Rio's tracks to Rio's port facilities. IOH's ore deposits are not "stranded".

Shared development costs: Mining companies consider the merits of sharing infrastructure, development and operational costs. This is particularly important with new developments. Examples include:

- *API Management/Aquila Resources 2009 agreement with Fortescue* to investigate shared development of port facilities at Anketell Point;
- *GVK's memorandum of understanding in 2012 with QCoal* to provide haulage of 20 million tonnes of coal per annum for the latter coal miner on GVK's planned Alpha Coal railway (Alpha–Abbot Point). GVK is in association with Hancock in the development of the railway; and
- *North West Infrastructure*, a joint venture company consisting of Atlas Iron, Brockman Resources and FerrAus. Practical space limits for (two) berths in Port Hedland's Inner Harbour, high construction and financing costs and limited throughput have led the venture partners to form a joint venture.
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Sharing or swapping capacity: There has been media speculation that BHP Billiton has been prepared to swap some of its railway capacity in return for port berth capacity at Port Hedland. In North America, railway companies share some of their track capacity where there are operational benefits (such as increasing track capacity by uni-directional train running on parallel tracks; reducing distances between terminals; and reducing unit overhead costs by increasing volumes). This is widely practised by Canadian National and Canadian

Pacific. Indeed, in the NAFTA countries, around 14 per cent of the route-kilometres of trackage involve shared usage[4].

Restricted physical circumstances: Throughout the period of railway construction it has been realised that there is limited traffic for railway movements; joint-stock companies and formal trackage/running/haulage rights have existed as commercial agreements to share capacity rather than to duplicate infrastructure. For example, the railway terminal facilities in Mexico City are owned by a joint-stock company that operates the terminal on behalf of three railway companies; the arrangement provides a practical solution rather than costly and unrealistic duplication of terminal facilities or independent operation of the terminal by each railway[5]. This arrangement is akin to the coal miners joint operation of Hay Point Coal Terminal[6] (at Hay Point), and Newcastle Coal Infrastructure Group[7] (at Newcastle).

The Minerals Council of Australia's (MCA) proposal: Voluntary private sector access sharing agreements could also be incentivised through the NAR for both Brownfield and Greenfield infrastructure. The MCA approach proposes capacity trading between large organisations as opposed to the average pricing currently implemented as part of the NAR and including the cost of sharing capacity of infrastructure into a Greenfield developments balance sheet.

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4 See, for example, BTRE 2003, *Rail infrastructure pricing: principles and practice*, footnote 129, page 115. http://www.bitre.gov.au/publications/2003/files/report_109.pdf

5 BTRE 2003, *Op. Cit.*, page 114.

6 Owned by the BHP Billiton Mitsubishi Alliance.

7 Newcastle Coal Infrastructure Group includes the following coal producers: BHP Billiton, Peabody Energy, Whitehaven Coal, Yankuang Group and Banpu Public Company.