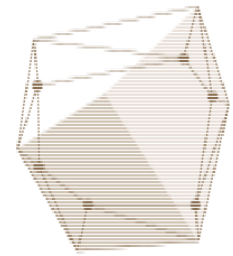
BROCKMAN

BROCKMAN MINING AUSTRALIA PTY LTD



Submission in response to the Productivity Commission Draft Report on the National Access Regime

16 July 2013

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1. EXECUTIVE SUMMARY

This submission is Brockman Mining Australia Pty Ltd's (**Brockman**) response to the Productivity Commission (**PC**) draft report in its inquiry into the National Access Regime (**Regime**) on 28 May 2013 (**Draft Report**) and Brockman's experience with recent activities under the railway networks the subject of the Railways (Access) Code 2000 (**Code**).

Brockman is an emerging multinational diversified mining and services group with interests in Australia, the mainland Peoples' Republic of China and Hong Kong. Brockman is listed on both the Australian and Hong Kong securities exchanges. In 2012 Brockman completed the takeover of an Australian based iron ore explorer and is now advancing its acquired portfolio of high quality, high potential iron ore deposits in the Pilbara.

The most significant of these projects is the Marillana hematite iron ore project (**Marillana**) and the recently discovered Ophthalmia hematite iron ore project (**Ophthalmia**). A mining lease has been secured for Marillana, which has reported Ore Reserves in excess of 1Bt of hematite iron ore. The project has established native title agreements, has advanced environmental approvals, and completed mine planning and engineering studies including definitive engineering and front end engineering. Marillana is targeting production in excess of 400 Mt of iron ore product over a 25 year mine life. Ophthalmia has reported maiden iron ore Mineral Resources in three deposits over the last five months, for a combined total Mineral Resource for the project of 269 Mt grading 59.16%. The projects are located in the East Pilbara in close proximity to the The Pilbara Infrastructure Pty Ltd (**TPI**) railway, Fortescue Metals Group Limited's (**FMG**) Nyidinghu iron ore project and to other major and junior mining company iron ore resources.

Brockman's focus for this submission is on the application of the Regime in a broad sense to the operation of the State based Code. Brockman generally supports the outcomes sought to be achieved under the Competition Principles Agreement and Brockman recognises that the Code was established as a framework to ensure effective fair and transparent competition on Western Australia's railway networks. Brockman understands that the Regime aims to encourage the efficient use of railways and investment in railways by facilitating a contestable market for access to railway lines and on-the-ground facilities.

2. CAVEATS TO SUBMISSION

Brockman's point of reference is from the WA Code, being that we are an interested party wishing to share experiences of regulation under the Code.

Brockman's point of view is provided with two caveats being:

- First, Brockman won't comment on whether the Code is an effective regime, however to the extent that there have been challenges as to whether the Code is an effective regime we encourage State and Federal regulators to undertake a review of this situation. We understand from information provided by the Economic Regulatory Authority that a review of the Code was to have occurred in January of 2012 and remains outstanding.

- Secondly, our access proposal under the Code is under assessment and there are some matters which may be confidential and we must therefore avoid any disclosure which might prejudice our position.

Brockman is however happy to have any comments in this submission published without restriction or redaction.

3. CRITERIA ASSESSMENT

As noted, Brockman's focus is on the Code however we have a few remarks relating to the review of the declaration criteria being:

- criterion b – economic to duplicate test – We understand that the High Court view recently expressed was that the test should be a commercial one, whereas the Draft Report still suggests that the natural monopoly test should apply. Brockman supports the PC's rationale for this approach which enhances the prospect for declaration and therefore the prospect of access seekers obtaining access.

  By way of general analysis of the Draft Report comments, Brockman suggests that coordination costs contemplated under criterion b will always be overwhelmed by the economies of scale for significant additional throughput by the owner of infrastructure. Evidence shows where infrastructure is vertically integrated, there is an opportunity for the owner to use the infrastructure to control supply and gain a pricing advantage in a downstream market (e.g. Pilbara). Economies of scale will not be sufficient incentive to promote regulated access to infrastructure if the impact on that downstream market could involve decreased prices due to "uncontrolled" additional supply. The incentive will be for the owner to seek rents for their own use rather than allowing access.

- criterion f – public interest test – Brockman's review of the suggested changes arising from the Draft Report imply that there has been slippage in the Draft Report by suggesting that the test should be a "satisfied promotes public interest" rather than the "minister's view that it is not contrary to public interest". Brockman supports the existing ministerial discretion rather than the replacement test proposed in the Draft Report.

4. SUPPORT OF CODE

Brockman supports the intent of the Code and we are supportive of its underlying principles – that is a regime to provide access for third parties to monopoly infrastructure where commercial negotiation cannot delivery fair and market based access charges. The example of BC Iron Limited, where that company transferred ownership of half of its project in addition to payment of access charges to FMG to obtain access (the parent company of the TPI – owner of the TPI rail and port infrastructure) is the model example of how a commercial framework will not produce competitive tensions and that a monopolist will abuse monopoly power.

Brockman suggests that having an effective access regime is the first step in making sure that infrastructure sharing is possible.

- Access regimes should be formulaic and mechanical – that is, clear steps in the process and clarity as to what is required to move from one step to the next.

- An access seeker and infrastructure owner should have no doubt as to what is required to be done to achieve an access agreement. Access regimes should provide the infrastructure owner with certainty and an access seeker with a certain path to gain access. Items 5, 6 and 7 outline some practical matters that would assist to achieve this purpose.

While ultimately, Brockman believes that it will be successful in gaining access under the Code, there are some aspects of the Code that could be improved.

- Some of these changes are outlined below.

- The improvements that we suggest are not to change the risk profile between infrastructure owner and access seeker but merely to provide a more efficient process.

5. PROCESS AND PRESCRIPTION

The first change that we would propose is that the Code be more prescriptive about each phase of the access process.

- As noted above, the process should be more mechanical. There should for example be greater use of standard forms - for example, standard access agreements, an agreed pro forma for the 'request for information' stage.

- Greater prescription is also needed because in our experience ambiguity provides an infrastructure owner with an opportunity for delay and additional cost to the access process (both of which are significant impediments to potential access seekers using the access process).

- There should be no doubt as to what exactly is required to satisfy the access tests. For example, the test for financial capacity should set out what exactly is required to satisfy an access seekers financial capacity.

6. EXPEDITED DISPUTE PROCESS

The second change which we would propose is an expedited dispute process.

- There should be prescribed times for each phase of the process, including mandatory time periods for arbitration.

- Infrastructure owners can use legal process to delay unnecessarily the access process. Brockman recognises that although there is a need to have some scope for judicial review, this should be limited.

7. GREATER TRANSPARENCY

The third change is that there needs to be greater transparency applied to infrastructure owners.

- Infrastructure owners should be required to publish things such as available capacity and capacity queues (and processes for entering queues) on a website.

- This would ensure that there is no game playing – e.g. an infrastructure owner simply responding that there is no capacity or proposing that all capacity has been reserved to a related party or for its own use.

- How capacity is to be assessed should be prescriptively defined. In the same way, ring-fencing and non-discrimination principles need to be far more robust and subject to third party audit.

- Ring-fencing should be consistent with the principles of the law and operate continuously rather than when a set of criteria determined by the owner are satisfied before any obligation to segregate arises. For example, in the ring-fencing space the TPI access business should be operated on a completely standalone basis.

8. CONFIRMING THE EXPANSION POWER

Brockman notes that Part IIIA of the *Competition and Consumer Act 2010* provides that the ACCC, in arbitrating an access dispute, has the power to require an infrastructure owner to 'extend' its facility. Although there may have been doubts about whether this allows the ACCC to require an infrastructure owner to 'expand' its facility, we support the finding of the Australian Competition Tribunal in the Pilbara rail access matter in 2010 which considered that the ACCC did have the power to require an expansion.

Brockman supports the Draft Report in its recommendation of amending the Regime to clarify that the ACCC can require capacity 'expansions' as well as geographic extensions.

Brockman also supports the Draft Report recommendation that the ACCC publish guidelines on how it would exercise the expansion power. While Brockman appreciates that expansions can give rise to a number of complex issues, including precisely how an expansion will be funded and what happens if subsequent users benefit from the expansion (e.g. how much should subsequent users pay for their use of the earlier funded expansion), Brockman notes these complexities have been successfully resolved in commercial circumstances and therefore they should be able to be accommodated in a regulated environment.