



**MINERALS COUNCIL OF AUSTRALIA  
NORTHERN TERRITORY DIVISION  
SUBMISSION ON REVIEW OF RAIL GUIDELINES  
FOR THE TARCOOLA-DARWIN RAILWAY –  
DRAFT DECISION**

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17 MAY 2019

## EXECUTIVE SUMMARY

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The Minerals Council of Australia Northern Territory Division (MCA NT) welcomes the opportunity to make this submission on the Essential Services Commission of South Australia (ESCOSA) Review of Rail Guidelines for the Tarcoola-Darwin Railway, Draft Decision given the past two reviews over the last nearly 5 years.

The Minerals Council of Australia (MCA) is the peak industry association that represents the corporate minerals companies in Australia. The members of the MCA are engaged in mineral processing, mining, exploration, or the provision of services to the industry and account for more than 85% of mineral industry output in Australia.

The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

The MCA NT represents the interests of members operating, exploring and providing services to the industry in the NT. The minerals industry has a large and diverse presence across the NT which comprises over 15% of the NT's gross domestic product whilst employing approximately 5,700 across mining operations for a range of mineral commodities including manganese, iron ore, lead, silver, zinc, gold, bauxite and uranium<sup>1</sup> and accounts for a \$4.49B return to the NT economy in 2017/18.

The MCA NT, is of course, broadly supportive of any measures that improves access to rail networks at lower cost for operators, and which enable development of new resources projects.

Members of the MCA NT are currently engaged in seeking rail transport solutions for their respective projects, and the MCA NT is providing feedback on their behalf for the ESCOSA review to ensure the access regime does not comprise a disincentive for future investment in and sustainable development of the minerals sector in the Northern Territory. The regime is

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<sup>1</sup> Inflation adjusted, Northern Territory Government, Department of Treasury and Finance, Economic Brief, Gross State Product 2017-18, accessed at <http://www.treasury.nt.gov.au/Economy/EconomicBriefs/Pages/GrossStateProduct.aspx>

intended to encourage commercial negotiation of access to the railway and establish procedures for conciliation and arbitration should access disputes arise. The current review has called for feedback on four guidelines under the AustralAsia Railway (Third Party Access) Act 1999, detailing the responsibilities of the regulator and industry participants, to ensure that the guidelines

- ‘continue to provide effective protection to existing and prospective railway users while ensuring the regulatory costs are kept to a minimum;
- are clear and represent contemporary practice; and
- anticipate, as much as practicable, future changes in the rail industry.’

Although ESCOSA has indicated that it ‘seeks views on improvements that might be made *within the limits of relevant legislation*,’ some of the greatest risks to our industry from inadequacies in the current regime will require a review and amendment of current legislation, and our submission identifies these issues in relation to longer-term reform of the regulatory framework. This draft decision goes some way to this, but without the buy in from the NT Government, it will remain difficult to see the results of this review across the NT regime.

There is still some concern that the MCA NT’s suggested issues raised in previous submissions, in August 2015, and February 2017, as raised by our organisation and other industry stakeholders, could not be addressed by ESCOSA, as certain of these, including introducing standard access agreements as an alternative to the current negotiate-arbitrate framework. These were deemed by ESCOSA to be outside ESCOSA’s purview.<sup>2</sup> However, unless the suggested review of relevant legislation is done, the objectives of the Act and guidelines, as identified in the three dot points above, cannot be achieved. The MCA NT feels that this Draft Decision goes some way to identifying, and working through, these issues, but remains in waiting to see this brought to fruition across the network, and across State/Territory borders.

Whilst there is a general acceptance that total freight services and carriage have declined over the past 5 years, the potential for minerals projects along this corridor continue to grow,

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<sup>2</sup> Essential Services Commission of SA, *Tarcoola-Darwin Railway: 10-year review of revenues – Final Report* (August 2015), p 15, available at <http://www.escosa.sa.gov.au/ArticleDocuments/365/20150828-Rail-Tarcoola-Darwin-TenYearReviewOfRevenues-FinalReport.pdf.aspx?Embed=Y>

and the progress of these projects will demand an appropriate access and pricing structure for their project economics – if collectively this can be achieved (as this Draft Decision goes some way to do) then we will see these numbers again climb as projects come on line over the next 5 years.

The key issues the MCA NT continues to request ESCOSA to acknowledge and address are as follows:

- The Tarcoola-Darwin Railway (TDR) is not only essential commerce-enabling major infrastructure for the current and future Northern Territory's resources sector but is an asset of national significance in the context of Australia's economic prosperity.
- Lack of transparency combined with asymmetry in relation to information available to the access provider compared to the access seeker within the regulatory framework governing the TDR constrains the overall effectiveness of the regulatory regime. These inadequacies have and will continue to jeopardise investment in the NT resources sector.
- In addition to these frustrations, current developers are being discouraged by a lack of certainty regarding infrastructure pricing and capacity, hampering and constraining global capital investment for NT projects and infrastructure.
- The Code should be subject to a more comprehensive review, including identifying issues that might require legislative reform for satisfactory resolution of impediments to future investment and development of the resources sector, to ensure consistency with current competition principles in relation to significant monopoly transport infrastructure.

The MCA NT appreciates the opportunity to again represent the views of our members in the context of the current ESCOSA review, and Draft Decision, and welcomes the opportunity to further discuss with you the issues raised in our submission.

## THE DRAFT DECISION

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The MCA NT is pleased to see that the intent of the review is that the Guidelines issued by the Commission assist commercial negotiations of rail access, and look at setting a transparency of product around pricing regimes.

As the backbone of the Northern Territory transport and logistics corridor, and as raised in our two previous submissions, without appropriate structures and guidelines governing this capacity, the utilisation of this network will remain at best underutilised, and at worst untenable. An inappropriate, or opaque pricing structure around access and utilisation will reduce the competitive nature of resource projects coming to fruition. This further impacts rural and regional development across the Territory, and potentially reduces the economic development of the Territory as a whole.

Specifically, the MCA-NT Division:

- Is of the view that the Tarcoola-Darwin Railway (TDR) is an asset of national significance, key to the economic prosperity of the Northern Territory
- Believes there is a detrimental lack of transparency and also a presence of information asymmetry within the regulatory framework governing the TOR, together constraining the overall effectiveness of the regulatory regime. Consequently, the current framework is inadequate, has and will continue to jeopardise investment within the Northern Territory
- Is of the view that developers are in the process of securing the required financing to begin project development, but are frustrated with both a lack of transparency and a lack of certainty around infrastructure pricing and capacity, altogether hampering, if not constraining, global capital investment within NT projects and infrastructure

The context of issues raised in the original submission included:

### **MCA NT Recommendation 1:**

The Code should be subject to a more comprehensive review, including identifying issues that might require legislative reform for satisfactory resolution of impediments to future investment and development of the resources sector, to ensure consistency with current competition principles in relation to significant transport infrastructure.

- In the absence of adequate regulatory oversight, a vertically-integrated monopoly (as exists in the Northern Territory) could exploit information asymmetry and lack of transparency to further leverage its market position at the expense of access seekers, for example by dictating the timing of investment to increase capacity or by using access pricing to lock out above rail competition.
- The Code was developed in 1999 in a vastly different economic climate to that prevailing now and should be assessed in the context of current competition principles, policies and agreements, including the 2012 National Compact on Regulatory and Competition Reform, the 2013 Review of the National Access Regime, the 2014 Harper Review and more recent reviews.
- A more robust method of regulation should be developed and implemented, for example rate of return based on the asset value determined by what GWAN actually paid for the asset rather than what it cost tax payers to build, price-cap or revenue cap forms of price control regulation.

**MCA NT Recommendation 2:**

Regulatory review of the Code should be done to allow alternatives to the negotiate-arbitrate regulatory framework, including a requirement for GWAN to provide access and pricing undertakings and the option for approved standard access agreements, aimed at avoiding protracted negotiations and reducing the potential for unequitable risk transfer between the access seeker and access provider.

**MCA NT Recommendation 3:**

Inadequate transparency and current information asymmetry (wherein the access provider has substantially greater access to information relevant to infrastructure pricing and capacity than access seekers) need to be redressed through provision of adequate information to access seekers to provide greater certainty in relation to capital investment for Northern Territory projects.

- A reasonable level of cost information is required to facilitate and expedite the negotiation phase of the regulatory framework. Supplying such information could increase the efficiency of negotiations while simultaneously achieving results expected in a competitive market.
- Additional information provided to access seekers in Queensland includes substantially more information about applying for access, a summary of the entire

access process, copies of the conceptual operating plan and various access agreements, in addition to line diagrams, costing manuals and compliance reports.

**MCA NT Recommendation 4:**

Lack of disputes should not be used as a criterion to assess the success of the negotiate-arbitrate framework, as access seekers could be unwilling or unable to test the dispute resolution process, because of potentially significant costs of arbitration.

- A more appropriate test of a successful dispute resolution framework (as well as the regulatory environment) is its impact on investment, growth and productivity, that together combine to foster continued competition and development.

## **CONSIDERATION AND PROPOSED AMENDMENTS**

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Due to the nature and extent of some of the proposed changes, particularly where they are minimal, or in reference to definition, the MCA NT will only provide comment on the pertinent areas of ongoing operation of the network, and how it pertains to the minerals sector, particularly as it relates to prior submissions.

Where there is minimal, or administrative change, there will not be comment made, and the Commission can take the proposal as accepted.

### **Guideline No. 1 – Access Provider Reference Pricing and Service Policies**

The MCA NT agrees with the proposals covered in this consideration, under 3.1.1 – the Publication of reference points. We also agree that due to the timeframe of operation, the lack of transparency is no longer a commercial imperative to protect operations of the provider, and will allow the accessing project, or customer, the ability to incorporate financials into their project proposals, and allow room for negotiation.

The MCA NT has long called for greater transparency in this area. The MCA NT supports the request of Genesee & Wyoming Australia (North) (the GWAN) to make available its pricing points and references. The MCA NT hopes that the GWAN will do this in good faith, and that it will not require the Commission to step in to ensure that this occurs.

Further to this, recommendation 3.1.4, Publication of maps and diagrams, also demonstrates the point further in regard to lack of transparency of information, and we are encouraged that this will also be pursuant to assisting project proposals to remove barriers for negotiation and provide greater detail for investment in these regions.

The MCA NT is please that the GWAN has committed to improving the availability of rail information, and recognises that the Commission will not mandate that this is to occur, but the MCA NT requests that this proposal is followed up by the Commission to ensure that the proposed information flow, and publication, does in fact occur.



## **Guideline No. 2 – Arbitrator pricing requirements**

The MCA NT continues to question the transparency and robust nature upon which pricing regimes are calculated and passed onto service users. As identified in both of our previous submissions, there remains questionability to the depreciation costs of the asset, transparency around the asset value base, and the appropriate return on this asset investment given the cost of the asset acquired by the operator, versus the book value attached to it.

As continuously raised, the MCA NT does not believe that the operator has this balance correct, and calls on the Commission to request further transparency around this.

## **Guideline No. 3 – Regulatory information requirements**

This issue has often been at the hub of the concerns raised by the MCA NT – particularly around the perspective that the GWAN has monopolies of both above and below rail operation and pricing/access regimes.

This particularly relates to the lack of ring fencing as the two monopolies “competing” against a greater outcome, and the ability to shift costs between the two.

To the MCA NT’s knowledge, there are no other rail networks operated in Australia that have such an arrangement. Whilst there may appear to be no occurrence of inappropriate cost shifting at the time of drafting the decision, and the MCA NT acknowledges the work of the GWAN to ensure that this does not occur, surely the Commission is bound to insure that the principles are put in place so that there is no potential of this happening in the future with other operators. This is the chance to put in place the guidelines to appropriately protect all involved – a chance for the GWAN to be able to say there is no impropriety due to adherence to the guidelines, thus insuring no reputational damage. The MCA NT believes that this is a missed opportunity for transparency on behalf of the Commission, and a chance to remove all doubt that the potential for this to occur is still there.

## CONCLUSION

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The MCA NT thanks the obvious efforts that the Commission has gone to in taking into account issues raised through previous submission processes, and recognises that whilst it has been a small number of submissions made at the time of each review process, there has been genuine effort into taking account of the concerns raised.

The issues contained within our previous work, whilst somewhat outdated, still represents the ratios and operational constructs as they did at the time of application. The call for further transparency not only around access regimes, but also pricing constructs, still apply, and as the sector prepares for future development, are potentially even more pertinent today.

The MCA NT recognises, however, the difficulty that the Commission has in administering these concerns across another jurisdictions legislative process, and governing system.

The MCA NT has long called on successive Territory Government's to buy into this review process, and facilitate the usage of this pivotal piece of our infrastructure, transport and logistics chain, particularly as it relates to the utilisation of the Darwin Port.

It is indeed that the scope of the proposed draft amendments are of limited scope, and are not expected to materially impact the operation of this facility – the MCA NT still calls on greater scrutiny of the administration of this network, and whilst recognises the steps taken in this draft determination, calls on both the South Australian and Northern Territory Government's to look at ensuring that the best, on behalf of both the community and the economy, is gained for all involved in this system.

The MCA NT, is of course, broadly supportive of any measures that improves access to rail networks at lower cost for operators, and which enable development of new resources projects.

The MCA NT looks forward to seeing the Commission's final outcome in July 2019.