MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO COMPETITION POLICY REVIEW

JUNE 2014

Contents

EXECUTIVE SUMMARY 1

1. INTRODUCTION 4

2. COMPETITION POLICY AND INTERNATIONAL COMPETITIVENESS: A CRITICAL LENS 8

3. TWO DECADES AFTER HILMER: TAKING STOCK OF MICROECONOMIC REFORM 11

4. INFRASTRUCTURE ACCESS: EXISTING FRAMEWORKS, PERSISTENT CHALLENGES 17

EXECUTIVE SUMMARY

Introduction

Australia's economy has undergone a major transformation over the past 20 years with improved economic performance off the back of sustained economic reform begun in the 1980s and rapid economic growth in emerging Asian economies (most notably China).

The minerals industry has been both a beneficiary of reforms that have made the economy more open and flexible and a driver of Australia's improved economic performance. The Millennium Mining Boom represents a decade-long structural adjustment with mining now a permanently larger part of Australia's economy.

- The resources industry as a whole (including oil and gas) accounted for around 18 per cent of Australia's nominal GDP in 2011-12, double the share in 2003-04.
- There has been an equally dramatic shift in the composition of Australia's exports. Minerals exports (excluding oil and gas) currently account for around 80 per cent of resources exports, 50 per cent of total Australian exports and roughly 10 per cent of nominal GDP.

The gains from Australia's new resources economy are large and enduring, including from higher incomes, increased exports, better paying jobs and increased taxes and royalties.

But with mining investment set to decline from historical highs and the terms of trade projected to decline further, both the mining industry and the wider economy face a new and more challenging environment. The focus falls squarely on Australia's productivity performance and international competitiveness as the foundation for future prosperity.

A renewed microeconomic reform agenda is essential to boost productivity growth and to sustain growth in living standards. In recent years, Australian debates have succumbed too easily to lazy discussions about the mining boom and redistribution, avoiding the tougher questions that surround ensuring our economy is competitive, innovative and flexible. The important role competition policy and broader regulatory settings play in establishing incentives for productivity growth, innovation and cost competiveness make this review especially timely.

Competition policy and international competitiveness: A critical lens

Australia's minerals industry operates in highly competitive global markets with strong competing sources of supply. The industry is a "price taker" in competitive international markets, though its costs are determined largely in domestic markets where competition varies and, in some cases, is constrained by impediments (both regulatory and non-regulatory).

Three years on from the peak in mineral commodity prices, improving productivity and cost competitiveness is the abiding focus of the minerals industry. Australia has become a relatively high cost location for doing business and the last decade has seen a clear decline in Australia's productivity performance.

The easy assumption that Australia will inevitably be a competitive minerals supplier and the location of choice for new investment because of its natural endowment can no longer be sustained, with prosperity ever more dependent on the efficiency of the entire export supply chain, from exploration and initial development through to final shipment.

The minerals industry has a vital interest in efficient, stable and risk-based policy settings that meet policy objectives without imposing unnecessary cost burdens. Competition policy laws and institutions are no exception and play an important role in shaping the business environment in which the minerals industry operates. They can impact both positively and negatively on industry confidence, commercial certainty and cost competitiveness, and hence on incentives to invest and innovate.

The links between competition law and policy and the capacity of Australian business to compete internationally may not always be clear, direct and straight-forward. Nonetheless, they should form a central focus of this Review Panel's work. Issues that should be examined in this context include:

- The competitive pressures and performance of non-traded parts of the Australian economy, those largely insulated from global competitive pressures
- Policy and regulatory settings that encourage a narrow focus on domestic markets versus more outward-looking policy approaches
- The role competition policy can and should play in taking account of domestic market power in light of global competitiveness concerns
- The particular challenges that surround further privatisation of government-owned assets that are part of export supply chains
- Whether existing competition policy frameworks and institutions may impose unnecessarily high costs on globally-oriented businesses, including transactions and compliance costs
- The specific barriers that hinder globally-oriented businesses in Australia from adapting to changing international market conditions, developing new processes and products and improving cost competitiveness.

Two decades after Hilmer: Taking stock of microeconomic reform

A period of wide-ranging microeconomic reform beginning in the 1980s delivered significant improvements in Australia's policy and regulatory environment. The Hilmer Review which gave rise to National Competition Policy was a key component of this reform agenda, resulting in the removal of much outdated and anti-competitive regulation.

In the last decade, however, the focus on microeconomic reform in general – and competition policy in particular – has waned. Industry confidence in Australia's regulatory systems has declined in the face of a steady stream of ad hoc regulatory changes, often characterised by poor process. A number of reform-minded observers (including those closely associated with past reforms) have criticised failures in implementation and a propensity to violate some of the basic tenets of competition policy.

Examples of reform "backsliding" are:

1. Changes to coastal shipping arrangements
2. Measures aimed at boosting local content on resource projects (e.g. the *Australian Jobs Act*)
3. Changes to workplace relations laws that proscribe certain types of agreements, buttress the role (and power) of third parties in the employer-employee relationship and place impediments on businesses looking to adapt to changing market conditions.

Improving national competitiveness should be an explicit focus of the Review Panel's recommendations. The Panel should provide the Australian Government with a comprehensive stocktake of "unfinished business" and of reform "backsliding", as well as options for reinvigorating regulatory review processes across the Federation.

- The MCA advocates the principle of minimal effective regulation – regulatory intervention should only be used where it is demonstrably the most efficient way of addressing an identified market failure and/or of achieving a specific policy objective for society.
- There should be a general presumption that free and transparent markets will deliver efficient outcomes. Intrusive approaches to regulation should only be used where light-handed approaches have failed.
- Economic regulation will be necessary in certain cases to ensure well-functioning markets and efficient outcomes. It is vital that the Review Panel establish an economically sound approach to establish when such regulation for competition policy purposes is called for and the objectives that should apply to such regulation.
- Regulation for competition policy purposes needs to be supported by good process and high-quality administration. Strong institutional oversight is required to ensure alternative policy options are considered and to ensure regulations generate benefits that outweigh costs.
- It is important that competition policy frameworks are not overly complex and that consideration be given to minimising business compliance costs, especially where those costs fall disproportionately on businesses that compete globally.

Infrastructure access: Existing frameworks, persistent challenges

Ensuring efficient and effective regulation of export infrastructure is critical to the future growth and competitiveness of Australia's minerals industry which in turn is fundamentally important to the ongoing prosperity of Australia's economy.

Introduced in 1995, the National Access Regime provides the regulatory provisions for determining access to services provided by "nationally significant infrastructure facilities". The Hilmer Committee recognised that any decision to force one business to make privately-owned facilities available to other businesses needed to be approached with caution and that differences in structural characteristics need to be considered. Hilmer also noted explicitly that the facilities most likely to meet the statutory requirements for third party access would be those where there was "traditional involvement of government in these industries, either as an owner or regulator".

Differing industry configurations give rise to differing regulatory issues with important consequences for economic efficiency. A singular example relates to the structural differences that characterise the vertically-integrated, privately owned, single user systems in west coast iron ore operations when compared with multi-user, multi-owner rail and port facilities in the east coast coal industry.

- Differences relate to ownership structures, public sector involvement, planning arrangements and the form of regulation, as well as reflecting particular geographic factors.
- Bottleneck challenges associated with the mining boom point to greater risk of inefficient outcomes in the case of multi-user, multi-owner infrastructure networks as compared with single-user, owner-operated, integrated infrastructure. These risks are likely to be exacerbated where formerly government-owned, multi-user assets have been corporatised or privatised without careful consideration of appropriate regulatory frameworks.
- Vertical integration in the west coast iron ore networks helped ensure tightly coordinated increases in capacity at the various steps of the vertical chain, as well as allowing firms to implement the least cost expansion path.

Though not directly regulated, vertically integrated, single user facilities in the Pilbara are subject to the threat of regulation through Part IIIA of the CCA. The fact that single user integrated facilities are being pursued and recommended for declaration suggests an element of "mission creep" beyond the original intent and heavily qualified approach recommended by the Hilmer review. Part IIIA has not achieved the objectives set for it by the Hilmer Committee, most obviously that of providing the owners of facilities that might be subject to declaration with a reasonable degree of confidence about how the regime would work.

A review of the National Access Regime by the Productivity Commission has made a series of recommendations, including changes to the tests that need to be met for assets to be "declared". The Panel should form its own independent view of the operation of the Regime, one that takes explicit account of potential implications for export supply chains.

The MCA regards it as critical that the Review Panel focus its attention on where risks surrounding market failure and/or regulatory failure are greatest in the area of export infrastructure. There is evidence to suggest these risks are greatest where inadequate regulatory systems could buttress the market power of infrastructure providers (often former government monopoly providers) within multi-user networks, providing incentives to restrict access and/or raise access prices unreasonably. These assets should remain subject to robust and effective access regimes.

This issue has particular relevance in light of debt burdens and ongoing fiscal pressures on governments in Australia (Federal and state) and associated plans to privatise infrastructure assets in the near term. Before privatising public monopolies involved in infrastructure service provision, governments should consider carefully whether access arrangements or other regulatory provisions take proper account of long-term efficiency objectives relating to Australia's export competitiveness. Fiscal incentives when selling monopoly assets should not override long-run efficiency objectives or otherwise undermine national export competitiveness.

1. INTRODUCTION

Australia's economy has undergone a major transformation over the past 20 years, with the Millennium Mining Boom giving rise to a permanently larger mining industry.

While the gains are large and enduring, adjustment processes underway define a new and more challenging environment for the mining industry and for the nation's economy as a whole.

Australia's weak productivity performance over the last decade highlights the need for renewed commitment to microeconomic reform. The important role competition policy and broader regulatory settings play in establishing incentives for productivity growth, innovation and cost competiveness make this review especially timely.

About the MCA

The Minerals Council of Australia (MCA) represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable economic and social development. The Council'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.

MCA member companies represent more than 85 per cent of Australia's annual minerals industry production and a higher share of minerals exports.

The minerals industry in Australia's transformed economy

Australia's economy has undergone a major transformation over the last twenty years. Among the factors that have underpinned structural change are economic reform, technical change, rising demand for services and the industrialisation of East Asia.[i]

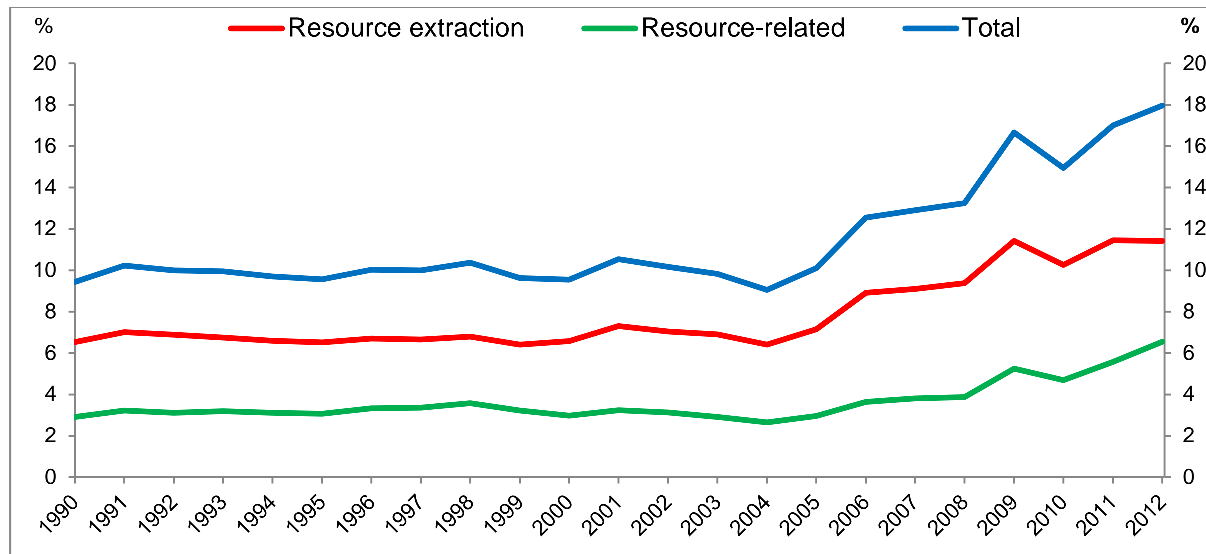
Australia's economic growth performance has improved off the back of sustained economic reform begun in the 1980s and rapid economic growth in emerging Asian economies (most notably China). In the process, Australia has capitalised on its traditional comparative advantage in mineral resources, especially over the last decade.

The minerals industry has been both a beneficiary of reforms that have made the economy more open and flexible and a driver of Australia's improved economic performance. In recent years, the industry has accounted directly for up to 8 per cent of GDP (significantly more when account is taken of related activity), upwards of 20 per cent of national investment and around half of Australia's exports.

The industry underpins important demand and supply relationships with the manufacturing, construction, transport, energy and services sectors of the economy. Research by the Reserve Bank of Australia has shown that when mining-related activities across the economy are taken into account, the resources industry as a whole (including oil and gas) accounted for around 18 per cent of Australia's nominal GDP in 2011-12, double the share in 2003-04 (Figure 1). The share of total employment accounted for by the resources sector also doubled since the mid-2000s to be almost 10 per cent in 2011-12.

The shift in the composition of Australia's exports over the last decade has been equally dramatic (Figure 2). Resources exports have risen to account for around 60 per cent of total goods and services exports, double the average of the 1990s. Minerals exports (excluding oil and gas) currently account for around 80 per cent of resources exports, 50 per cent of total Australian exports and roughly 10 per cent of nominal GDP.

Figure 1: Australia's resources economy – share of gross value added

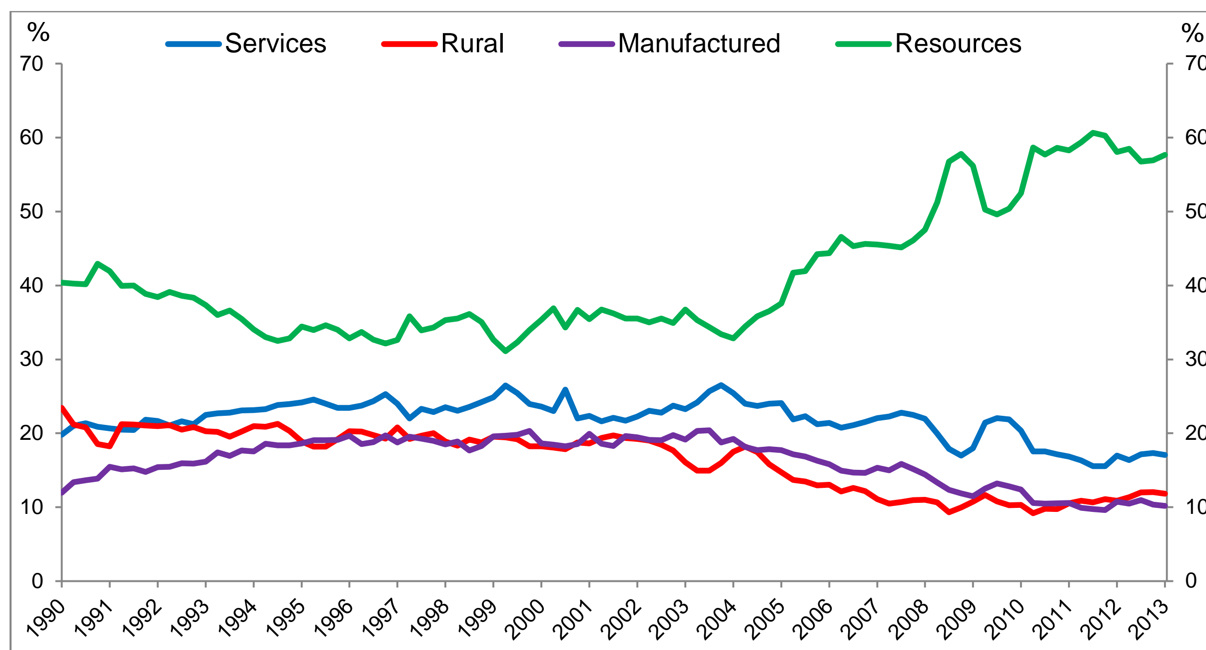


Source: Reserve Bank of Australia

The Millennium Mining Boom represents a decade-long structural adjustment of the Australian economy. Mining now forms a permanently larger part of Australia's economy. The boom had its origins in a significant pick-up in the pace of urbanisation and industrialisation in emerging Asian economies – most notably China – in the early 2000s. It has been characterised by three overlapping phases.

Beginning in 2002-03, increased demand for bulk commodities used in steel-making and electricity generation (in particular, iron ore and coal) resulted in a large rise in commodity prices, and hence in Australia's terms of trade. The rise in commodity prices (interrupted in 2008 by the Global Financial Crisis) boosted activity and incomes and encouraged labour and capital to shift towards the mining industry.

Figure 2: Australia's exports of goods and services – shares of total

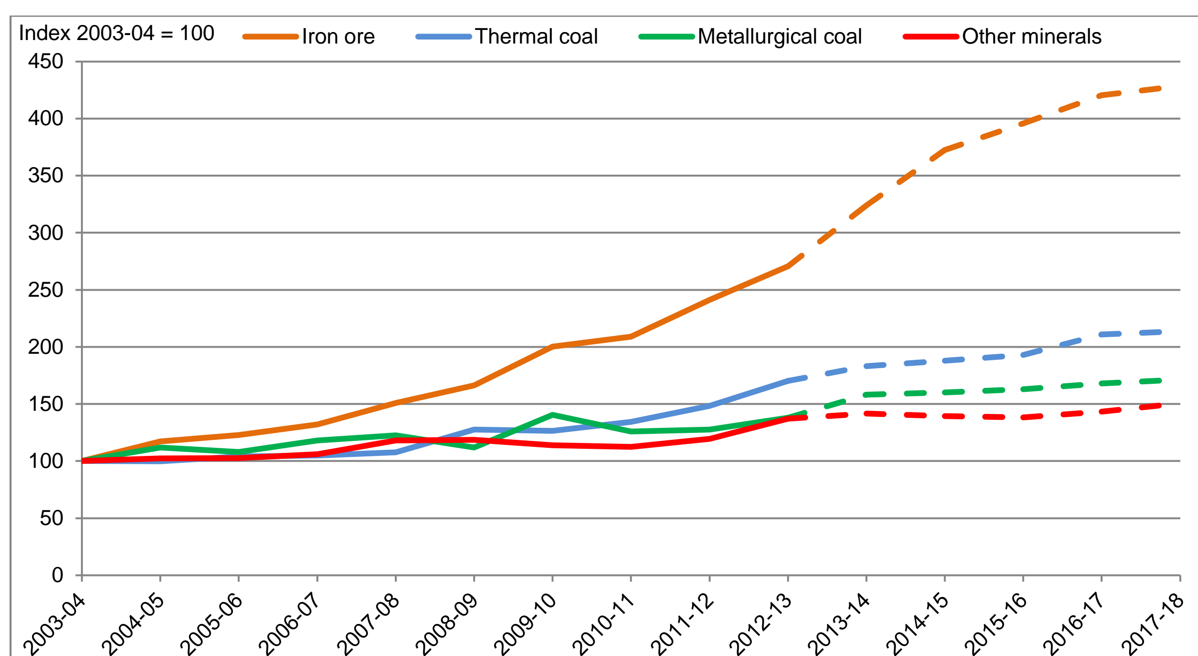


Source: Reserve Bank of Australia

This sustained rise in commodity prices was followed by a ‘once-in-a-century’ mining investment boom.[ii] This saw mining investment roughly quadruple from a long-run average of 2 per cent of GDP to an historical high of more than 8 per cent of GDP in 2012-13. Driven initially by large-scale investment in iron ore and coal projects, the investment boom has been concentrated more recently in LNG projects.

The (current) third phase of the mining boom will see the scaling down of resources investment, while the fruits of past investment come on stream in the form of higher production and export volumes. This transition is already well underway in the iron ore and coal sectors with growth in export volumes contributing strongly to real GDP growth in early 2014. In the past year alone, there have been large production capacity increases of 215 million tonnes for iron ore and 43 million tonnes for coal. The medium-term outlook of the Bureau of Resources and Energy Economics (BREE) projects that by 2017-18 export volumes of iron ore will have increased by more than half the level of 2012-13, with the coal industry also recording very strong export volume growth in coming years.[iii]

Figure 3: Growth in mineral resource export volumes



Source: Bureau of Resources and Energy Economics

Gains are enduring, but productivity growth is essential to future prosperity

In the last decade, Australia has developed a new resources economy that is larger, more prosperous and more tied to developments in emerging Asian economies. Benefits have accrued directly in the form of higher incomes, increased payments to domestically sourced inputs, higher taxes and royalties and after-tax profits paid to Australian resident owners of mining companies. The process of reinvestment has added further to domestic activity and income growth. At the same time, a higher exchange rate increased the purchasing power of households across the economy.

The gains to the Australian community have been large and enduring (see box 1). Improvements in the flexibility and adaptability of the Australian economy due to past policy reforms have reduced adjustment costs relative to earlier terms of trade booms.

As a result, average weekly household incomes are more than 40 per cent higher than a decade ago. More Australians are in skilled, high-wage mining jobs which pay roughly double the all-industry average. The minerals industry’s contribution to government revenues has increased roughly four-fold over the period 2002-03 to 2012-13. Growth in mining activity helped cushion Australia during the Global Financial Crisis. Subsequent new investment in the productive capacity will continue to support export revenues, national income, employment and tax revenues for decades to come.

Box 1: MILLENIUM MINING BOOM DELIVERS LARGE AND ENDURING GAINS

While the capital flows associated with the investment phase of the mining boom have brought substantial economic benefits to Australia they are realised over a relatively short period of time. The economic benefits of the production phase may not be as large as the investment phase per year, but they are expected to last for considerably longer.

Bureau of Resources and Energy Economics, 27 November, 2013.

… Australians will continue to benefit from the higher level of resources output for a very long time. There has been a large lift in global demand for natural resources that our country happens to have in abundance. Most people agree that the rate of growth of that demand will be lower in the future than it has been in recent years; some say much lower. But the lift in the level of demand we have already seen is permanent enough, and large enough, to have a quite persistent effect on our economy.

Governor Glenn Stevens, Reserve Bank of Australia, 'Economic Policy After the Booms', 30 July 2013.

…Overall, the boom has been good for Australia. It helped the country weather the global financial crisis. It helped fund major government initiatives. Most Australians have prospered.

…In the past decade, incomes have increased faster across the country than in the decade before. Regions have grown at different rates but few are left worse off. Benefits have been spread across the country as the boom helped to offset the impacts of globalisation and technological change on lower-skilled workers.

Grattan Institute, The Mining Boom: Impacts and prospects, 28 July 2013.

The emergence of a permanently larger mining industry, with export volumes and mining production at a higher share of GDP, sits alongside other far-reaching changes in the Australian economy. From a long-run perspective, the most prominent has been the structural shift away from agriculture and manufacturing and towards services – a shift that long predates the mining boom.

Equally clear, however, is that Australia's economy faces major challenges if it is to sustain future growth in living standards at a rate comparable to recent years. A sharp fall in bulk commodity prices over the last few years has seen the mining industry enter a more constrained and demanding phase. A number of projects have been either scaled back or deferred. Some relatively high cost mines have closed with attendant job losses.

With mining investment set to decline from historical highs and the terms of trade projected to decline further, the adjustment process defines a new and more challenging environment for the mining industry and for the nation's economy as a whole. The focus falls squarely on Australia's productivity performance and international competitiveness as the foundation for future prosperity.

Productivity growth has consistently been the most significant source of income growth. The last decade has been the exception with higher terms of trade boosting per capita incomes in Australia while productivity growth has waned.

Labour productivity grew strongly in the 1990s, at an average annual rate of 2.1 per cent. Productivity accounted for about 96 per cent of annual income growth in that decade. Since 2000, labour productivity has slowed to an average of 1.4 per cent a year. While various cyclical and temporary factors (including lag effects from the surge in resources investment) have clearly played a role in this poorer productivity performance, weakened enthusiasm for productivity-enhancing reforms is a fundamental area of concern.[iv]

A renewed microeconomic reform agenda is essential to boost productivity growth and to sustain growth in living standards. In recent years, Australian debates have succumbed too easily to lazy discussions about the mining boom and redistribution, avoiding the tougher questions that surround ensuring our economy is competitive, innovative and flexible. As the former Chairman of the Productivity Commission, Gary Banks, has observed "the microeconomic policy challenges for Australia essentially remain the same whether there is a mining boom or not".

> *The imperative must be to drive productivity improvements throughout the economy, through actions that can effectively foster competition, facilitate organisational flexibility and adaptability, and build capability.*[v]

The important role competition policy and broader regulatory settings play in establishing the incentives for productivity growth, innovation and cost competiveness in the Australian economy make this competition policy review especially timely.

2. COMPETITION POLICY AND INTERNATIONAL COMPETITIVENESS: A CRITICAL LENS

Australia's minerals industry operates in highly competitive global markets with strong competing sources of supply. The industry is a "price taker" in international markets, though its costs are determined largely in domestic markets.

The industry has a vital interest in efficient, stable and risk-based policy settings that meet policy objectives without imposing unnecessary cost burdens – costs that cannot simply be passed on to users. Competition policy laws and institutions are no exception and play an important role in shaping the business environment in which the minerals industry operates.

The links between competition policy and the capacity of Australian business to compete internationally may not always be clear, direct and straight-forward. Nonetheless, they should form a central focus of this Review Panel's work.

Australia's minerals industry operates in highly competitive global markets with strong competing sources of supply. Global barriers to trade are low compared with other sectors. The industry is highly capital intensive and characterised by high-risk exploration outlays, large upfront capital commitments, long-life assets, sophisticated technologies and long lead times to profitability. Its capital, people and technology are globally mobile.

The industry is a "price taker" in competitive international markets, though its costs are determined largely in domestic markets where competition varies and, in some cases, is constrained by impediments (both regulatory and non-regulatory). The Issues Paper for this review notes that:

> *Many of Australia's key markets are relatively concentrated – that is, they have few participants with large market shares. This is due partly to Australia's small population, distance between and to key markets, and also reflects our history of national development.*[vi]

For Australia's most export-oriented industry, international competitiveness and the capacity for businesses to succeed in global markets is a critical lens through which competition policy and related institutional frameworks should be evaluated.

The productivity and cost competitiveness challenge

Three years on from the peak in mineral commodity prices, improving productivity and cost competitiveness is the abiding focus of the minerals industry. As noted above, the Millennium Mining Boom has delivered significant growth in Australian living standards. At the same time, Australia has become a relatively high cost location for doing business and the last decade has seen a clear decline in Australia's productivity performance.

A major study for the MCA by Port Jackson Partners (PJP) in 2012 found that Australia's mining operations and projects are no longer as cost competitive as they once were. This structural challenge has multiple dimensions but is most evident in:

- stagnation or losses in market share in the last decade (a slight rise in iron ore market share being the exception)
- a sharp decline in industry productivity over the period since 2003
- high operating and capital costs compared with global peers
- the emergence of new, strong rivals.[vii]

The PJP report found that ranked against competing producers in the thermal coal, coking coal, copper and nickel markets, more than half of Australia's mines have costs above global averages. In 2006, for example, 63 per cent of Australia's thermal coal production fell within the bottom two quartiles of the global cost curve. In 2012, this figure had fallen to 28 per cent. In copper and nickel, nearly half of Australia's production was found to be in the most expensive 25 per cent of mines globally.

High capital costs mean new projects in Australia have become less attractive. Australian iron ore projects were found to be 30 per cent more expensive than the global average whereas capital costs for thermal coal projects were 66 per cent above the global average.

In short, the easy assumption that Australia will inevitably be a competitive minerals supplier and the location of choice for new investment because of its natural endowment can no longer be sustained.

Higher demand for resources over the last decade opened up new economic opportunities not just for Australia but also for other economies with comparable resource export such as Brazil, Indonesia, Canada, Chile, Russia and South Africa. The response has been global with supply catching up and in many cases overtaking growth in demand for mineral resources. The speed and methods by which new rivals are emerging, and their quality when they do emerge, is not widely appreciated.[viii]

With commodity prices now well below peak levels, ensuring competitive domestic markets for business inputs – including labour, energy, equipment, transport and other business services – is critical if the industry is to improve its cost competitiveness, capture future investment opportunities and deliver further long-run growth in export revenues.

Prosperity is ever more dependent on the efficiency of the entire export supply chain, from exploration and initial development through to final shipment. As Ergas and Owen observe:

> *Historically, Australia's trade pattern has been shaped by the sheer size of our natural resource endowment relative to our endowments of labour and capital. But the fact that we have a pronounced comparative advantage in those endowments does not imply an absence of international competition; even less does it ensure we can derive significant net incomes from their supply. Rather, that depends on our costs of supply, relative to world prices.*
>
> *Those costs do not depend only on the actual costs of extraction; rather, they depend on the costs of the entire set of operations that goes from extraction to final delivery. Moreover, in the long run, they also depend on the costs (and overall attractiveness) of undertaking exploration and new mine development in Australia relative to other resource-rich provinces. What is clear is that those costs are rising in Australia, both in absolute terms and compared with other sources of supply.*[ix]

Linking national competition policy and international competitiveness

As Australia's most globalised and export-oriented industry, the minerals industry has a vital interest in efficient, stable and risk-based policy settings that meet policy objectives without imposing unnecessary cost burdens – costs that cannot simply be passed on to users.

Competition policy laws and institutions are no exception and play an important role in shaping the business environment in which the minerals industry operates. They can impact both positively and negatively on industry confidence, commercial certainty and cost competitiveness, and hence on incentives to invest and innovate.

Competition is not an end in itself, but a means to improve living standards. This is pertinent when considering the challenges that surround sustaining growth and competitiveness in Australia's largest export industry. Improved cost competitiveness, productivity and flexibility are essential if Australia is to secure the next wave of gains from minerals resource development. Without high-quality policy settings and institutional frameworks, future gains are at risk.

The links between competition law and policy and the capacity of Australian business to compete internationally may not always be clear, direct and straight-forward. Nonetheless, they should form a central focus of this Review Panel's work.

The Issues Paper has drawn attention to the need for this review to take explicit account of globalisation:

> *A modern competition policy should provide a framework with the right incentives and enabling provisions that fosters vigorous and healthy competitive processes, allowing*

Australia to take advantage of the opportunities an increasingly global marketplace provides. In particular, this requires a sharp focus on identifying and removing unwarranted barriers and impediments to competition, and a recognition of the evolving marketplace, where increasing trade-exposure has expanded the scope and depth of markets in which our businesses and consumers participate.[x]

Issues that should be examined in this context include:

- The competitive pressures and performance of non-traded parts of the Australian economy, those largely insulated from global competitive pressures
- Policy and regulatory settings that encourage a narrow focus on domestic markets versus more outward-looking policy approaches
- The role competition policy can and should play in taking account of domestic market power in light of global competitiveness concerns
- The particular challenges that surround further privatisation of government-owned assets that are part of export supply chains
- Whether existing competition policy frameworks and institutions may impose unnecessarily high costs on globally-oriented businesses, including transactions and compliance costs
- The specific barriers that hinder globally-oriented businesses in Australia from adapting to changing international market conditions, developing new processes and products and improving cost competitiveness.

3. TWO DECADES AFTER HILMER: TAKING STOCK OF MICROECONOMIC REFORM

A period of wide-ranging microeconomic reform beginning in the 1980s delivered significant improvements in Australia's policy and regulatory environment. The removal of much outdated and anti-competitive regulation was a singular achievement of the Hilmer reforms.

In the last decade, however, the focus on microeconomic reform (including competition policy) has waned. Industry confidence in Australia's regulatory systems has declined in the face of a steady stream of *ad hoc* regulatory changes, often characterised by poor process.

The Review Panel should provide the Australian Government with a comprehensive stocktake of "unfinished business" and of reform "backsliding", as well as options for reinvigorating regulatory review processes across the Federation.

A period of wide-ranging microeconomic reform beginning in the 1980s delivered significant improvements in Australia's policy and regulatory environment. Successive waves of financial, tariff, labour market and product market reform increased competitive pressures in the economy and provided firms with greater flexibility to respond to market incentives. These market-oriented reforms laid the basis for improvements in productivity in the 1990s and renewed growth and investment in the minerals industry in the wake of a sustained pick up in global commodity demand in the 2000s.

The Hilmer Review which gave rise to National Competition Policy (NCP) was a key component of this reform agenda. The interrelated issues of low growth, stagnant productivity, inefficient government monopolies and heavily regulated non-traded goods and services provided the central focus of the Hilmer Review.

Competition reforms extended the reach of competition to a number of previously sheltered areas of the economy such as public natural monopolies and unincorporated businesses. It affected some sectors directly (for example, utilities) and most sectors indirectly (through a strengthened competition regulation framework). The reforms were implemented through a number of intergovernmental agreements which provided for payments from the Australian Government to the states and territories to return the fiscal dividend from the latter's implementation of agreed reform commitments.

The NCP reform agenda spanning the period from 1995 to 2005 delivered substantial gains to the Australian community. Large parts of the economy were restructured and about 1,000 anti-competitive regulations were reformed. A 2005 review of NCP reforms by the Productivity Commission identified a 2.5 per cent increase in GDP attributable to productivity and price changes in key infrastructure sectors, with price reductions across many parts of the economy.[xi]

In the last decade, however, the focus on microeconomic reform in general – and competition policy in particular – has waned. Industry confidence in Australia's regulatory systems has declined in the face of a steady stream of *ad hoc* regulatory changes, often characterised by poor process.

While challenges facing Australia's economy in 2014 will in many cases be different from those of two decades ago given changes in our economy, it is equally important to recognise where those challenges remain as relevant today. A number of reform-minded observers (including those closely associated with past reforms) have criticised failures in implementation and a propensity to violate some of the basic tenets of competition policy in more recent years, including in areas nominally outside the reach of the *Competition and Consumer Act 2010*.

Citing the policy drift on regulatory review, Hilmer has noted that it is "not just our processes that are the problem – too often we're not observing process at all".[xii] This has allowed new regulatory initiatives with unjustified anti-competitive dimensions to become added to the stock of those that were not adequately dealt with under NCP reforms.

Three examples illustrate this reform "backsliding" and its negative impact on the competitiveness of the minerals industry:

1. Changes to coastal shipping arrangements
2. Measures aimed at boosting local content on resource projects (e.g. the *Australian Jobs Act*)
3. Changes to workplace relations laws that proscribe certain types of agreements, buttress the role (and power) of third parties in the employer-employee relationship and place impediments on businesses looking to adapt to changing market conditions.

Coastal shipping

From the early 1990s, Australia relaxed its coastal shipping requirements resulting in a downward trend in coastal shipping costs. However, anti-competitive changes introduced in recent years have reversed that trend. The result has been increased domestic transport and administration costs that have made it more difficult for Australia's minerals industry (and other industries reliant on dry bulk commodity freight) to source competitively-priced coastal shipping services when they are needed.

In 2012, the (previous) Australian Government, as part of efforts to support Australian-flagged coastal shipping with taxation incentives, introduced the *Coastal Trading (Revitalising Australian Shipping) Act 2012*. The *Act* applies to commercial shipping voyages between: (a) a port in one state or territory and a port in another, and (b) voyages between two or more ports in the same state or territory, followed by trips to one or more states or territories.

The *Coastal Trading Act* introduced new anti-competitive rules designed to provide an advantage to Australian ships by allowing them unrestricted access to coastal trade along with the opportunity to compete for voyages *proposed to be conducted* by foreign ships. This privileged position is afforded to holders of a General License which is valid for five years and is only available to vessels on the Australian General Shipping Register.

Conversely, foreign-flagged vessels only have access to a 12 month Temporary License or, in exceptional circumstances, an Emergency License (valid for no more than 30 days). The Temporary License replaced the previous system of Single and Continuous Voyage Permits and imposed more onerous conditions on foreign-flagged vessels. While Single and Continuous Voyage Permits required applicants to specify voyage dates and tonnage amounts, and were subject to a public interest criterion, the Temporary License requires applicants to:

- Undertake a minimum of five voyages during the 12-month term of the license
- Detail, at the time of application, loading dates, cargo types and volumes, and ports of loading and unloading, for the 12-month period ahead
- Have this information published on the website of the Department of Infrastructure and Regional Development (subject to commercial-in-confidence conditions), so that a General License holder can nominate to conduct any of the notified voyages instead.

If a General License holder is available to conduct any of the notified voyages, then the Temporary License holder must negotiate with them. This negotiation may be arbitrated by the Department, but in any case the Minister or his or her delegate must decide whether to grant the Temporary License within 15 days.

The imposts associated with the cabotage licensing system come on top of the extension of Australian wage rates to foreign crew operating in trading waters under the *Fair Work Act 2009.* The Seafarers Award has two parts: Part A applies to Australian crew and Part B to foreign crew on foreign vessels passing through Australia. Evidence provided to the MCA suggests the application of the *Fair Work Act* has meant Part B wages across a standard-crew dry bulk vessel are around $1,500 a day higher than International Transport Federation wages.

Together, these changes have greatly reduced the cost competitiveness of coastal shipping services in Australia. For some dry bulk commodity producers, the cost of shipping final product around Australia is now estimated to be about the same as shipping from Asia to Australia.

One company has reported that tonnage rates on a key route have increased 63 per cent, from $18.20 a tonne in 2011 to $29.70 in 2012. This compares with $17.50 a tonne being charged by international operators in 2012. This company's demurrage rates also rose from $14,000 in 2011 to $35,000 per day in 2012. Another company reports freight changes increasing by more than $3,000 a day up and down the east coast of Australia.

MCA member companies have highlighted the commercial problems that arise from Australian shippers having the ability to contest Temporary License applications (as well as variations) by foreign shippers. One company reports that its very first Temporary License application was contested and that it is still arguing its case nearly two years later. The company estimates that the cost of this process is in the order of hundreds of thousands of dollars and that its case is on track for a High Court appeal.

The risk of challenges to Temporary Licenses by local shippers has led some companies to advise their business units to sell through free-on-board arrangements rather than to offer cost-and-freight. It has also been reported that manganese ore is now being imported into Australia instead of being shipped from the Northern Territory.

Australian Jobs Act 2013

Mining projects generate large benefits for Australian industry with substantial purchases locally on major projects. Studies of the Western Australian resources industry, for example, have shown domestic sourcing rates higher than 80 per cent in the construction phase of mining projects and above 90 per cent in the operations phase. Market realities dictate that Australia's minerals industry has a strong interest in the development and maintenance of a vibrant and competitive local supplier industry.

A number of state governments in Australia require plans for local supplier content on major projects, in some cases as part of project approvals. In recent years, steps have been taken by the Commonwealth to extend regulatory and administrative intervention in this area, the most recent being the (misnamed) *Australian Jobs Act 2013*.

This measure mandates Australian Industry Participation (AIP) plans for private investment projects over $500 million, an instrument previously linked more narrowly to obtaining tariff concessions under the Enhanced Project By-Law Scheme. Under the *Act*, project proponents need to notify the new Australian Industry Participation Authority of a potential project, complete and submit an AIP plan to the Authority and report compliance with the plan for the duration of the project.

The *Australian Jobs Act 2013* imposes complex, prescriptive, unrealistic and costly burdens on project proponents with no accompanying rigorous economic analysis or allowance for systems and practices already in place within companies to seek local procurement opportunities. It adds more red tape and new costs on Australian projects already under pressure for commercial reasons and against a backdrop of concern about the future pipeline of resources investment in Australia. It proceeds on the mistaken premise that more bureaucracy (rather than cost competitive supply) is a vehicle to support the creation and retention of Australian jobs. Among the costs associated with the measure are:

- Drafting an AIP plan (and doing so in a way that does not release commercially sensitive information)
- Negotiating sign-off of the AIP plan with the AIP Authority
- Setting up systems and collecting information on compliance with the AIP plan
- Drafting a compliance report for the AIP Authority every six months
- Active and ongoing promotion of all supply opportunities
- Provision of feedback and advice to unsuccessful Australian entities post the bid process
- Conducting awareness programs for suppliers (including workshops and advertising)
- Conducting training programs
- Encouraging and implementing integration into global supply chains
- Monitoring and updating a website for publishing of opportunities implementing contractual arrangements with procurement entities to ensure compliance.

In addition, there are costs to government to administer the scheme. The lack of commercial realism underpinning this law is one of its most concerning features. Project proponents may be required to submit AIP plans at a “trigger date” determined by the relevant bureaucracy, before a company’s board has formally decided to proceed with the investment. At the very least this is likely to prove wasteful in cases where projects do not go ahead. More generally, proponents may be at risk of publishing commercially sensitive information before board approval.

The *Australian Jobs Act 2013* is emblematic of how easily governments in recent years have discarded “best practice” regulation principles when it suits them politically to do so. The “problem” to which the measure is addressed was not clearly identified in the Regulatory Impact Statement. A rigorous cost-benefit analysis of the measure was not undertaken. Alternative measures that could achieve the stated policy objective at least cost were not properly considered. The Australian Government should repeal the *Australian Jobs Act* 2013 at the first opportunity.

Workplace relations

In recent years, Australia’s workplace relations system has been re-regulated in a way that bolsters the power of trade unions and tribunals at the expense of employers and employees. The *Fair Work Act* has reduced choice and flexibility in employment arrangements, created a more adversarial bargaining system and dragged more issues within the remit of a centralised industrial tribunal, rather than be under the sway of those with a direct stake in the success of the enterprise or workplace.

This policy approach runs directly counter to the direction of reforms to Australia’s industrial relations system begun in the early 1990s. The dismantling of centralised wage fixation and the advent of enterprise bargaining provided firms with more scope to fashion remuneration and work practices to the circumstances of their markets and regions.

In a 2012 speech, the former Chairman of the Productivity Commission, Gary Banks, examined the status of labour market regulation within a competition policy framework. The remarks are worth noting at length:

> *Industrial relations regulation has generally been regarded as falling outside the purview of competition policy altogether and, secondary boycotts aside, union activities are largely exempt from the anti-competitive conduct provisions of the Competition and Consumer Act. The basis for this has been that labour markets are more complex than product markets and involve a significant human dimension. And these points are correct. But are they good reasons for foregoing scrutiny of whether the benefits of particular restrictions on competition and other regulatory measures in the labour market exceed the costs and, where they do, whether they are the best way of achieving those benefits?*
>
> *This question is significant because of the pervasiveness of these regulations across the economy and their influence on the ability of enterprises to innovate and adapt to market opportunities and pressures. Also, the industrial landscape today is considerably evolved from what it was a few decades ago – and far removed from the ‘dark satanic mills’ of the early industrial era. Competition among firms is much greater, most production is technologically more sophisticated and ‘human capital’ is generally seen as key to competitive performance. Moreover, general social safety nets and government support mechanisms have become well developed.*
>
> *Ensuring that people are treated fairly in workplaces must remain a central concern. However, any trade-offs with productivity or competitiveness that may be associated with specific regulatory instruments need to be carefully considered and re-assessed over time. After all, productivity gains provide the only sustainable source of higher wages and job security for workers.*[xiii]

The MCA endorses this view and, notwithstanding the Australian Government’s stated intention to conduct a separate, dedicated review of the *Fair Work Act*, urges the Review Panel examining competition policy to address the issue of anti-competitive provisions of Australia’s workplace relations system.

Under the cloak of fairness, legislative changes in recent years have enhanced and institutionalised the bargaining power of unions. Instead of responding to changing business conditions, managers in the mining industry and elsewhere have faced a union rights agenda of the sort that characterised the pre-1990s industrial system. Unreasonable claims and actions have increased project costs, compromised workplace harmony and productivity and undercut the foundations for current and future high-wage jobs.

The result has been to weaken a central productivity-enhancing pillar of Australia's microeconomic reform era. An August 2013 study for the resource industry employer group the Australian Mines and Metals Association found that almost 90 per cent of resource industry employers surveyed report that they have not achieved any productivity gains via new workplace agreements under the *Fair Work Act*. Some 75 per cent of employers stated that productivity has reduced because of overregulation of Australia's workplace relations system.[xiv]

In theory, the *Fair Work Act* was to provide workplace relations laws that "are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity". In practice, the *Act* is a case study in regulatory overreach where the adverse consequences of the whole are more than the sum of its problematic parts. While individual provisions present particular challenges, the full regulatory impact needs to be gauged based on the nexus and interaction of various elements. Principal among these are:

- Provisions which mandate union involvement in workplace bargaining, beyond that commensurate with workplace representation
- Restrictions on agreement-making options (with the banning of Australian Workplace Agreements and the neutering of flexibility arrangements in awards and enterprise agreements)
- Expanded breadth of matters subject to bargaining and allowable in agreements, well beyond matters relating to wages and conditions of employment, backed by the threat of "protected industrial action"
- Unbalanced, union-friendly clauses associated with "right of entry" rules and "adverse action"/general protection provisions
- Mandatory union involvement in greenfield negotiations
- The enhanced role of the Fair Work Commission compared with its predecessor, tilted towards a narrow and inadequate view of "fairness".

At the heart of the system, and reinforced with each wave of amendments to the Fair Work Act, is the legal buttressing of union power and privilege. This has provided the springboard for a concerted push by unions in the mining industry to restrict the capacity of managers to align workplace incentives with long-term business needs, undermining productivity, cost competitiveness and flexibility.

An example of where the *Fair Work Act* has bitten especially hard in its impact on the mining industry is greenfield negotiations where, unlike the previous workplace relations regime, unions have mandatory involvement under the *Act*. A degree of certainty about the near-term industrial environment (including employment conditions) is vital in providing investors with confidence in Australia's policy settings, especially given the capital requirements and risks associated with new mining projects. Where a competitive and timely greenfield agreement cannot be negotiated, the project proponent carries the risk of starting up with no security of terms and conditions and no protection against industrial action.

Regulatory interventions that have pervasive effects across the economy such as workplace relations regulation are in need of particular scrutiny. The point has again been well made by Gary Banks that: "If we are to secure Australia's productivity potential into the future, the regulation of labour markets cannot remain a no-go area for evidence-based policy making".[xv]

Principles and priorities

This Review provides an opportunity to reinvigorate microeconomic reform in Australia. Improving national competitiveness should be an explicit focus of the Review Panel's recommendations.

Removing regulatory impediments to competition should be a priority. Outdated, unnecessary or poorly designed regulation can add significantly to business compliance costs, reducing international competitiveness, limiting flexibility, stifling innovation and inhibiting productivity growth.

The Review Panel should provide the Australian Government with a comprehensive stocktake of "unfinished business" and of reform "backsliding", as well as options for reinvigorating regulatory review processes across the Federation.

In general, the MCA advocates the principle of minimal effective regulation – regulatory intervention should only be used where it is demonstrably the most efficient way of addressing an identified market failure and/or of achieving a specific policy objective for society. There should be a general presumption that free and transparent markets will deliver efficient outcomes. Intrusive approaches to regulation should only be used where light-handed approaches have failed.

That said, economic regulation will be necessary in certain cases to ensure well-functioning markets and efficient outcomes. It is vital that the Review Panel establish an economically sound approach to establish when such regulation for competition policy purposes is called for and the objectives that should apply to such regulation. For example, problems can arise from unclear legislative objectives and the degree to which multiple objectives are set for regulators without clear guidance on trade-offs.[xvi]

As with other areas, regulation for competition policy purposes needs to be supported by good process and high-quality administration. Improving the design, operation and review of regulatory frameworks impacting on competition requires close consultation, coordination and cooperation between different levels of government in Australia and between government and industry.

Strong institutional oversight is required to ensure alternative policy options are considered and to ensure regulations generate benefits that outweigh costs. The Panel should examine the standard of regulatory impact analysis as part of this review of competition policy, recognising that a comprehensive review of such analysis in Australia in 2012 found a significant gap between agreed principles and what happens in practice.[xvii]

It is important that competition policy frameworks are not overly complex and that consideration be given to minimising business compliance costs, especially where those costs fall disproportionately on businesses that compete globally.

Noting that the Review Panel is to have regard to the "regulatory balance between the Commonwealth and the States and Territories" and "the need to minimise business compliance costs", it should look explicitly at whether Australian competition policy regimes fall short of best practice in relation to transactions and compliance costs.

In a May 2014 submission to the Queensland Government, the Queensland Resources Council (QRC) cites an example relating to new rail access undertakings currently before the Queensland Competition Authority. The QRC estimates that before the processes conclude by the end of 2014, collective legal and other compliances costs for relevant parties are expected to range from $20 to $25 million. All these costs are borne by the Queensland coal industry as by convention industry typically pays for the costs of these processes by way of a legislated levy.[xviii]

The essential point, whether in relation to Commonwealth or state and territory competition regimes, is that businesses operating in global markets cannot readily pass on such costs. Explicit account should be taken of international competitiveness concerns if regulatory settings are to align clearly with the long-term economic welfare of the Australian community.

4. INFRASTRUCTURE ACCESS: EXISTING FRAMEWORKS, PERSISTENT CHALLENGES

Differing industry configurations within the minerals industry give rise to differing regulatory issues in relation to export infrastructure access and pricing. Infrastructure bottleneck challenges in the early phase of the mining boom point to greater risk of inefficient outcomes in multi-user, multi-owner infrastructure networks as compared with single-user, integrated owner-operated infrastructure.

The single-user, vertically-integrated iron ore facilities in the Pilbara are subject to the threat of regulation through the National Access Regime (Part IIIA). The MCA considers that a degree of "mission creep" has marked the National Access Regime compared with the heavily qualified conclusions of the Hilmer Committee. The Review Panel should form its own independent view of the Regime's operation, notwithstanding the Productivity Commission's Inquiry Report forwarded to the Australian Government in October 2013.

Formerly government-owned, monopoly infrastructure providers within east coast coal supply chains should remain subject to robust and effective regulatory regimes. The experience of the east coast coal networks also underlines the importance of governments establishing appropriate regulatory frameworks before privatisation of multi-user assets, especially those that form part of vital export supply chains. Fiscal incentives when selling monopoly assets should not override long-run efficiency objectives or otherwise undermine national export competitiveness.

Ensuring efficient and effective regulation of export infrastructure is critical to the future growth and competitiveness of Australia's minerals industry which in turn is fundamentally important to the ongoing prosperity of Australia's economy. Issues related to infrastructure access and pricing are among the most complex areas of national competition policy. This was recognised by the Hilmer Committee.

Differing industry configurations give rise to differing regulatory issues

Introduced in 1995, the National Access Regime provides the regulatory provisions for determining access to services provided by "nationally significant infrastructure facilities". It is intended to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.

The regulatory provisions of the Regime are contained in Part IIIA of the *Competition and Consumer Act 2010* (CCA) and clause 6 of the Competition Principles Agreement (1995). Those arrangements provided for access to the services of essential infrastructure to be regulated either through the national regime or a state-based regime. As part of the Hilmer reforms, there are similar criteria for assessing declaration applications and the effectiveness of a state-based regime and access undertakings. The regime sits alongside other industry-specific access regimes (including Commonwealth and state and territory regimes).

In its Issues Paper on the National Access Regime, the Productivity Commission observed that:

> *The Hilmer Committee noted that the National Access Regime required flexibility to be adaptable to differences between industries and within an industry over time. The Committee was conscious of the need to carefully limit the circumstances in which a business is required by law to make its facilities available to another. The Committee favoured private agreement on access terms and conditions supported by binding arbitration by a regulator in the event that parties could not reach agreement.*[xix]

Hence, the Hilmer Committee recognised that any decision to force one business to make privately-owned facilities available to other businesses needed to be approached with caution and that differences in structural characteristics (whether across or within industries) need to be fully considered in infrastructure regulation decisions. The Hilmer report also noted explicitly that the facilities most likely to meet the statutory requirements for third party access would be those where

there was “traditional involvement of government in these industries, either as an owner or regulator”.[xx]

The minerals industry provides a powerful case study as to how differing industry configurations give rise to differing regulatory issues with important consequences for economic efficiency. A singular example relates to the structural differences that characterise the vertically-integrated, privately owned, single user systems in west coast iron ore operations when compared with multi-user, multi-owner rail and port facilities in the east coast coal industry.

These differences relate to ownership structures, public sector involvement, planning arrangements and the form of regulation, as well as reflecting particular geographic factors. Moreover, there are several variants within multi-user systems that encompass track (below rail), trains (above rail) and ports. They in turn underline the need for careful analysis of the role competition policy can and should play in promoting efficient outcomes.

In the east coast coal networks, the major regulatory issues have been with the management of open-access arrangements for previously government-owned natural monopoly assets, including the setting of the terms and conditions of access. In the west coast iron ore operations, the major issues have been whether third party access should be provided at all over historically private-owned, vertically-integrated facilities.

Bottleneck challenges associated with the mining boom point to greater risk of inefficient outcomes in the case of multi-user, multi-owner infrastructure networks as compared with single-user, owner-operated, integrated infrastructure. These risks are likely to be exacerbated where formerly government-owned, multi-user assets have been corporatised or privatised without careful consideration of appropriate regulatory frameworks.

The period of very strong demand growth from 2003 highlighted acute capacity constraints problems within the multi-user infrastructure systems in the coal industry compared with integrated, single-user systems in the iron ore industry. The relative pace and extent to which export volumes of coal and iron ore responded to increases in commodity prices provides telling evidence of where efficiency problems (and regulatory failures) tend to be greatest.

Production was scaled up more rapidly and to a far greater extent in the vertically-integrated west coast iron ore systems than in the vertically-separated, multi-user coal chains of the eastern seaboard. Thus while iron ore export volumes increased by close to 10 per cent a year between 2005 and 2010, coal export volumes grew by around half that rate.[xxi]

Whereas Australia maintained market share in iron ore over this period, Australia lost market share in the coal industry. While not the only factor, infrastructure bottlenecks and coordination difficulties among the various participants in the east coast coal supply chain clearly contributed to Australia not taking maximum advantage of rapid growth in minerals demand. “The result was visible in long queues of ships off east coast coal ports, as existing capacity was poorly used while new capacity took too long to come on stream”.[xxii]

The fundamental issue revolved around poor alignment of incentives at different stages of the export supply chain. Among the problems highlighted within multi-user, multi-owner systems were a lack of accountability for debottlenecking which in turn resulted in delays to critical investments and poorly sequenced expansions. Moreover, operators who did not bear the true cost of delays were not incentivised to lift performance resulting in inefficient use of existing assets. BREE notes, for example, that single-user operated iron ore export chains in the Pilbara have tended to operate at utilisation rates of 95 per cent whereas multi-user coal infrastructure in the eastern states has operated at 85 per cent.[xxiii]

Vertical integration in the west coast iron ore networks helped ensure tightly coordinated increases in capacity at the various steps of the vertical chain, as well as allowing firms to implement the least cost expansion path. As a result, the major iron ore producers launched a sequence of expansion programs from 2003-04, well before expansion plans were put in train in the multi-user systems in the coal industry.

To some extent, the problems experienced in the multi-users systems were inherent in the architecture that emerged from the Hilmer reforms. Prior to Hilmer, the dominant pattern was for publicly-owned rail and ports to connect privately-owned mines to domestic and world markets. Following the Hilmer reforms, those rail and port facilities were commercialised (and in many cases later privatised) and placed on an explicitly open-access basis. Elaborate access regimes, implemented by competition regulators, were put in place to determine the terms and conditions on which that access is made available.

Within the separated production chains those reforms had created, each vertical layer had incentives to shift costs on to other vertical layers, including the costs (and risks) of financing capacity expansion. In turn, the system as a whole failed to undertake investment in a timely, coordinated and cost effective manner. There is evidence to suggest that the stronger commercial focus (initially through corporatisation) made overcoming these coordination problems even harder, with the difficulties compounded by the large number of actors.

Productivity Commission review of National Access Regime

Though not directly regulated, vertically integrated, single user facilities in the Pilbara are subject to the threat of regulation through Part IIIA of the CCA. There have been attempts to obtain declaration of the Pilbara rail facilities, but so far the only successful application has been in respect of the Goldsworthy railway line; although this has not been followed up by any request for access. The applications in respect of the Hamersley, Mt Newman and Robe railways have not succeeded.

During subsequent review processes by the Australian Competition Tribunal, it was established that open access and conversion of these facilities from single user to multi-user would have a net cost to the economy of many billions of dollars. These findings (and the lack of interest in using the Goldsworthy railway notwithstanding declaration) demonstrate that there is no public benefit in applying Part IIIA to facilities of this nature and consideration should be given to exempting single user integrated facilities from the regime. A stronger “production process” exemption – being a threshold exemption – would have helped achieve this final result far more quickly and efficiently.

The fact that single user integrated facilities are being pursued and recommended for declaration suggests an element of “mission creep” beyond the original intent and heavily qualified approach recommended by the Hilmer review. Hence Part IIIA has not achieved the objectives set for it by the Hilmer Committee “most obviously that of providing the owners of facilities that might be subject to declaration with a reasonable degree of confidence about how the regime would work”.[xxiv]

A review of the National Access Regime by the Productivity Commission, forwarded to the Australian Government in October 2013, has made a series of recommendations, including changes to the tests that need to be met for assets to be “declared”. The Panel should form its own independent view of the operation of the Regime, one that takes explicit account of potential implications for export supply chains.

Former government-owned, multi-user facilities: the practical focus of economic regulation

The MCA regards it as critical that the Review Panel focus its attention on where risks surrounding market failure and/or regulatory failure are greatest in the area of export infrastructure. There is evidence to suggest these risks are greatest where inadequate regulatory systems could buttress the market power of infrastructure providers (often former government monopoly providers) within multi-user networks, providing incentives to restrict access and/or raise access prices unreasonably.

These assets should remain subject to robust and effective access regimes to ensure ongoing investor confidence in key export industries like the coal industry. As the Queensland Competition Authority has noted, for example, both Aurizon Network’s rail network and the Dalrymple Bay Coal Terminal facility “were privatised (via a long term lease) on the basis that an effective access regime would apply following privatisation. Many coal miners in Queensland have made significant investments on the basis that they would continue to receive access, on reasonable terms, to former government owned infrastructure facilities”.[xxv]

This issue has particular relevance in light of debt burdens and ongoing fiscal pressures on governments in Australia (Federal and state) and associated plans to privatise infrastructure assets in the near term. These plans include long-term leases (99 years) for the Gladstone Port Corporation (including the RG Tanna Coal Terminal) and the Townsville Port (including the Mt Isa freight rail line) in Queensland.

Privatisation can unlock efficiency gains, if accompanied by regulatory arrangements that support competitive market outcomes and ensure monopoly positions are not exploited. In the case of export infrastructure assets, the need is for competitive supply chains that do not undermine the cost competitiveness of vital export industries.

Before privatising public monopolies involved in infrastructure service provision, governments should consider carefully whether access arrangements or other regulatory provisions take proper account of long-term efficiency objectives relating to Australia's export competitiveness. Effective governance and regulatory structures need to be in place before privatisation as resolving regulatory failures after the fact has proven extremely difficult. Fiscal incentives when selling monopoly assets should not override long-run efficiency objectives or otherwise undermine national export competitiveness.

ENDNOTES

[i] Ellis Connolly and Christine Lewis, “Structural change in the Australian economy”, *Bulletin*, Reserve Bank of Australia September Quarter 2010.
[ii] Philip Lowe, “Developments in the Mining and Non-mining Economies”, Address to the ADC Future Summit – Melbourne, 14 May 2012.
[iii] Bureau of Resources and Energy Economics, *Resources and Energy Major Projects*, April 2014. Bureau of Resources and Energy Economics, *Resources and Energy Quarterly*, March Quarter 2014.
[iv] See, for example, Commonwealth of Australia, *Budget 2014-15*, Budget Strategy and Outlook Budget Paper No. 1, Statement No. 4, 2014-15.
[v] Gary Banks, “Australia’s mining boom: what’s the problem?”, *Advancing the Reform Agenda: Selected Speeches*, Productivity Commission, December 2012.
[vi] Commonwealth of Australia, Competition Policy Review, *Issues Paper*, 14 April 2014, p. 1.
[vii] Port Jackson Partners, *Opportunity at risk: Regaining our competitive edge in minerals resources*, Report commissioned by and prepared for the Minerals Council of Australia, September 2012.
[viii] See Port Jackson Partners, 2012, section 2 for a discussion of emerging rivals to Australia in mineral resources aided by policy reform, new technologies and new investors.
[ix] Henry Ergas and Joe Owen, *Rebooting the boom: Unfinished business on the supply side*, A public policy analysis produced for the Minerals Council of Australia, No. 2, December 2012, p. 18.
[x] Commonwealth of Australia, Competition Policy Review, *Issues Paper*, p. 2.
[xi] Productivity Commission, Review of National Competition Policy Reforms, Inquiry Report, No. 33, February.
[xii] Fred Hilmer, “Abbott’s competition review is long overdue”, *The Australian Financial Review*, 11 December 2013, p. 39.
[xiii] Gary Banks, “Competition Policy’s regulatory innovations: quo vadis?”, *Advancing the Reform Agenda: Selected Speeches*, Productivity Commission, December 2012.
[xiv] AMMA, *The AMMA Workplace Relations Research Project – a survey based analysis*, Report 6, August 2013.
[xv] Gary Banks, “Successful reform: past lessons, future challenges”, *Advancing the Reform Agenda: Selected Speeches*, Productivity Commission, December 2012.
[xvi] Australian Government, Australia’s Export Infrastructure: Report to the Prime Minister by the Exports and Infrastructure Taskforce, May 2005.
[xvii] Productivity Commission, *Regulatory Impact Analysis: Benchmarking*, Productivity Commission Research Report, November 2012.
[xviii] Queensland Resources Council, Submission – Strong Choices for Queensland, May 2014.
[xix] Productivity Commission, *National Access Regime*, Productivity Commission Issues Paper, November 2012.
[xx] Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Report), *National Competition Policy: Report by the Independent Committee of Inquiry*, 1993, p. 251.
[xxi] Virginia Christie et al., “The Iron Ore, Coal and Gas Sectors”, *Bulletin*, Reserve Bank of Australia, September Quarter 2010.
[xxii] Henry Ergas and Joe Owen, 2012, p. 44.
[xxiii] Bureau of Resources and Energy Economics, *Australian Bulk Commodity Exports and Infrastructure – Outlook to 2025*, July 2012.
[xxiv] Henry Ergas and Joe Owen, 2012, p. 47.
[xxv] Queensland Competition Authority, Submission to the Productivity Commission on the National Access Regime, March 2013.