National Competition Council

Level 9 128 Exhibition Street Melbourne Victoria 3000 Australia GPO Box 250 Melbourne Victoria 3001 Australia



Telephone 03 9285 7474. Facsimile 03 9285 7477.

MEDIA RELEASE

20 June 2008

National Competition Council Releases draft recommendations on declaration of Robe, Hamersley and Goldsworthy Railways

The National Competition Council (the Council) today released draft recommendations that the services provided by Rio Tinto's Hamersley and Robe railway lines, and BHP Billiton's Goldsworthy railway line, be declared under Part IIIA of the *Trade Practices Act 1974*.

Today's draft recommendations are in response to three separate applications received from The Pilbara Infrastructure Pty Ltd (TPI) (a wholly owned subsidiary of Fortescue Metals Group) for the declaration of the:

- Robe Service (application received 18 January 2008)
- Hamersley Service (application received 16 November 2007)
- Goldsworthy Service (application received 16 November 2007)

A summary of the Council's draft recommendations and the complete draft recommendations, and the applications and submissions from interested parties are available at www.ncc.gov.au

Following the draft recommendations there will be a further public submissions period after which the Council will make its final recommendations to the designated Minister, the Hon. Wayne Swan, MP, Treasurer. The Minister will decide whether or not to declare the services and has 60 days in which to do so.

A final decision to declare the services would provide TPI, and other third parties with a legally enforceable right to negotiate access to the railway lines.

A decision to declare the Robe, Hamersley and Goldsworthy services will not automatically result in TPI gaining access.

A decision by the Minister to declare one or more of the services will entitle TPI to seek access either through an agreement negotiated with BHP Billiton and/or Rio Tinto or, in the absence of an agreement, through arbitration by the Australian Competition and Consumer Commission (ACCC). The ACCC has the power to impose access terms, or refuse access if it finds that BHP Billiton and/or Rio Tinto cannot be appropriately compensated for the costs associated with providing access to the facilities in a specific situation.

TPI has sought declaration of *all points* services, to offer a rail haulage service to mining companies seeking to move bulk materials between any two points on the railways, including interconnection points with other rail networks and railway lines.

The Council has reached a preliminary view that each of the services for which access is sought satisfies the declaration criteria set out in Part IIIA of the *Trade Practices Act 1974*.

BHP Billiton, as the provider of the Goldsworthy Service, and Rio Tinto, as provider of the Robe and Hamersley services, opposed TPI's applications.

Where access to essential infrastructure is necessary to compete in markets that depend on the infrastructure, and it is uneconomical to duplicate the infrastructure, an organisation may apply to the Council to declare the service under Part IIIA of the *Trade Practices Act 1974*.

Part IIIA of the *Trade Practices Act 1974* recognises that failure to enable a third party to access privately or government owned essential infrastructure can pose a bottleneck that impacts adversely on competition in other markets.

The Draft Recommendations

In making draft recommendations to declare the railway lines, the Council must be satisfied that the services meet all of the following criteria outlined in the *Trade Practices Act 1974*:

- a) That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service
- b) That it would be uneconomical for anyone to develop another facility to provide the service
- c) That the facility is of national significance, having regard to:
 - i The size of the facility or
 - ii The importance of the facility to constitutional trade or commerce or
 - iii The importance of the facility to the national economy
- d) That access to the service can be provided without undue risk to human health or safety
- e) That access to the service is not already the subject of an effective access regime
- f) That access (or increased access) to the service would not be contrary to the public interest

In formulating its draft recommendations that the Robe, Hamersley and Goldsworthy services be declared, the Council reached the following conclusions on each of the criteria.

a) That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service

The Council is satisfied that access to each service for which declaration is sought would promote a material increase in competition in both the market for haulage services for iron ore on the particular railway and the market for iron ore tenements in the Pilbara.

b) That it would be uneconomical for anyone to develop another facility to provide the service

The Council is satisfied that this criterion is met, as the duplication of the facilities would increase costs, waste economic resources and generally be contrary to Australia's national interest.

c) That the facility is of national significance, having regard to:

- i The size of the facility or
- ii The importance of the facility to constitutional trade or commerce or
- iii The importance of the facility to the national economy

No parties argued that these railways are not of national significance. This, along with the railways' size and critical role in a major export industry, satisfies the Council that criterion (c) is met.

d) That access to the service can be provided without undue risk to human health or safety

The Council is unaware of any evidence to suggest that regulation of rail safety would be made less effective as a result of access.

e) That access to the service is not already the subject of an effective access regime

The Western Australian Rail Access Regime does not apply to any of the railways covered in these applications. The various State Agreement Acts have not been certified as effective access regimes under Part IIIA and in any event these Acts do not deal with access to rail track services.

The Council also considered the proposed Pilbara Rail Haulage Regime but again this relates to haulage, not rail track access, and the form and timing of any regime remains uncertain.

The Council therefore accepts that the services are not already the subject of an effective access regime.

f) That access (or increased access) to the service would not be contrary to the public interest

The Council considers the benefits of declaration include the promotion of competition in the Pilbara rail haulage and tenements markets and the economic and environmental benefits of avoiding unnecessary duplication of rail infrastructure.

The Council has considered the arguments put forward by BHP Billiton and Rio Tinto which suggest that declaration would be contrary to the public interest. The Council considers that these arguments are based on improbable scenarios and overly pessimistic assumptions. The Council also notes that the BHP Billiton and Rio Tinto submissions did not take into account the provisions within Part IIIA governing arbitration of access disputes and specific limitations on arbitration determinations by the ACCC. The Council believes these provisions, and the powers of the ACCC, are directly aimed at avoiding the outcomes that Rio Tinto and BHP Billiton claim will result from the declaration of their Pilbara railways.

The Council is therefore satisfied that declaration would not be contrary to the public interest.

All interested parties are invited to make submissions pertaining to the Council's draft recommendations to declare the Robe, Hamersley and Goldsworthy services. Submissions close on Monday 21 July 2008, and should be directed to: The Executive Director, National Competition Council, GPO Box 250 Melbourne 3001.

--- ends ---

See also:

- Attached diagram: Process for declaration of a service.
- Attached diagram: Process for arbitration of an access dispute in relation to a declared service.
- A summary of the Council's draft recommendations and the complete draft recommendations, and the applications and submissions from interested parties are available at www.ncc.gov.au

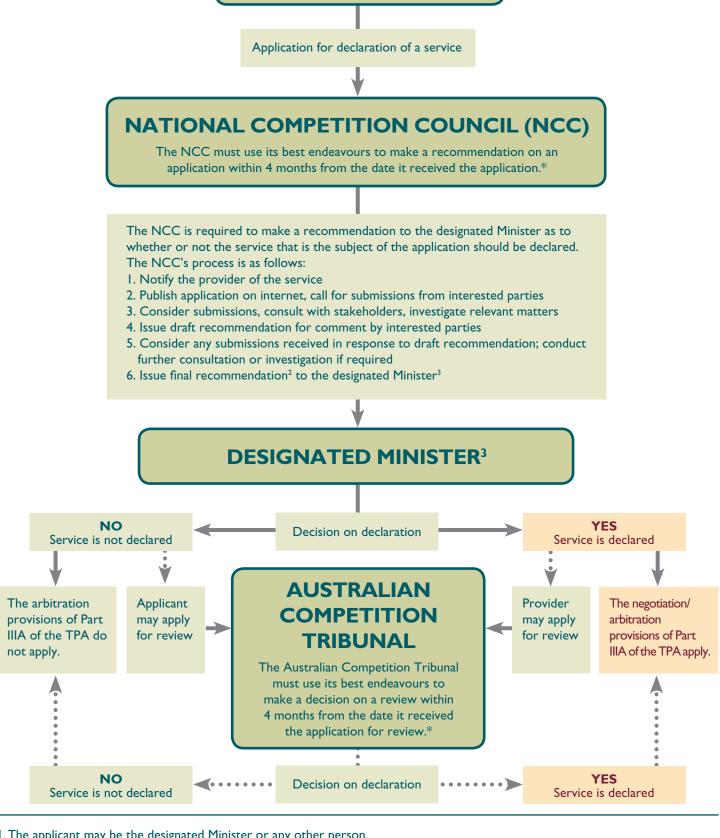
For further information contact:

Royce Communications:

Michael Horkings, Tel: 03 9639 2300 Mobile: 0407 049 648 or Richard Amos, Tel: 03 9639 2300 Mobile: 0418 344 978

Process for Declaration of a Service

APPLICANT¹



- 1. The applicant may be the designated Minister or any other person.
- 2. The final recommendation is made public when the designated Minister issues the decision on declaration
- 3. Where the provider of the service is a State or Territory government body, the "designated Minister" will be the responsible State or Territory minister. In all other cases, the "designated Minister" will be the Federal Treasurer (or a delegate).

^{*} In each case the standard time periods may be extended.

Process for arbitration of an access dispute in relation to a declared service

THIRD PARTY

The Third Party can be any party that seeks access to the service. It does not have to be the same party that applied for declaration of the service.

Third party and Provider attempt to negotiate terms and conditions of access.

Where negotiations fail or access is refused, either party may notify an "access dispute" to the ACCC for arbitration.

PROVIDER

The Provider of the service is the owner or operator of the facility used to provide the service.

AUSTRALIAN COMPETITION & CONSUMER COMMISSION (ACCC)

The ACCC must use its best endeavours to make a final determination within 6 months from the date it received notification of an access dispute.*

ARBITRATION

The ACCC's arbitration process may include:

- I. Notifying relevant parties of the access dispute, and considering applications by interested parties wishing to become parties to the arbitration
- 2. Holding arbitration hearing(s), and taking evidence on oath or affirmation
- 3. Seeking and considering submissions from interested parties
- 4. Summonsing witnesses and/or documents
- 5. Commissioning reports by experts

TERMINATION

The ACCC may terminate its arbitration at any time where:

- the dispute is vexatious or lacks substance
- the party notifying the dispute has not negotiated in good faith;
- access should continue to be governed by an existing contract or access determination



DRAFT DETERMINATION

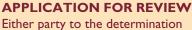
The ACCC must issue a draft determination for comment by the parties to the arbitration.



FINAL DETERMINATION

The ACCC may:

- Determine that the provider is not required to give access
- Require the provider to give access
- Require the third party to accept and pay for access
- Impose terms and conditions of access on the parties; and/or
- Require the provider to extend the facility (but cannot impose the cost of expansion on the provider)



(the Third party or the Provider)
may seek review of the final
determination by the Australian
Competition Tribunal



Ÿ

REVIEW BY THE TRIBUNAL

The Tribunal fully rearbitrates the access dispute.



DETERMINATION

The Tribunal may either affirm or vary the ACCC's determination.

AUSTRALIAN COMPETITION TRIBUNAL

The Australian Competition Tribunal must use its best endeavours to make a decision on a review within 4 months from the date it received the application for review.*



COURT ORDERS

The Federal Court may:

- Affirm the Tribunal's determination
- Set aside or vary the Tribunal's determination
- Remit the matter to the Tribunal to be decided again in accordance with the Court's directions



APPEAL

The Tribunal's determination can be appealed to the Federal Court on a question of law only.