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IDENTIFICATION OF THE RELEVANT SERVICE

Background

1. In its Application for declaration under Part IIIA, FMG sought declaration of a service defined as "use of the facility, being":
 - (a) that part of the Mt Newman Railway Line which runs from a railway siding to be constructed near Mindy Mindy to port facilities at Nelson Point in Port Hedland; and
 - (b) that part of the Goldsworthy Line which runs from the junction with the Mt Newman Railway Line to port facilities at Finucane Island in Port Hedland.
2. The Council subsequently determined that the service provided by Mt Newman Railway Line and the Goldsworthy Railway Line should, for the purposes of the Application, be considered as two separate services.
3. The Council further determined that the service provided by the Goldsworthy Line could not be declared under Part IIIA because it is not a "service" within the meaning of s44B of the TPA.
4. It has been acknowledged by the Council that "FMG seeks access to the Mt Newman Service for the primary purpose of raling ore from its Mindy Mindy project to its proposed port facilities at Port Hedland".¹ This acknowledgement is consistent with FMG's public announcements, court documents and submissions to the Council. FMG has also clearly indicated that it does not propose to use port facilities at Nelson Point for the shipping of ore from either its Chichester Ranges project or its Mindy Mindy project.
5. FMG's proposed port facilities are to be located at Anderson Point, near Finucane Island, and cannot be reached by use of the Mt Newman Railway Line alone. FMG has stated on multiple occasions that it requires use of the Goldsworthy Railway Line to ship ore to its proposed facilities at Anderson Point.
6. None of the above issues were mentioned or dealt with by the Council in its Draft Recommendation.
7. Further, notwithstanding the above issues, it appears from the Draft Recommendation that the Council proposes to recommend declaration of the service being the use of the Mt Newman Railway Line including that part of the Railway Line that runs from the junction with the Goldsworthy Railway Line to Nelson Point at Port Hedland.
8. BHPBIO submits that the Council's Draft Recommendation is seriously deficient in this regard. The following discussion examines this question in more detail.

¹ NCC Draft Recommendation, para 4.8.

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The Council can (and must) reconsider the scope of the Service

9. Whilst the Council does not have jurisdiction to redefine, expand, contract or otherwise interfere with the description of the "particular service" which is the subject of a written application, it is for the Council to interpret the definition and scope of a service which is the subject of a written application.²
10. Properly interpreted, the service which is sought to be declared in this case by FMG is use of that part of the Mt Newman Line that runs from FMG's proposed rail siding near Mindy Mindy to the point where the Mt Newman Line intersects the Mt Goldsworthy Line (**Goldsworthy Junction**), being approximately 28 km from Nelson Point.
11. To interpret the scope of the Mt Newman Service so as to terminate at Goldsworthy Junction rather than Nelson Point is consistent with:
 - (a) FMG's stated purpose for using the Service, which is to transport ore mined at the Mindy Mindy mine to its proposed port facilities at Anderson Point;³
 - (b) the manner in which FMG states that it intends to use the Service, namely to run trains carrying the iron ore mined at Mindy Mindy:⁴
 - (i) from a rail siding near the Mindy Mindy mine along the Mt Newman Line to the Goldsworthy Junction;
 - (ii) from that intersection along the Mt Goldsworthy Line to where the Goldsworthy line intersects FMG's proposed unloading loop;
 - (iii) off the Mt Goldsworthy Line and onto FMG's unloading loop;
 - (iv) around FMG's unloading loop to a car dumper where the ore would be unloaded onto conveyor belts which transport the ore to the ship loading facilities at Anderson Point; and
 - (v) (returning) along the Mt Goldsworthy and Mt Newman Lines to Mindy Mindy; and
 - (c) FMG's own submissions state that:

"the only economically viable method of exporting iron ore from Mindy Mindy is by using the Goldsworthy Rail Facility Service, together with the Mt Newman Rail Facility Service, to transport ore to port facilities at Port Hedland".⁵

² *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [112].

³ Affidavit of Julian Tapp sworn 29 August 2005, paras 17, 25, 88 and 94-96.

⁴ Affidavit of Julian Tapp sworn 29 August 2005, paras 98-99; Affidavit of Julian Tapp sworn 22 December 2005, paras 73-74.

⁵ Points of Claim filed by FMG in *Fortescue Metals Group Limited v The National Competition Council & Anor* – Federal Court proceeding WAD39 of 2005 at para 24.

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12. Conversely, to interpret the Service as extending to use of all of the Mt Newman Line to Nelson Point, rather than only to Goldsworthy Junction, would involve the Council ignoring the following facts:
- (a) FMG has said that it does not require access to any of BHPBIO's bulk handling facilities located at Nelson Point;⁶
 - (b) BHPBIO's facilities at Nelson Point cannot accommodate FMG's ore;⁷
 - (c) FMG considers that there is no land at the end of the Mt Newman Line at Nelson Point that would accommodate its facilities;⁸
 - (d) FMG intends to construct its own facilities at its proposed port at Anderson Point including all equipment and machinery necessary to unload its trains;⁹ and
 - (e) the physical layout and congestion at Nelson Point is such that it would not be feasible for FMG to transport any ore unloaded at Nelson Point from Nelson Point to Anderson Point or any other available port.
13. Accordingly, the Service for which declaration is sought in this case, correctly interpreted, should not include use of any part of the Mt Newman Railway Line between the Goldsworthy Junction and Nelson Point.

Ramifications for satisfaction of necessary criteria

14. Before it can recommend declaration of a service, Part IIIA requires that the Council must be satisfied that the criteria in section 44G(2) are met.
15. The Council does not appear to have given any consideration as to how FMG is to transport its ore from the Goldsworthy Junction to its proposed port facilities at Anderson Point. There are only four means by which this could be achieved:
- (a) by a finding of the Federal Court that the service provided by the Goldsworthy Line is a service for the purposes of Part IIIA, and then subsequent declaration of that service. For the present however, it is not open to the Council to take this possibility into account as it would pre-empt the Federal Court's consideration of the matter and would be inconsistent with the Council's own determination of the issue;

⁶ FMG Submission in Response to the Council's Draft Recommendation dated 5 December 2005, para 7.28.

⁷ Points of Claim filed by FMG in *Fortescue Metals Group Limited v The National Competition Council & Anor* – Federal Court proceeding WAD39 of 2005 at para 21.

⁸ Points of Claim filed by FMG in *Fortescue Metals Group Limited v National Competition Council and Anor* – WAD 39 of 2005 at para 21.

⁹ Affidavit of Julian Tapp sworn 22 December 2005, paras 67-71 (paras 92-96 of 29 August affidavit).

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- (b) by FMG constructing its own line to transport ore from the Goldsworthy Junction to its proposed port facilities at Anderson Point. If this option were to be taken into account by the Council, the Council would need to assess and consider:
- (i) the costs of this line in its assessment of the costs of developing another facility to provide the Service and the benefits of access, and of the viability of FMG's proposed Mindy Mindy project; and
 - (ii) the feasibility of construction of the line, in light of the limited spare land available in the vicinity and the environmental issues associated with the location of further rail lines close to the township of South Hedland.

The Council has not undertaken any such assessment or consideration in its Draft Recommendation;

- (c) by FMG seeking a rail haulage service to transport iron ore on the Goldsworthy Railway Line¹⁰ from the Goldsworthy Junction to Anderson Point. This option is unlikely to be feasible both practically and economically given the significant interference it will cause to BHPBIO's operations and the practicalities of adopting this course. Particularly:
- (i) under RGP3, the Goldsworthy Railway Line will have increased traffic from BHPBIO iron ore mines and any additional FMG ore traffic would introduce further significant constraints and interference; and
 - (ii) the option would add significant complexity and variability to the operation of the railway lines as it would require FMG to transport its iron ore on its own trains on the Mt Newman Line, and then to unload and transfer that ore to BHPBIO trains at the Goldsworthy Junction and for the BHPBIO trains to carry the ore to Anderson Point;
- (d) by FMG using its own proposed rail line, to be constructed for its Chichester Ranges project, to transport ore from its projects to its proposed port facilities at Anderson Point. However, the Council's finding in its Draft Recommendation was that "it would be premature to describe the FMG line unequivocally "committed" or its cost sunk".¹¹ That is, it seems that the Council cannot be satisfied that the FMG Line will be built.

16. In the absence of there being a clear proposal for the rail transportation of iron ore from Goldsworthy Junction to Anderson Point, BHPBIO submits that the Council cannot be satisfied that access to the Service (on the Mt Newman Line) would promote competition in any market, that it would be uneconomic for anyone to develop another facility to provide the service or that access would not be contrary to the public interest.

¹⁰ Pursuant to the Schedule 1 of *Iron Ore (Mount Goldsworthy) Agreement Act 1964* or otherwise.

¹¹ NCC Draft Recommendation, para 6.55