

**FORTESCUE METALS GROUP LIMITED
RESPONSE
DATED 6 MAY 2005**

**IN RESPONSE TO THE ISSUES PAPER RELEASED
BY THE NATIONAL COMPETITION COUNCIL
DATED 11 MARCH 2005**



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**RESPONSE BY FORTESCUE METALS GROUP LIMITED TO THE ISSUES PAPER RELEASED BY
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1. INTRODUCTION

1.1 Fortescue Metals Group Limited ("**Fortescue**") refers to:

- (1) Fortescue's Application under Part IIIA of the Trade Practices Act for Declaration of the service provided by BHP Billiton Iron Ore Pty Ltd dated 11 June 2004 ("**Declaration Application**");
- (2) Fortescue's Supplementary Submissions dated 8 July 2004 ("**Supplementary Submissions**"); and
- (3) Fortescue's Submissions dated 4 October 2004 ("**Preliminary Issues Paper Submissions**").

1.2 Fortescue also refers to the Issues Paper dated 11 March 2005 issued by the National Competition Council ("**NCC**"). In its Issues Paper, the NCC sought comments on what it considered to be the principal issues in considering Fortescue's Declaration Application for declaration of the Service (described as the use of that part of the Mount Newman railway line specified in Fortescue's Declaration Application).

1.3 Specifically, the NCC sought comments on the following questions:

What is an appropriate duration for declaration of the Mount Newman Railway Service and why?

Are there any reasonably foreseeable factors which may materially affect the NCC's assessment of Fortescue's Application for declaration? What is the time frame for the realization of such factors?

1.4 The NCC cannot recommend that a service be declared unless it believes all the criteria set out in section 44G(2) of the Trade Practices Act have been satisfied. The NCC must also consider whether it would be economical for anyone to develop another facility that could provide part of the services, section 44F(4) of the Trade Practices Act.

1.5 Fortescue's Declaration Application and Supplementary Submissions sought to address each of the criteria set out in section 44G(2) of the Trade Practices Act in submitting that the services provided by the Facility should be Declared. In this response to the NCC's Issues Paper (the "**Response**"), Fortescue seeks to address some of the issues that have subsequently been raised by the NCC, BHP Billiton Iron Ore Pty Ltd ("**BHPBIO**") and others.

1.6 Fortescue also notes that the NCC in its document "Preliminary Matters: Statement of Reasons (November 2004)" considered that the Mount Newman railway line is a service to which Part IIIA of the Trade Practices Act applies, but that the Goldsworthy railway line is not a service to which Part IIIA of the Trade Practices Act applies. Nevertheless, Fortescue's submissions as contained in this Response as they address both the Mount Newman railway line and the Goldsworthy railway line are equally applicable to the Mount Newman railway line when considered in isolation.

1.7 Unless the context otherwise requires or unless otherwise stated, words or phrases used or defined in the Declaration Application, the Supplementary Submissions or Preliminary Issues Paper Submissions are similarly used in this Response to the NCC's Issues Paper.

2. SECTION 44G(2) OF THE TRADE PRACTICES ACT

2.1 As noted in paragraph 1.4 of this Response and at paragraph 2.2 of the NCC's Issues Paper, the NCC cannot recommend that a service be declared unless the NCC is satisfied of the following matters set out in section 44G(2) of the Trade Practices Act:

- (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; and*
- (f) *that access (or increased access) to the service would not be contrary to the public interest.*

2.2 Fortescue now seeks to address those criteria set out in section 44G(2) of the Trade Practices Act, as those criteria are addressed in the NCC's Issues Paper.

3. SECTION 44G(2)(B) – THAT IT WOULD BE UNECONOMICAL FOR ANYONE TO DEVELOP ANOTHER FACILITY

3.1 Criterion (b) [section 44G(2)(b) of the Trade Practices Act] tests whether a facility exhibits natural monopoly characteristics. It is concerned with the nature of the facility, rather than the effect on competition [paragraph 5.2 of the Issues Paper]. The facility is a natural monopoly if the facility can serve the range of reasonably foreseeable demand for the services provided by the facility at less cost than that of two or more facilities [paragraph 5.3 of the Issues Paper].

3.2 Fortescue does not intend to address the NCC's questions on current and reasonably foreseeable levels of demand for the services provided by the Mount Newman Railway Line over and above what it has already stated in its Declaration Application and Supplementary Submissions. Fortescue further contends that demand levels are immaterial to the issue of whether it would be uneconomical for anyone to develop another facility. That is, regardless of the current and reasonably foreseeable levels of demand, it would still be cheaper to increase the capacity of the Facility than it is to construct a new standalone facility.

3.3 Similarly, Fortescue does not intend to address the NCC's questions on current and spare capacity of the Facility over and above what it has already stated in its Declaration Application and Supplementary Submissions. Fortescue also submits that regardless of the current capacity levels of the Facility, it remains cheaper to increase the capacity of the Facility than it is to construct a new standalone facility.

- 3.4 There is potential to expand the capacity of the Facility to accommodate demand from the Pilbara Iron Ore Pty Ltd (of which Fortescue is a 50% joint venture shareholder and manager of the joint venture) and its Mindy Mindy Iron Ore Project (the "**Mindy Mindy Mine**"). The expansion would be achieved by constructing passing loops at incremental stages along the Facility. Eventually, as the number of passing loops increased (to increase capacity), the passing loops would be joined to effectively form a dual track, running parallel to the existing Facility. This potential expansion of capacity can be achieved at a lower cost than designing and constructing a new standalone facility stretching over the entire length of the existing Facility.
- 3.5 Accordingly, the potential to expand capacity of the Facility (at a lower cost than a new standalone facility) remains true for any level of current or projected capacity up until the point where the Facility has been effectively converted to dual track along its entire length. At this point, the Facility would have the capacity to meet all foreseeable market demand for the service, with capacity in the vicinity of 400 - 600 million tonnes per annum.
- 3.6 The Facility alone can meet the reasonably foreseeable demand for the service more cheaply than two or more facilities for the following reasons:
- (1) increasing the capacity of the Facility (by the amount required to accommodate the output from the Mindy Mindy Mine) would involve considerably lower capital expenditure than building a new and complete standalone facility; and
 - (2) operating costs associated with utilising the existing Facility (as opposed to operating costs of a new purpose built facility) would also be considerably lower due to the economies of scale related to maintenance and other associated operations.
- 3.7 Fortescue has signed the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* ("**Infrastructure State Agreement**") with the State of Western Australia. The Infrastructure State Agreement governs the development of a railway line from the Chichester Ranges to Fortescue's proposed port facilities at Port Hedland. It has been ratified by both houses of Parliament and comes into effect on the signing of the *Iron Ore (FMG Chichester Pty Ltd) Agreement*.
- 3.8 However, even with a ratified Infrastructure State Agreement in force, Fortescue does not currently intend to build a spur from the proposed line (constructed under the Infrastructure State Agreement) to connect with its Mindy Mindy Mine as Fortescue cannot commercially justify the cost of building such a spur. That is, the limited volume of iron ore expected to be produced from the Mindy Mindy Mine does not commercially justify the cost of building that spur. Instead, the Mindy Mindy Mine would only be commercially feasible if Fortescue had access to the Facility. In other words, development of Fortescue's Mindy Mindy Mine is currently wholly dependent on access to the Facility being granted through its Declaration Application.
- 3.9 Regardless of the outcome of its Declaration Application, Fortescue needs to build a railway from the Christmas Creek area in the Chichester Ranges to a point in close proximity to the Mount Newman railway line. If Fortescue is successful in its efforts to have the Facility declared, it is entirely possible it will not be necessary for Fortescue to build those sections of its proposed railway line that will run in close proximity to the Facility. Instead, Fortescue would seek to use the Facility.
- 3.10 Fortescue acknowledges that the construction of its railway, if built in its entirety from Christmas Creek to Port Hedland, will in effect duplicate that part of the Facility where the two facilities run closely parallel. However, Fortescue's willingness to effectively duplicate part of the Facility does not demonstrate the absence of a natural monopoly for the following reasons:

- (1) a natural monopoly is concerned with the nature or character of the facility (not the effect on competition). The existence of another railway (regardless of whether it runs alongside part of the Facility or not) does nothing to affect the nature or character of the existing Facility;
- (2) the Facility (in its current form) can serve the range of reasonably foreseeable demand for the services provided by the facility at less cost than that of two or more facilities; and
- (3) it would be socially and economically preferable for the existing Facility to be shared rather than wastefully duplicating it.

3.11 It is therefore Fortescue's contention that the Facility is a natural monopoly facility and as such criterion (b) is satisfied.

4. SECTION 44G(2)(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

4.1 Criterion (a) [section 44G(2)(a) of the Trade Practices Act] is designed to limit access regulation to circumstances where access is likely to enhance the environment for competition in a dependent market(s) [*Paragraph 6.1 of Issues Paper*]. This in turn depends on the existing service provider having a requisite degree of market power in the dependent market because it is the exercise of such market power to adversely affect competition that the granting of access is expected to overcome.

4.2 At paragraph 6.11 of the Issues Paper, the NCC defined “market power” as “the ability to profitably and sustainably raise prices above proper economic costs, or behave in a market in some other manner for a sustained period, without being constrained by current or potential competitors”. With respect, this is an unduly restrictive definition as it fails to encompass the ability of a monopoly service provider to behave in a manner which is designed to prevent the development of markets through the refusal of access to required infrastructure (on reasonable terms or any terms whatsoever).

4.3 Thus, for those markets located upstream of a bottleneck facility, it is not the fact that the owner of the infrastructure exercises market power by raising prices in those dependent markets. Rather, it is the fact that the owner prevents such markets from developing by refusing to make the infrastructure available on terms that would enable such markets to develop.

4.4 Consequently, it is not merely iron ore, but all mineral resources located within the Pilbara region of Western Australia which are failing to attract entrepreneurial activity aimed at developing those resources. This is because the inability to obtain use of the infrastructure required to transport such resources to export facilities renders the resources stranded and therefore effectively worthless and incapable of development.

4.5 Fortescue also takes issue with the following statement made by the NCC at *paragraph 6.21 of the Issues Paper*. In that paragraph, NCC stated that:

“For example, declaration may have little effect on the international iron ore commodity market if the significance of any increased production flowing from declaration is minor relative to the market as a whole”.

4.6 Fortescue asserts that enhancing the opportunities and environment for competition in the dependent markets does not require a significant increase in production in relation to the size of the market. It simply requires that any additional production would alter the competitive

environment in a pro-competitive manner. That is, it is not the existence of competitors in the market that exerts competitive pressures so much as the threat posed by both existing and potential competitors. It is 'contestability' rather than the volume of competitors' products that is the key issue here.

- 4.7 Through its control of the Facility, BHPBIO can use its monopoly power over the existing infrastructure to prevent its competitors from moving iron ore from the Central and Eastern Pilbara to export facilities at Port Hedland. Consequently, BHPBIO can prevent those competitors from offering new contracts for iron ore from this area of the Pilbara to steel mills elsewhere in the world.
- 4.8 It is the absence of the ability for steel mills to obtain new iron ore contracts from any company other than BHPBIO and Rio Tinto (if that ore is to be sourced from the Pilbara as the largest and cheapest source of iron ore for the steel mills of Asia) that results in BHPBIO and Rio Tinto being able to exert considerable market power over the Asian steel mills. This duopoly is able to ensure that the price at which iron ore is exported to Asia remains profitably and sustainably above proper economic costs.
- 4.9 The recent 71.5% increase in the price of globally traded seaborne iron ore with a comparatively smaller increase in the associated costs of production suggests that the market power enjoyed by the three companies (CVRD, BHPBIO and Rio Tinto) that control almost 80% of this market is very substantial. Such a huge increase is prima facie evidence of the current lack of threat posed by competitors due to the high barriers to entry. The principle barrier to entry being the high cost and natural monopoly characteristics of the infrastructure required to get iron ore to export terminals so that it can be sold into the export markets.
- 4.10 The structure of the iron ore market is such that long-term contracts (ranging from three years up to as much as twenty years) are entered into on the basis of agreed volumes of product with the price paid being determined by reference to a benchmark price which is adjusted once a year. Therefore, the number of new contracts negotiated in any one year is the sum of:
- (1) additional new contracts over and above those already existing;
 - (2) the number of contracts that have expired in any one year and are renewed; and
 - (3) the number of contracts that have expired in any one year, are not renewed, but entered into with a different third party.
- 4.11 Therefore, when considering the size of the market into which any new production of iron ore would go, the relevant comparator is not the size of the globally traded seaborne iron ore market but rather, the size of new contracts entered into and number of renewals of existing contracts each year.
- 4.12 Moreover, given the economics of steel mills, there is often a considerable cost involved in changing to iron ore inputs of a different composition. Therefore, in the absence of a compelling reason to switch to a different supplier, most long term contracts are renewed at the end of their term rather than being competed with alternate suppliers. In this environment, a new entrant predominantly competes for additional new contracts, as set out in paragraph 4.10(1), rather than for already existing supply contracts (which are generally renewals of long term contracts). However, it is the market for new contracts which is one of the principal factors in determining the overall price. Under these circumstances, even relatively small new competitors can have a significant impact at the margin where new contracts are being negotiated.
- 4.13 Given the huge economies of scale associated with the operation of railways (both capital costs and operating costs), in the absence of gaining a competitive benefit in a dependent market, an

economically rational owner and operator of a railway would encourage third party use of its railway in order to share costs and therefore improve the efficiency of its operations and drive down its costs.

- 4.14 The fact that BHPBIO has denied third parties access to its facilities can only reasonably be explained by the fact that it derives other benefits from denying access. That is, benefits that outweigh the economies of scale associated with additional usage of the existing infrastructure facilities. In the case of BHPBIO, the only plausible benefit it can derive from denying access to third parties is an increase in its market power in the global seaborne iron ore market.
- 4.15 BHPBIO has suggested that although an access seeker could run its rolling stock on the Mount Newman railway line without using BHPBIO's intellectual property (which BHPBIO claims has improved the operation and efficiency of its railways), the access seeker would not "*achieve the efficiencies or gain the benefits which BHPBIO has achieved through the use of this technology*". BHPBIO has also suggested it should not be required to disclose this intellectual property to an entity which is likely to be a competitor.
- 4.16 It is clear that Part IIIA of the Trade Practices Act does not require a service provider to make available its intellectual property. The NCC has raised the question as to whether the inability to access the technology involved may constitute such a significant barrier to entry that competition would not be promoted in a dependent market even if the Service was declared.
- 4.17 Although it is accepted that BHPBIO has significantly and consistently improved the efficiency of its operations since it first commenced operations, the technology involved is for the most part, not proprietary to BHPBIO but is available from BHPBIO's component suppliers. For example, the Micro Alloyed Class-C wheels used by BHPBIO which have been responsible for the increase in wheel life, are freely available in the market.
- 4.18 In addition, a significant element of BHPBIO's intellectual property is applied to improve the productivity of its mixed fleet of ore car types. In contrast, Fortescue will have a single type of ore car incorporating the latest technology. Accordingly, BHPBIO's intellectual property which applies to its mixed fleet of ore car types has no application to Fortescue's newer ore cars.
- 4.19 Finally, even to the extent that BHPBIO owns proprietary technology and intellectual property which is not publicly available or able to be easily reverse engineered, any inefficiency of Fortescue's operations (by reason of not obtaining access to BHPBIO's intellectual property) would not pose a significant barrier to entry. This is because the cost implications would be insignificant compared to the overall cost of mining the iron ore and transporting it to export facilities.
- 4.20 To reiterate a point made above, it is important to understand that the development of the Mindy Mindy Mine is currently wholly reliant on accessing the Facility. If the Service is not declared and access is not made available, any resources at the Mindy Mindy Mine will effectively be stranded and Fortescue cannot justify further expenditure on developing the resource. Even if the Chichester Range to Port Hedland railway is built by Fortescue in its entirety, it is not commercially viable, based on production alone from the Mindy Mindy Mine, to construct a spur from that railway to the Mindy Mindy Mine site.
- 4.21 The existing regulatory arrangements (including access obligations under the *Iron Ore (Mount Newman) Agreement* and the *Rail Transport Agreement*) although applying to the Mount Newman Joint Venture Participants, have no restraining effect on the ability of the Mount Newman Joint Venture Participants to exercise market power. This is because access obligations under those agreements are easily avoided by manipulating capacity constraints and rendering any access as being capable of characterization as unduly interfering with or

prejudicing existing operations.

5. SECTION 44G(2)(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

5.1 Criterion (c) [section 44G(2)(c) of the Trade Practices Act] is a test of materiality that relates to the facility itself rather than the services provided by it. A facility is required to satisfy only one of three determinants in order to satisfy criterion (c).

5.2 Fortescue refers to its Declaration Application and Supplementary Submissions and reiterates its firm belief that the facility satisfies all three of the determinants and therefore unequivocally satisfies criterion (c).

6. SECTION 44G(2)(D) - THAT ACCESS TO THE SERVICE CAN BE PROVIDED WITHOUT UNDUE RISK TO HUMAN HEALTH OR SAFETY

6.1 Criterion (d) [section 44G(2)(d) of the Trade Practices Act] simply rules out a declaration where increased access could pose a legitimate risk to human health or safety.

6.2 Fortescue refers to its Declaration Application and Supplementary Submissions and states again that it does not believe there are any health or safety matters that could not be dealt with through the terms and conditions of access, as has been demonstrated by the facts.

7. SECTION 44G(2)(E) - THAT ACCESS TO THE SERVICE IS NOT ALREADY TO THE SUBJECT OF AN EFFECTIVE ACCESS REGIME

7.1 Criterion (e) [section 44G(2)(e) of the Trade Practices Act] prevents services already covered by an effective access regime from being declared.

7.2 Fortescue maintains that there is no effective access regime in place and in particular that neither the *Iron Ore (Mount Newman) Agreement*, nor its amendment through the *Rail Transport Agreement*, provides an enforceable right of access.

8. SECTION 44G(2)(F) - THAT ACCESS (OR INCREASED ACCESS) TO THE SERVICE WOULD NOT BE CONTRARY TO THE PUBLIC INTEREST

8.1 Criterion (f) [section 44G(2)(f) of the Trade Practices Act] requires that access to the Service is not contrary to the public interest. The NCC raised the issue of BHPBIO's claim that unless BHPBIO were to pass on its intellectual property, third party access would increase the risk of rail damage and rail accidents, lead to a significant reduction in the life of the rail tracks and lead to a significant increase in operating and maintenance costs for BHPBIO [*paragraph 10.6 of the Issues Paper*]. Further, this might not be capable of redress through the terms and conditions of access.

8.2 Fortescue submits it would defeat the intention of Part IIIA of the Trade Practices Act if the owner of infrastructure could require an access user to implement certain procedures, but then subsequently refuse access to the information required to implement those procedures on the grounds that the information contained intellectual property that it should not be compelled to divulge to an access seeker.

8.3 The key issue should be whether access to the contained intellectual property would confer a competitive advantage to the access seeker or whether the information required is specific to the

Service and is not transferable to other operations.

8.4 BHPBIO has listed eight areas where it claimed intellectual property was imbedded in its processes. BHPBIO claimed it should not be required to pass on this intellectual property to its competitors, but that if it did not do so, it would result in substantially increased maintenance and replacement costs to BHPBIO [*Paragraph 4.1 Ridley 2004*]. Each of these areas will be considered in turn:

- (1) **Control and Signalling Systems.** Fortescue understands all of BHPBIO's railway operations are controlled by the Centralised Traffic Control system. This technology, both hardware and software, was originally provided by Westinghouse and is freely available in the market. The technology was subsequently configured and enhanced exclusively by R C Wright & Associates for BHPBIO. This intellectual property is specific to BHPBIO's operations and there is no need for the customised intellectual property to be made available to third parties. All that would be required of an access seeker would be that their systems communicate the required information to a central controller and that they act on information received in response. That is, there would be no need for intellectual property to be divulged to the access seeker.
- (2) **Wheel and Rail Interaction.** All that is required is that the access seeker ensures that the wheels are:
 - (a) made to required specifications, namely Micro-Alloyed Class C of appropriate hardness; and
 - (b) machined to a particular profile.

Since the wheel profile is specific to the rail profile (which BHPBIO does not need to divulge to the access seeker), which is in turn unique to BHPBIO's railway, no useful intellectual information would be passed to the access seeker other than a rail profile that optimised the performance of wagons on BHPBIO's railway system.

BHPBIO claimed that without the adoption of BHPBIO's rail management procedures, there would be increased risk of rail track damage and rail accidents, significant reduction in the life of the rail tracks and a significant increase in operating costs and maintenance costs for BHPBIO. BHPBIO further claimed that in order to employ these procedures, not only would it effectively have to disclose the ideal profile, it would also have to video image the ore car wheels of the access seeker and perform the machining of the wheels.

Fortescue refutes the claim that BHPBIO would have to both reveal the ideal profile as well as monitor the profiles and undertake the necessary machining. Instead, Fortescue believes that because the profile would be specific to BHPBIO's system, the ideal profile could be revealed without giving any useful intellectual property to Fortescue. Fortescue could be required to video image its own wheels and to machine them to an agreed profile. Alternatively, if BHPBIO insisted on carrying out the video monitoring and machining, it would not be necessary to reveal the ideal profile to an access seeker at all. BHPBIO also claimed that if the wheels were of a different composition, specification and standard to those used by BHPBIO, then the ideal profile might be different. This problem could easily be resolved by requiring Fortescue to adopt the same specification wheels as used by BHPBIO.

- (3) **Management of Long Trains.** Fortescue contends that the management of long trains is not relevant to Fortescue (or indeed most other access seekers) as they are unlikely to run long trains in the same way as BHPBIO.

- (4) **Vehicle Stability Monitoring.** Fortescue submits that BHPBIO does not need to divulge its research and development findings on the issue of vehicle stability monitoring. It simply has to require that constant contact sidebearers be fitted to the access seekers' rolling stock.
- (5) **Track and Ore Car Monitoring.** The issues related to train breakage are a function of the fact that BHPBIO runs long trains. Fortescue does not propose to run long trains. Accordingly, the breakage issue is not significant. Further, BHPBIO could require Fortescue to use instrumented ore cars for the purpose of monitoring the track without having to divulge any of its intellectual property.
- (6) **Automatic Train Protection System.** Fortescue understands that BHPBIO's Automatic Train Protection System was originally provided by General Electric Transportation Systems. The fact that it was reconfigured in a manner that customized it into a system specific to BHPBIO does not mean that it embodies intellectual information that would give a competitive advantage to a competitor if divulged. This is entirely a safety related issue. Fortescue is able to purchase its own Automatic Train Protection System and would expect BHPBIO to make available whatever information was required to ensure that Fortescue's trains were running as safely as possible whilst on BHPBIO's track.
- (7) **Wheel Impact Monitoring.** All that is required is that BHPBIO uses its in track monitoring system to identify wheels on equipment used by Fortescue and notifies Fortescue that the wheels need to be replaced or repaired. There is no transfer of intellectual property involved in this process.
- (8) **Hot Box and Hot Wheel Detectors.** The hardware for hot box and hot wheel detectors, (like for the Automatic Train Protection System) was developed by General Electric Transportation Systems with the software being adapted for BHPBIO's facilities. Again, BHPBIO does not need to provide Fortescue or any other access seeker with the Hot Wheel Detectors or the Hot Box Detectors or any related intellectual property. All that is required is for BHPBIO to pass information about overheating wheels or axle boxes to Fortescue so that Fortescue is able to take remedial action.

7.5 As a result, Fortescue submits that there are no grounds on which to suppose that access to the Facility would be contrary to the public interest.

9. RESIDUAL DISCRETION

9.1 The NCC has residual discretion not to recommend declaration if it believes that the application for declaration has not been made in good faith [section 44F(3) of the Trade Practices Act]. Rio Tinto Iron Ore previously questioned whether Fortescue's willingness to construct an alternate railway line is inconsistent with its Declaration Application and therefore constituted grounds for believing that the Declaration Application was not in good faith.

9.2 As Fortescue has already made clear, the development of the Mindy Mindy Mine is wholly dependent on gaining access to the Facility. Even if Fortescue's railway from Christmas Creek to Port Hedland is built in its entirety, a spur from that railway line to the Mindy Mindy Mine cannot be commercially justified. Accordingly, Fortescue's application is made entirely in good faith and its willingness to construct an alternate railway line is not insistent with its Declaration Application.

9.3 The NCC is also required under section 44F(4) of the Trade Practices Act to consider whether it would be economical for anyone to develop another facility that could provide part of the service.

9.4 The definition of economical is the same as applies to criterion (b). That is, it should be considered in the context of social rather than private costs. Under this definition, it is clear that it is not economical for anyone to develop another facility that could provide part of the service.

10. DURATION

10.1 The NCC is required to include an expiry date if a recommendation is made to declare the Facility. The determination of an appropriate duration represents a balance between the certainty required and the potential for circumstances to change in a manner that would alter the declaration decision.

10.2 Fortescue believes it would be appropriate for the NCC to recommend a declaration period of 20 years in order to give certainty to any investment at the Mindy Mindy Mine. Moreover, Fortescue believes it would be in the public interest for the Facility to be declared in order to encourage entrepreneurial activity targeting resources in the Pilbara, quite independently of the project at the Mindy Mindy Mine.

11. SUMMARY

11.1 Fortescue believes that all six criteria listed in section 44G(2) of the Trade Practices Act are satisfied in respect of Fortescue's Declaration Application. There are no grounds for the NCC to exercise any residual discretion and it should quickly recommend that the Service be Declared for a period of 20 years.



ANDREW FORREST
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