

## ANNEXURE 14

### CRITERION (E)

#### ACCESS TO THE SERVICE IS ALREADY THE SUBJECT OF AN EFFECTIVE ACCESS REGIME

##### BACKGROUND

1. Section 44G(2)(e) of the TPA provides that the Council cannot recommend that a service be declared unless it is satisfied that access to the service is not already the subject of an effective access regime.
2. Section 44G(3) provides that in deciding whether an access regime established by a State or Territory that is a party to the *Competition Principles Agreement* (CPA) is an effective access regime, the Council must apply the relevant principles set out in the CPA but must not, subject to section 44DA, consider any other matters.
3. Section 44DA provides that the Council and Minister are to apply the individual relevant principles set out in the CPA as guidelines in deciding whether there is an effective access regime. An effective access regime may contain additional matters that are not inconsistent with CPA principles.
4. Clause 6 of the CPA sets out the "individual relevant principles" which are conveniently categorised by the Council<sup>1</sup> into 5 broad requirements of the "access regime" in issue, as follows:

| Requirement                                | Relevant Principles                               |
|--|---|
| Coverage of services                       | 6(3), 6(4)(d)                                     |
| Treatment of interstate issues             | 6(2), 6(4)(p)                                     |
| Negotiation framework                      | 6(4)(a) – (c), (e), (f), (g) – (i), (m), (n), (o) |
| Dispute resolution                         | 6(4)(a) – (c), (g), (h), (i), (j), (k), (l), (o)  |
| Appropriate terms and conditions of access | 6(4)(a) – (c), (e), (f), (i), (k), (n)            |

##### THE ACCESS REGIME

###### Mt Newman State Agreement and RTA

5. The State Government of WA has established an "access regime" in relation to an iron ore "rail carriage service" under an agreement scheduled to the *Iron Ore (Mount Newman) Agreement Act 1964 (Mt Newman State Agreement)*, which has subsequently been

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<sup>1</sup>NCC Guide, Part C, para 3.8.

expanded by the *Railway Transport Agreement 1987 (RTA)*. Copies of the Mt Newman State Agreement and the RTA are included in the **Supporting Documents**.

6. The *Iron Ore (Mount Newman) Agreement Act 1964* provides for the approval of the Mt Newman State Agreement (and subsequent variations). The obligations on the "company" (now the Mt Newman Participants) include those set out in clause 9(2)(a), which provides:

"(2) Throughout the continuance of this Agreement the Company shall:

- a) operate its railway in a safe and proper manner and where and **to the extent that it can do so without unduly prejudicing or interfering with its operations hereunder** allow crossing places for roads stock and other railways and transport the passengers and carry the freight of the State and of third parties on the railway subject to and in accordance with by-laws (which shall include provision for reasonable charges) from time to time to be made altered and repealed as provided in sub-clause (3) of this clause and subject thereto or if no such by-laws are made or in force then upon reasonable terms and at reasonable charges (having regard to the cost of the railway to the Company) PROVIDED THAT in relation to its use of the said railway the Company shall not be deemed to be a common carrier at common law or otherwise" (emphasis added);

7. In January 1987, the State Government of WA and the then Mount Newman Participants entered into the RTA. The RTA was negotiated and agreed between them, at the request of the State, so as to develop and expand upon the requirements on the Mt Newman Participants under paragraph 9(2)(a) of the Mt Newman State Agreement, in relation to the carriage of iron ore products of third parties.

8. The operative provisions of the RTA provide:

"2.

- a) Notwithstanding the provisions of clause 9(2)(a) of the Mount Newman Agreement the provisions of the Schedule hereto and the principles set forth therein shall apply to the carriage of iron ore products of third parties over the Mount Newman railway system.
- b) Where the Mount Newman Participants are operating a mine producing iron ore (other than a mine operated pursuant to the Mount Newman Agreement) under an agreement with the State, the Minister may agree that in respect of those operations the Mount Newman Participants shall not be third parties for the purposes of the Schedule hereto and may approve those operations for the purpose of Clause 20 of the Schedule hereto.

3. All freight goods or products of a third party other than iron ore products shall be carried over the Mount Newman railway system pursuant to the provisions of clause 9(2)(a) of the Mount Newman Agreement."

9. The Schedule to the RTA contains 34 clauses which set out, in short, a "negotiate/arbitrate" model for determining the basis on which an iron ore "rail carriage service" is to be provided to "third parties" by the Mount Newman Participants.

## Hope Downs Negotiations and WA Litigation

10. The Mt Newman Participants and HDMS have engaged in discussions and negotiations for the provision of a rail carriage service for iron ore produced out of the Hope Downs mine or mines to be developed.

**CONFIDENTIAL Annexure 6** sets out a more detailed chronology and description of the discussions and negotiations between the parties.

11. HDMS and the promoters of the Hope Downs project have not been refused the provision of a rail carriage service under the RTA by the Mt Newman Participants. Importantly:
- (a) the Mt Newman Participants have engaged constructively with HDMS since 1997 in relation to providing a rail carriage service under the RTA;
  - (b) the Mt Newman Participants have offered detailed terms on which a rail carriage service would be supplied by them;
  - (c) at no point has HDMS sought to invoke the dispute resolution process under the RTA, either prior or subsequent to the WA Supreme Court litigation;
  - (d) the WA Supreme Court litigation has confirmed the entitlement of third party promoters of iron ore mines to negotiate and agree upon the provision of a third party rail carriage service on the Mt Newman Line, once their plans for mining are sufficiently "well advanced" (see below);
  - (e) the threshold requirement of the third party's plans for mining being "well advanced" is required so as to avoid any wasteful application of the obligations under the RTA;
  - (f) since the determination of the WA Supreme Court litigation, HDMS has not sought to acquire a rail carriage service from the Mt Newman Participants.

## FMG's approach under the RTA

12. BHPIO and FMG have exchanged correspondence in relation to the provision by the Mt Newman Participants of a rail carriage service to FMG.
13. It was clear however, at the time of that correspondence, that FMG was not a "third party" as defined in the RTA, and clarified by the WA Court of Appeal. That is, FMG was at that time not sufficiently advanced in its proposals to develop one or more iron ore mines to qualify as a "third party" – the WA Court of Appeal having observed that:

*"... I do not see how the "detailed contractual arrangements" contemplated by cl 2 of the schedule to the Rail Transport Agreement could be established except by a person whose plans for mining were well advanced."*<sup>2</sup>

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<sup>2</sup> Per Templeman J with whom Murray J agreed, *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2003] WASC 259 at para 33.

At the time, FMG had no reserves, or even resources, identified and was very far from the position where its "plans for mining were well advanced".

14. FMG discontinued the correspondence with BHPIO and it has not sought to revisit the possibility of acquiring a "rail carriage service" from the Mt Newman Participants.

### **THE RELEVANT "SERVICE"**

15. A threshold issue is whether it is the particular "service" sought to be declared pursuant to the FMG Application and on which the Council has sought submissions (the **Service**) which is potentially "the subject of an effective access regime".
16. There is something of a distinction between:
  - (a) the provision of an iron ore "rail carriage service" pursuant to the RTA; and
  - (b) the provision of a "service" which is described as the "use of the Facility, being that part of the Mt Newman Railway Line which runs from a rail siding ... near Mindy Mindy in the Pilbara to port facilities at Nelson Point ...".<sup>3</sup>

The latter requires that the access seeker source and arrange for the operation of its own above rail equipment and rolling stock, whereas the former is the provision by the infrastructure owner of a rail transportation service, by use of its own above-rail rolling stock.

17. This distinction does not however disqualify the RTA from being a potentially effective access regime in relation to the Service. This is for the following reasons:
  - (a) it is artificial and overly restrictive to construe the requirement in criterion (e) only so as to apply to the exact "service" sought to be declared as defined (potentially self-servingly) by the access seeker – it is appropriate that the "service" referred to in criterion (e) should include effective substitutes to that precise "service" just as is properly the case in construing the application of criterion (b) under ss44G(2) (see the submissions in relation to criterion (b));
  - (b) the application for declaration of the Mt Newman Line relates, practically, only to the transportation of iron ore in the Pilbara region<sup>4</sup>;
  - (c) there is no demand for railway track services or rail haulage services for the transportation of any bulk commodity material other than iron ore in the Pilbara region<sup>5</sup>.

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<sup>3</sup> FMG Application, para 5.1.

<sup>4</sup> The application for declaration is focussed exclusively on the Service being declared and subsequently used for the purpose of carrying iron ore.

18. The "rail carriage service" to be provided pursuant to the RTA is a practical and effective substitute for the Service. The rail carriage service and the Service (if it is declared) each provide an effective means by which the rail transportation of the iron ore of a third party along the Mt Newman Line to Port Hedland might be acquired by an iron ore miner. From the perspective of the promoters of an iron ore mines in the Pilbara region (being the only likely users of the Service), the two options are direct and effective substitutes for the following reasons:
- (a) The iron ore miner without its own integrated rail system, requires simply a service, which is highly likely to be out-sourced, by which its iron ore will be transported on the Mt Newman Line to Port Hedland – in each case, this will be readily available.
  - (b) In one case, a "bundled" service is available from the operator of the Mt Newman Line, pursuant to the RTA – that is, the "rail carriage service" to be provided by the Mt Newman Participants. In the other case, the iron ore miner, or an intermediary, must aggregate the "bundle". Notwithstanding, the two options are direct substitutes for the iron ore miner. By definition, an iron ore miner will be an economic entity with access to substantial capital resources and with sophisticated organisational and commercial contracting skills.
  - (c) The tariff principles by which a charge for the rail carriage service will be levied pursuant to the RTA will be very close to the costs to the iron ore miner of using the Service and acquiring the services of a contractor to provide rolling stock and rail operation services. In each case, the "third party" or "access seeker" will be required to pay (be it directly, indirectly, or via a per unit charge):
    - (i) the direct operating costs of running the trains in each case;
    - (ii) the rolling stock, track maintenance and other periodic costs involved in running the trains in each case;
    - (iii) the capital costs of rolling stock and additional rail and other infrastructure required to run the trains (being additional traffic on the Mt Newman Line) in each case; and
    - (iv) a return on the capital invested (appropriately optimised and discounted) in the existing infrastructure required to run the trains in each case.

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<sup>5</sup> There is no evidence that other goods or passengers would be transported on the Mt Newman Line if declared – see especially **CONFIDENTIAL Annexure 7** and **Annexure 8** as to the position with other minerals being, or potentially to be, mined in the Pilbara region.

## CPA PRINCIPLES - CLAUSE 6

19. The access regime as established under the RTA otherwise complies with the principles set out in sub-clauses 6(3) and (4) of the CPA. This is particularly the case, given that those principles are to be construed as "guidelines" – see section 44DA(1)(d) of the TPA.

### Clause 6(3)

20. Clause 6.3 provides:

*For a State or Territory regime to conform to the principles set out in this clause, it should:*

- (a) *apply to services provided by means of significant infrastructure facilities where:*
  - (i) *it would not be economically feasible to duplicate the facility;*
  - (ii) *access to the service is necessary in order to permit effective competition in a downstream or upstream market; and*
  - (iii) *the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and*
- (b) *incorporate the principles referred to in subclause (4).*

### *The Council's approach*

21. The Council has recognised that the paragraph 6(3)(a) criteria are similar to the declaration criteria under s44G(2) of the TPA, and as far as possible applies each set of criteria in a consistent manner<sup>6</sup>. In applying clause 6(3), the Council applies the same definitions (for terms such as "service") as it applies in considering declaration applications, and its approach to matters such as market definition is consistent with its approach in declaration matters<sup>7</sup>. However, the Council has noted four distinctions in relation to clause 6(3)(a) and s44G(2).<sup>8</sup>

- (a) Under paragraph 6(3)(a), the term "significant" (in relation to infrastructure facilities) imposes a lower threshold than that imposed by the terms "national significance" in declaration criteria 44(2)(c).
- (b) The Council considers it appropriate to interpret paragraph 6(3)(a)(i) in a manner consistent with declaration criterion 44G(2)(b), despite there being a distinction between the words "duplicate" and "develop" used in each criterion in relation to the economic feasibility of duplication.
- (c) While the s44G(2) declaration criteria include a public interest criterion, the clause 6(3) principles do not, which may reflect that a public interest assessment for certification of a State or Territory access regime is a matter for the jurisdiction.

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<sup>6</sup>NCC Guide, Part C, para 3.8.

<sup>7</sup>NCC Guide, Part C, para 3.11.

<sup>8</sup>NCC Guide, Part C, para 3.12.

- (d) Paragraph 6(3)(a)(iii) raises the issue of appropriateness of safety regulations, while s44G(2)(d) does not. The Council may consider that certification issues arise if safety regulations impose an unnecessary barrier to new entrants to a market.

*Analysis*

22. Submissions in relation to issues along these lines, although expressed differently (as set out in s44G of the TPA), are set out in the Submission. In each case, it is clear that these criteria do not apply, or are not made out, in relation to the "facility" in question, namely the Mt Newman Line.
23. If, however, the Council is properly satisfied that criteria (a), (b), (c) and (d) under s44G(2) are made out, the principles in sub-clause (3) will also be made out.
24. In relation to paragraph 6(3)(a)(iii), the RTA provides that dust suppression and other standards of the Mount Newman Participants for environmental health and safety related matters, as well as the requirements of the "Mt Newman Mining co Limited Railroad Rule Book" (or its successor), shall be observed by the third party where the loading operation affects the work environment of Mount Newman personnel<sup>9</sup>. However, this requirement is reasonable and does not impose an unnecessary barrier to new entrants to the market, so as to cause the Council to reach a different view under clause 6(3)(a)(iii) than that which it may have reached in relation to s44G(2)(d).

**Paragraphs 6(4)(a)-(c) of the CPA**

25. Paragraphs 6(4)(a)-(c) of the CPA provide:

*A State or Territory access regime should incorporate the following principles:*

- (a) *Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
- (b) *Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
- (c) *Any right to negotiate access should provide for an enforcement process.*

*The Council's approach*

26. The Council considers paragraphs 6(4)(a)-(c) together, because jointly they establish a framework for negotiations to proceed in an effective regime<sup>10</sup>. In doing so, the Council assesses whether regulatory arrangements establish an environment in which third parties can enter into effective access negotiations, in particular whether the appropriate guidance is given to market participants to address information and market power asymmetries<sup>11</sup>.

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<sup>9</sup> See clauses 25 and 27 of the Schedule to the RTA.

<sup>10</sup>NCC Guide, Part C, para 3.13.

<sup>11</sup>NCC Guide, Part C, para 3.16.

27. The Council has indicated that addressing information and market power asymmetry is likely to require a process through which third party access seekers can seek information to effectively negotiate terms of access, together with safeguards for the provision of commercially sensitive information<sup>12</sup>. The Council has also suggested that addressing asymmetry is likely to require guidance on appropriate access prices or price boundaries, established through either independent and transparent regulatory processes that provide, for example, for stakeholder consultation or an effective competitive tendering process, subject to oversight by an independent regulatory body.
28. The Council has also identified guidance on other terms and conditions of access<sup>13</sup> and credible enforcement mechanisms<sup>14</sup> as other relevant factors for clauses 6(4)(a)-(c). In relation to guidance on other terms and conditions of access, the Council has identified the following four examples.
- (a) The Council considers that it is inappropriate for an access provider to establish additional safety requirements that impose an unreasonable barrier to access<sup>15</sup>.
  - (b) The Council has noted that independent and transparent negotiation is needed to assure market participants that capacity issues are resolved in a manner that promotes competitive outcomes<sup>16</sup>. The Council has indicated that in rail, train path principles should facilitate efficient use and be competitively neutral to all market participants<sup>17</sup>.
  - (c) The Council has indicated the importance of interoperability issues which relate to the interconnection of discrete geographic networks and the relationship between the provision of an infrastructure service and the use of that service.<sup>18</sup>
  - (d) The Council has indicated that in rail, an effective regime should ensure contracts set performance indicators to establish the service provider's accountability, covering matters such as entry and exit times, track quality and speed restrictions<sup>19</sup>.

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<sup>12</sup>NCC Guide, Part C, para 3.16.

<sup>13</sup>NCC Guide, Part C, para 3.36.

<sup>14</sup>NCC Guide, Part C, para 3.51.

<sup>15</sup>NCC Guide, Part C, para 3.39.

<sup>16</sup>NCC Guide, Part C, para 3.43.

<sup>17</sup>NCC Guide, Part C, para 3.43.

<sup>18</sup>NCC Guide, Part C, para 3.49.

<sup>19</sup>NCC Guide, Part C, para 3.50.



## *Analysis*

29. Paragraphs 6(4)(a)-(c) of the CPA are complied with by the terms of the RTA, both on the plain construction of those paragraphs, and on the extended approach taken by the Council as to their construction, as set out above.
30. The WA Court of Appeal has recognised, by declaration, that the Mt Newman Participants are obliged, on request of a third party under and in accordance with the Mt Newman State Agreement as varied by the RTA, to negotiate and enter into a contract with a third party, to carry the iron ore products produced by the third party operating a mine<sup>20</sup>.
31. Clause 2 of the Schedule to the RTA (so far as relevant) provides for third party access on terms and conditions negotiated between the parties as follows:

"The Mount Newman Participants shall as and when required carry the iron ore products of a third party over the third party railway system in accordance with detailed contractual arrangements, consistent with the provisions of this Schedule and with such additional provisions as the parties may agree, to be negotiated between the Mount Newman Participants and the third party."
32. Clause 3 of the Schedule to the RTA provides machinery for an independent expert to make binding determinations in relation to disputes between the Mt Newman Participants and third parties. This is addressed in submissions in relation to clause 6(4)(g) of the CPA, below.
33. The RTA provides a process through which third parties can request information from the Mt Newman Participants to effectively negotiate terms of access. For instance, information on the operational capacity of the common railway system and the Mt Newman Participants' best estimate of the time when any incremental expansion of the system will be required, can be requested. In addition, the proposed capacity and likely cost thereof (to be verified by detailed studies carried out by independent consultants, if requested, at the cost of the third party)<sup>21</sup> can also be requested. Likewise, a register detailing the components of the common railway system and the ownership, use, age and operational capacity thereof (to be maintained by the Mt Newman Participants on the request and at the cost of the third party)<sup>22</sup> can be requested. There are no specific requirements set out in the RTA as to confidentiality of information provided by the Mt Newman Participants under these obligations, but this does not detract from the utility of the RTA as an effective access regime, from the perspective of an access seeker.
34. The RTA provides guidance on access prices by clearly outlining the basis for calculation of the relevant charges and other costs which are to be paid by a third party for a rail carriage service<sup>23</sup>. Given the infinite number of possibilities as to the nature of the "rail carriage service" which might be requested in any one case (with variables as to geography, tonnage, time etc all unknown at the time of framing the RTA, and dependent upon the

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<sup>20</sup> *Hancock Prospecting Pty Ltd and Ors v BHP Minerals Pty Ltd and Ors* [2003] WASCA 259.

<sup>21</sup> See clause 10 of the Schedule to the RTA.

<sup>22</sup> See clause 11 of the Schedule to the RTA.

<sup>23</sup> For example, see clauses 12-14, 20, 30-34 of the Schedule to the RTA.

emergence of then unknown third parties promoting unknown resources), and the long term duration of the operation of the RTA, no more specific guidance on those costs and other charges could feasibly be outlined in the RTA. For example, no particular "reference tariff" in relation to any one "rail carriage service" was likely to be helpful, given the infinite variety of services that might be sought over time. The nature of the charges provided for under the RTA is further addressed in the submission in relation to clause 6(4)(i) of the CPA, below.

35. The RTA also provides guidance on other terms and conditions of third party access. For instance:
- (a) terms dealing with safety requirements are addressed in this submission in relation to clause 6(3) of the CPA, above;
  - (b) terms dealing with the fair and competitively neutral allocation of capacity among competing users are set out in the Schedule to the RTA; see especially clause 8 (which provides that railway capacity for transport of a third party's base tonnage shall be made available by the Mt Newman Participants for such period as the third party reasonably requires having regard to the estimated life of the third party's mine and the third party's contractual commitments for sales of iron ore products), and clause 23 (which provides that all trains are to be scheduled for all users subject to the same schedule constraints on the Mt Newman line);
  - (c) terms dealing with interoperability and interconnection are set out in clause 16 (requiring the third party rail system to be "designed and installed in accordance with standards and specifications having general application to the Mt Newman railway system"), clause 15 (requiring the third party to provide access and sharing of the third party's infrastructure), and other clauses which deal with interoperability issues such as building third party facilities to accommodate certain train lengths<sup>24</sup>, installation of an in-motion vehicle weighing station conforming with specified requirements and responsibility for payment of reasonable costs incurred where certain facilities and equipment provided by a third party are incompatible with the reasonable requirements of the Mt Newman Participants<sup>25</sup>; and
  - (d) there is a requirement, in relation to more detailed issues of operational efficiency in the provision of a rail carriage service, pursuant to clause 22, that the Mt Newman Participants retain control of the operation and scheduling of trains, subject to the same scheduling constraints applying to all traffic (see clause 23, as referred to above) and the operation of the Mt Newman Line being conducted pursuant to the requirements of the Mt Newman Mining Co Pty Ltd Railroad Rule Book (or its approved successor) (see clause 25).
36. Above all, there is an overriding obligation on the Mt Newman Participants to schedule a third party's trains "at reasonably regular intervals", "so as to meet the third party's transport requirements for base tonnage", and, importantly, "subject to the same schedule

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<sup>24</sup> See clause 17 of the Schedule to the RTA.

<sup>25</sup> See clause 19 of the Schedule to the RTA.

constraints that apply to all other traffic (including other third parties) on the Mt Newman railway system and to force majeure events".<sup>26</sup>

37. The RTA has credible enforcement mechanisms, as addressed in submissions in relation to clause 6(4)(h), below.

### **Paragraph 6(4)(d) of the CPA**

38. Paragraph 6(4)(d) provides:

*Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.*

### *The Council's approach*

39. The Council considers that to ensure periodic assessment occurs, the regime should mandate appropriate review requirements<sup>27</sup>. The Council has noted that this could be satisfied via scheduled reviews.<sup>28</sup>
40. Alternatively, because the Council considers that the review requirements in clause 6(4)(d) relate to the regime's coverage of particular services and the assessment of the scope of coverage against the clause 6(3)(a) criteria, clause 6(4)(d) could be satisfied where, for example, the regime incorporates the clause 6(3)(a) criteria in the making of coverage decisions<sup>29</sup> or includes revocation or review provisions in relation to coverage decisions.

### *Analysis*

41. The RTA provides that railway capacity for transport of a third party's base tonnage shall be made available by the Mt Newman Participants for such period as the third party reasonably requires having regard to the estimated life of the third party's mine and the third party's contractual commitments for sales of iron ore products<sup>30</sup>. However, over that period, the parties may negotiate and agree changed commercial terms on which the rail carriage service is provided, or failing agreement, appoint an expert to determine the outcome. In this sense, there is available to the parties to a rail carriage service arrangement an infinite number of reviews of those arrangements over the life of the third party's mine, its contractual commitments, or otherwise.
42. More broadly however, by entering into the RTA in 1987 with the then Mt Newman Participants (following on from the provisions of clause 9(2) of the Mt Newman State

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<sup>26</sup> See clause 23 of the Schedule to the RTA

<sup>27</sup>NCC Guide, Part C, para 3.56.

<sup>28</sup>NCC Guide, Part C, para 3.56.

<sup>29</sup>NCC Guide, Part C, para 3.57.

<sup>30</sup> See clause 8 of the Schedule to the RTA.

Agreement), the State Government of WA effectively determined that the Mt Newman Line would be "covered" in the sense that the rights of the Mt Newman Participants would be subject to the requirement to carry the iron ore of others. While the RTA itself does not include a detailed provision which "provides for a periodic review of the need for access regulation to apply to a particular service", the State Government of WA has wholly within its power to review, except or revoke (should it decide to do so) application of the RTA to the Mt Newman Line at its discretion.

43. In the context of the long time frames generally applicable in the iron ore mining industry, these are acceptable arrangements for compliance with the principle set out in paragraph 6(4)(d), as a guideline.
44. For example:
- (a) Upon the development of the FMG line and/or the HD Line, the State Government of WA may fundamentally reassess the application of the RTA to the Mt Newman Line in accordance with the principles set out in clause 6.3 of the CPA;
  - (b) Assuming HDMS were to acquire a rail carriage service under the RTA (contrary to its stated intentions), and the FMG Line were constructed, it may be open to either the Mt Newman Participants or HDMS in those circumstances to appoint an expert (failing agreement on the issue) to revisit the cost of capital component in "return on investment" calculations under clause 33 of the Schedule to the RTA, having regard to the "commercial practices" which then prevail in relation to tariffs on the FMG Line.
45. In any event, it is clearly the case that the "rights" of third parties under the RTA are "existing contractual rights and obligations", which ought not to be automatically revoked. It is clear that the terms of the 1987 RTA predate the conclusion of the CPA in 1995. Further, the RTA may be considered to be an extension or amendment of clause 9(2) of the 1964 Mt Newman State Agreement. Either way, the RTA complies with the guideline set out in paragraph 6(4)(d) of the CPA.

#### **Paragraph 6(4)(e) of the CPA**

46. Clause 6(4)(e) provides:

*The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.*

#### *The Council's approach*

47. The Council considers that an access regime may incorporate clause 6(4)(e) either explicitly or through general provisions that have the same effect<sup>31</sup>.

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<sup>31</sup>NCC Guide, Part C, para 3.62.

48. Access regimes considered by the Council have underpinned this principle in various ways, including regulations requiring a facility owner to<sup>32</sup>:
- (a) provide access seekers with written information on spare capacity and indicative access terms and conditions, including sufficient information for access seekers to understand the derivation of tariffs;
  - (b) use all reasonable endeavours to accommodate a person's request for access to spare capacity;
  - (c) respond to access requests and negotiate terms and conditions within a reasonable timeframe; and
  - (d) provide a written explanation as to why a particular request for access cannot be accommodated, including likely prospects for future access.
49. The Council has noted that under certified rail access regimes, rail track operators are required to disclose information relating to track use, timetabling, network congestion management and network priority, in addition to pricing information<sup>33</sup>.

*Analysis*

50. Clause 6(4)(e) is effectively complied with by the terms of the RTA.
51. As outlined in the submissions in relation to clause 6(4)(a)-(c) of the CPA above, clause 2 of the Schedule to the RTA requires that the "Mount Newman Participants shall as and when required carry the iron ore products of a third party railway system in accordance with detailed contractual arrangements...".
52. As outlined in submissions in relation to clause 6(4)(l), the proviso under the RTA that contractual arrangements "do not unduly prejudice or interfere with the operations of the Mount Newman Participants under the Mount Newman Agreement", does not go beyond what is reasonable to protect the interests of the Mt Newman Participants, operating in a workably competitive environment. Importantly, that proviso must not take account of downstream competitive effects in the sale of iron ore – see clause 4(a) of the Schedule to the RTA. Also, once commercial terms are resolved under the RTA (be it by the parties or by resolution of disputes by the appointed expert), the proviso ceases to take effect – see clause 4(b) of the Schedule to the RTA.
53. Clause 8 of the Schedule to the RTA provides that railway capacity for transport of a third party's base tonnage shall be made available by the Mt Newman Participants for such period as the third party reasonably requires having regard to the estimated life of the third party's mine and the third party's contractual commitments for sales of iron ore products.
54. Clause 23 of the Schedule to the RTA provides that trains to carry a third party's iron ore products shall be scheduled at reasonably regular intervals so as to meet the third party's

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<sup>32</sup>NCC Guide, Part C, para 3.63.

<sup>33</sup>NCC Guide, Part C, para 3.68.

transport requirements for base tonnage but shall be subject to the same schedule constraints that apply to all other traffic (including other third parties) on the Mount Newman railway system and to force majeure events.

55. Under clause 24 of the Schedule to the RTA, a third party may from time to time request the Mt Newman Participants to carry iron ore products over and above the base tonnage. If, in the reasonable opinion of the Mt Newman Participants, or ultimately the expert, this can be accommodated within the third party railway system, they are required to carry such extra tonnage on a casual basis at the average cost per tonne which applies to the base tonnage.
56. The RTA further underpins the principle in clause 6(4)(e) by providing a process by which third parties can request information in relation to the operational capacity and components of the common railway system<sup>34</sup>, and outlining in a transparent manner the relevant charges which are to be paid by a third party in each annual period<sup>35</sup>.

#### **Paragraph 6(4)(f) of the CPA**

57. Paragraph 6(4)(f) provides:

*Access to a service for persons seeking access need not be on exactly the same terms and conditions.*

#### *The Council's approach*

58. The Council has noted that while providing for efficient price discrimination, clause 6(4)(f) does not entitle a vertically integrated service provider to price access to the bottleneck facility in a manner designed to unfairly favour its affiliated downstream entity<sup>36</sup>. In such cases, the Council considers whether the access regime contains effective mechanisms to ensure that access pricing charged to the affiliated downstream entity falls within an appropriate range<sup>37</sup>.

#### *Analysis*

59. Clause 6 of the Schedule to the RTA expressly provides that a third party may enter into contractual arrangements with the Mt Newman Participants on terms other than those provided for under the Schedule generally, provided that those arrangements (ie. those outside of the Schedule) must not prejudice any other third party in relation to transportation of its iron ore on the Mt Newman system. This provision clearly accommodates different terms and conditions to prevail for different third parties, provided that no third party is unfairly favoured. It should be noted also that the definition of "third party" includes any person operating a mine which is not a mine operated pursuant to the

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<sup>34</sup> See clauses 10 and 11 of the Schedule to the RTA.

<sup>35</sup> For example, see clauses 30-34 of the Schedule to the RTA.

<sup>36</sup>NCC Guide, Part C, para 3.71.

<sup>37</sup>NCC Guide, Part C, para 3.71.

Mt Newman State Agreement – so as to include subdivisions of BHP Billiton operating new mines.<sup>38</sup>

60. Further, there is no evidence to suggest that the RTA allows a vertically integrated service provider to price provision of a "rail carriage service" in a manner designed to favour its affiliated downstream entity unfairly. The obligations under clauses 30 to 33 of the RTA prevail in relation to all third parties, and reflect actual costs of the service provider in any event. The only permissible departures from the application of those rules must comply with the requirements of clause 6 of the Schedule to the RTA, as referred to above.
61. Hence, the RTA properly complies with the guideline in paragraph 6(4)(f) of the CPA.

### **Paragraph 6(4)(g) of the CPA**

62. Paragraph 6(4)(g) provides:

*Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.*

#### *The Council's approach*

63. The Council considers that to ensure arbitration outcomes are credible and consistent, some or all of the following mechanisms may be necessary<sup>39</sup>:
- (a) ensuring the arbitrator has sufficient resources and expertise to fulfil its duties;
  - (b) vesting the arbitrator with adequate information gathering powers (which is a specific requirement of clause 6(4)(o));
  - (c) binding the arbitrator to observe previous determinations by an independent regulator, thereby ensuring consistency and shifting important skill requirements from the arbitrator to the independent regulator;
  - (d) allowing the arbitrator to seek expert advice from an independent regulator, thus facilitating information flows and a consistent approach across different arbitrations; and
  - (e) vesting the arbitrator with the power to determine process, including confidentiality and timeframe matters.

#### *Analysis*

64. Paragraph 6(4)(g) of the CPA is clearly complied with by the RTA.

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<sup>38</sup> Unless otherwise agreed by the Minister. Note however that the Minister has granted consent to such a mine on only one occasion, in January 1987 in relation to the development of Yandicoogina mine at that time by the Mt Newman Participants.

<sup>39</sup>NCC Guide, Part C, para 3.92.

65. Clause 3 of the Schedule to the RTA provides machinery for an independent expert to make binding determinations in relation to disputes between the Mt Newman Participants and third parties in negotiating the terms and conditions of access, as follows:

"Where the Mount Newman Participants and the third party are unable to reach agreement on any aspect of the detailed contractual arrangements referred to in Clause 2 the same shall be determined by an independent expert, qualified and expert in the areas in dispute, appointed by agreement between them or, in the absence of such agreement, appointed by the President of the Institution of Engineers, Australia upon the written request of either of them, it being the intent that all matters which have not been agreed between the Mount Newman Participants and the third party shall be referred to the expert at the same time. The detailed contractual arrangements shall likewise provide for reference of any dispute between the parties to an independent expert. The decision of the independent expert shall be final and binding on the Mount Newman Participants and the third party."

It is implicit in the above, that the costs of determination are to be borne by the parties equally, or as the expert determines. It is a matter for the expert in each case, to ensure that he or she has sufficient resources to comply with the representations of clause 3.

66. Further, it is likely that the expert may rely on the powers and procedural provisions in relation to commercial arbitrations in Western Australia which are set out in the *Commercial Arbitration Act 1985 (WA)*.

The expert is likely to be considered to be conducting an arbitration, notwithstanding the terms of clause 3 not making express reference to that function. It is the view of the author of *Commercial Arbitration – Law and Practice*<sup>40</sup>, that:

*"No matter how the expert evaluation clause is dressed up, if the person appointed to resolve the issue is required to determine a formulated dispute, he or she wears an arbitrator's hat and is governed by the provisions of the Commercial Arbitration legislation".*

67. This view is supported by case law<sup>41</sup>.

68. Upon application of the *Commercial Arbitration Act*, a detailed framework for the resolution of "disputes" under clause 3 of the Schedule to the RTA would arise:

(a) *Appointment of Arbitrator*

- (i) A presumption for the appointment of a single arbitrator.
- (ii) A presumption that any arbitrator shall be appointed jointly by the parties.
- (iii) A default provision if a person who has the power to appoint an arbitrator fails to do so.
- (iv) Provisions which allow for the appointment of new arbitrators if the current arbitrator dies or otherwise ceases to hold the position.

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<sup>40</sup> MS Jacobs.

<sup>41</sup> See for example: *Isca Construction v Grafton City Council* (1962) 8 LGRA 87 (NSWCA); *Thomas Cook v Commonwealth Banking Co* (1986) 4 BPR 915; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405.



(b) *Conduct of Arbitration Proceedings*

- (i) There is an overriding provision which allows the arbitrator to conduct proceedings in a manner in which the arbitrator thinks fit.
- (ii) Where arbitrators fail to determine matters within a time period agreed, the Act allows for the appointment of an umpire in place of the arbitrator.
- (iii) Subpoenas may be issued by a Court for the purposes of an arbitration.
- (iv) Where parties refuse or fail to attend before the arbitration, the court may, on application of a party to the arbitration require that person to attend before the court, or produce to the court any relevant documents or do the relevant thing.
- (v) Where a party refuses or fails to attend before the arbitrator, the arbitrator may continue the arbitration proceedings.
- (vi) Evidence before the arbitration can be given orally or in writing.
- (vii) The arbitrator in conducting any proceedings is not bound by the rules of evidence.
- (viii) Any determination made by the arbitrator is to be according to the law.
- (ix) The arbitrator can, if the parties agree, determine questions that arise in the course of the proceedings, by reference to considerations of general justice and fairness.
- (x) An arbitrator has the power to make an award for specific performance of any contract in line with the powers of the Supreme Court.
- (xi) The ambit of arbitration proceedings can be extended to capture other disputes between the same parties under the same agreement.
- (xii) The arbitrator has the ability to consolidate proceedings.
- (xiii) The parties can seek the assistance of the arbitrator to act as a mediator.

(c) *Awards and Costs*

- (i) Any award tendered by the arbitrator shall be final and binding.
- (ii) Where an arbitrator makes an award which is not in writing, then upon request by a party within 7 days of the award, the arbitrator must give a written statement of the award and the reasons for making the award.
- (iii) The arbitrator has the ability to include interest in an award. The rate of interest shall be as the arbitrator directs but in any event shall not exceed the rate payable on a judgement debt of the Supreme Court. Interest is not payable on amounts which already include interest.

- (iv) An award of an arbitrator may, by leave of the Court, be enforced in the same manner as a judgement or order of the Court.
  - (v) The arbitrator has the ability to make orders as to costs.
69. This framework complies with paragraph 6(4)(g) of the CPA, at least as a guideline.

### **Paragraph 6(4)(h) of the CPA**

70. Paragraph 6(4)(h) provides:

*The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.*

#### *The Council's approach*

71. The Council has noted that an effective access regime should have credible enforcement arrangements to ensure an arbitrator's decision is binding, and should give effect to the enforcement process through legislative provisions, with appropriate sanctions and remedies for non-compliance<sup>42</sup>. The Council has also indicated that a regime may need to require that an arbitrator's decision be reflected in a contract between the parties within a specified timeframe<sup>43</sup>.
72. The Council considers that while it is unnecessary for an effective regime to include a mechanism for conducting a merits review of an arbitrator's decision, any diminution of existing appeal rights (eg rights to seek judicial review on accounts of bias or breach of natural justice) may offend clause 6(4)(h)<sup>44</sup>.

#### *Analysis*

73. The RTA clearly complies with paragraph 6(4)(h) of the CPA.
74. In *Hancock Prospecting Pty Ltd and Ors v BHP Minerals Pty Ltd and Ors* [2003] WASCA 259, it was unanimously held by the Court of Appeal, that BHP Minerals is obliged, on the request of a third party under and in accordance with the Mt Newman State Agreement as varied by the RTA, to negotiate and enter into a contract with a third party, to carry the iron ore products produced by the third party operating a mine.
75. Where the Mt Newman Participants and the third party are unable to reach agreement on any aspect of the detailed contractual arrangements, clause 3 of the Schedule to the RTA provides that a qualified and independent expert will be appointed to make a final and binding decision in relation to the matter (see submission in relation to paragraph 6(4)(g), above).

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<sup>42</sup>NCC Guide, Part C, para 3.98.

<sup>43</sup>NCC Guide, Part C, para 3.99.

<sup>44</sup>NCC Guide, Part C, para 3.101.

76. Clause 3 then provides that:

*"...it being the intent that all matters which have not been agreed between the Mt Newman Participants and the third party shall be referred to the expert at the same time. The detailed contractual arrangements shall likewise provide for reference of any dispute between the parties to an independent expert. The decision of the independent expert shall be final and binding on the Mt Newman Participants and the third party."*

77. Consequently, the decision of the expert will be effectively embodied in the detailed contractual arrangement which is entered into between the Mt Newman Participants and the third party. Any subsequent breach of the arrangement by either party will be enforceable as a breach of contract, subject to the reference of any dispute between the parties to an independent expert in accordance with the detailed contractual arrangements (as required in clause 3 of the Schedule to the RTA).

78. In addition, see the notes set out above, as to the powers of the expert, as an arbitrator, and the framework to be applied.

#### **Paragraph 6(4)(i) of the CPA**

79. Paragraph 6(4)(i) provides:

*In deciding on the terms and conditions for access, the dispute resolution body should take into account:*

- i) the owner's legitimate business interests and investment in the facility;*
- ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;*
- iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;*
- iv) the interests of all persons holding contracts for use of the facility;*
- v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;*
- vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;*
- vii) the economically efficient operation of the facility; and*
- viii) the benefit to the public from having competitive markets.*

#### *The Council's approach*

80. Paragraph 6(4)(i) requires a balancing of various (sometimes conflicting) criteria in determining the terms and conditions of access<sup>45</sup>. The Council has noted that an access

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<sup>45</sup>NCC Guide, Part C, para 3.137.

regime satisfies paragraph 6(4)(i) if it requires that the determination of access terms and conditions account for the paragraph 6(4)(i) principles in an independent and transparent manner<sup>46</sup>.

81. In balancing the criteria to determine an appropriate range of outcomes, the Council has reference to the underlying objective of Part IIIA, being the improvement of "efficiency through competition by unlocking bottleneck services through access"<sup>47</sup>.
82. The Council considers that its concerns over the regulatory process may be mitigated if the outcomes of the regulatory process lie within an 'appropriate range', taking into account the paragraph 6(4)(i) criteria and the purpose and underlying intent of Part IIIA of the TPA<sup>48</sup>. The Council considers that an appropriate range is the range of outcomes likely to be achieved in an effectively (or workably) competitive market - that is, the terms and conditions of access ensure access seekers are protected from the exercise of monopoly power while also ensuring access providers achieve a return that supports the investment needed to deliver access at an efficient level<sup>49</sup>.
83. The Council considers that assessments of price and cost quantum are a matter for regulatory processes defined within an access regime. The Council has indicated that its scrutiny of pricing thus tends to be restricted to<sup>50</sup>:
  - (a) whether price/revenue and underpinning cost principles in the regime reflect accepted methodologies; and
  - (b) whether mechanisms are in place to ensure pricing outcomes reflect these principles over time.
84. As an example of acceptable access pricing, the Council refers to pricing methods in the New South Wales, Western Australian and Northern Territory/South Australian rail access regimes, where parties may commercially negotiate prices within a band approved by an independent regulatory process<sup>51</sup>.
85. In addition to price, paragraph 6(4)(i) covers all other terms and conditions of access<sup>52</sup>. The Council has indicated that the issue of whether safety requirements act as a barrier to entry, as well as terms and conditions relating to track capacity allocation, timetabling, track entry

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<sup>46</sup>NCC Guide, Part C, para 3.107.

<sup>47</sup>NCC Guide, Part C, paras 3.146, 3.149.

<sup>48</sup>NCC Guide, Part C, para 3.111.

<sup>49</sup>NCC Guide, Part C, paras 3.111, 3.137-3.151.

<sup>50</sup>NCC Guide, Part C, paras 3.108 and 3.152 – 3.162.

<sup>51</sup>NCC Guide, Part C, para 3.165.

<sup>52</sup>NCC Guide, Part C, para 3.177.

and exit times, track quality and speed restrictions, are all significant terms and conditions to which paragraph 6(4)(i) applies<sup>53</sup>.

86. Where a regime does not restrict the regulator or arbitrator in its application of paragraph 6(4)(i), the Council does not consider how the regime interprets factors for the purposes of paragraph 6(4)(i). Such interpretation is at the discretion for the regulator and/or arbitrator<sup>54</sup>.
87. Where the access regime requires the regulator/arbitrator, in determining the terms and conditions of access, to consider factors instead of or in addition to the clause 6(4)(i) criteria, the Council has indicated that it needs to assess whether these factors are consistent with and cover all the criteria in clause 6(4)(i). The Council has noted that this assessment requires it to interpret each of the clause 6(4)(i) factors<sup>55</sup>.
88. The Council has noted that the criteria can be grouped as follows<sup>56</sup>:
- (a) criteria (i), (iv) and (v), which account for the interests of the facility owner and existing facility users;
  - (b) criteria (ii), (iii) and (vi), which account for the costs of providing access (such costs must be necessary and must not reflect gold plating or other unnecessary measures); and
  - (c) criteria (vii) and (viii), which expressly account for efficiency objectives and the benefits of competitive markets.

*Criteria (i), (iv) and (v)*

89. The Council considers that criterion (i) requires the actual price paid and invested in a facility by a facility owner be taken into account in determining the terms and conditions of access (including reference tariffs), provided such acquisition or investment took place in a legitimate manner (that is, without contravention of the law)<sup>57</sup>.
90. The Council has noted that there is significant overlap between criteria (iv) and (v)<sup>58</sup>. The Council considers that criterion (v) requires that the actual value of contractual obligations be taken into account even if it includes monopoly returns<sup>59</sup>.

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<sup>53</sup>NCC Guide, Part C, para 3.178.

<sup>54</sup>NCC Guide, Part C, para 3.113.

<sup>55</sup>NCC Guide, Part C, paras 3.114 and 3.115–3.136.

<sup>56</sup>NCC Guide, Part C, para 3.147.

<sup>57</sup>NCC Guide, Part C, para 3.119.

<sup>58</sup>NCC Guide, Part C, para 3.121.

<sup>59</sup>NCC Guide, Part C, para 3.123.

*Criteria (ii), (iii) and (vi)*

91. The Council considers that the "costs" to be taken into account in criterion (ii) are the actual costs to the owner of providing access, and do not include those incurred by overcapitalisation, those unnecessarily incurred to provide access or those based on an inappropriate attribution of common costs<sup>60</sup>. Additionally, the Council has noted that lost monopoly rents as a result of access and increased competition cannot be taken into account under criterion (ii) in determining the terms and conditions of access<sup>61</sup>.
92. The Council has interpreted "economic value" in criterion (iii) to mean "the present value of future revenues less the present value of future costs"<sup>62</sup>. The potential for inclusion of inappropriate costs in the determination of economic value under criterion (iii) may arise, for example, where the access seeker does not have sufficient information to determine the additional investment that the facility owner is required to make.
93. For the purposes of criterion (vi), the Council considers that only those costs that are required or needed to achieve the safe and reliable operation of the facility should be taken into account. The Council has noted that overcapitalisation ("gold plating"), the inappropriate attribution of common costs or other unnecessary expenditure should not be considered under criterion (vi).

*Criteria (vii) and (viii)*

94. The Council considers that criterion (vii) requires consideration of the operation of the facility in an economically efficient manner as the term is generally understood by economists<sup>63</sup>. The Council has also noted that criterion (vii) may be inconsistent with, and needs to be balanced against, the legitimate business interests of the owner under criterion (i)<sup>64</sup>.
95. The Council considers that criterion (viii) requires a consideration of the public benefit (in terms of efficiency gain) from having a workably competitive market (that is, one in which no firm has a substantial degree of market power in the longer term)<sup>65</sup>.

*Analysis*

96. The RTA does not explicitly require the independent expert referred to in clause 3 of the Schedule to the RTA, to take into account the clause 6(4)(i) principles in deciding the terms and conditions of access. Nonetheless, interpreting the 6(4)(i) principles as

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<sup>60</sup>NCC Guide, Part C, para 3.133.

<sup>61</sup>NCC Guide, Part C, para 3.134.

<sup>62</sup>NCC Guide, Part C, para 3.135.

<sup>63</sup> NCC Guide, Part C, para 3.128.

<sup>64</sup> NCC Guide, Part C, para 3.128.

<sup>65</sup> NCC Guide, Part C, para 3.128.

guidelines (pursuant to section 44DA(1)(d) of the TPA), the RTA complies with clause 6(4)(i).

97. As recognised in section 44DA(2) of the TPA, an effective access regime may contain additional matters that are not inconsistent with CPA principles.
98. The RTA provides general principles which the independent expert must follow in deciding the terms and conditions of access. These principles are described below.
99. Pursuant to clause 3 of the Schedule to the RTA, the independent expert is required to make a final and binding determination as to any aspect of the detailed contractual arrangements referred to in clause 2, on which the Mt Newman Participants and the third party are unable to agree. Clause 2 refers to "detailed contractual arrangements, consistent with the provisions of this Schedule and with such additional provisions as the parties may agree, to be negotiated between the Mount Newman Participants and the third party", with any such "additional provisions" to be in accordance with the terms of clause 6.
100. Clause 4 provides that the detailed contractual arrangements referred to in clause 2 must be structured so as not to "unduly prejudice or interfere with the operations of the Mount Newman Participants under the Mount Newman Agreement".
101. Clause 6 provides that whilst the Mt Newman Participants and a third party are entitled to agree upon and enter into detailed contractual arrangements which are at variance with the provisions of the Schedule to the RTA, such arrangements must not prejudice the operation of the provisions of the Schedule in relation any other third party with respect to the transport of its iron ore products on the Mt Newman railway system.
102. The effect of these general clauses is that unless the parties have otherwise agreed (and such agreement does not prejudice other third parties in the manner prohibited in clause 6), the terms and conditions of access decided by the independent expert must be consistent with the provisions of the Schedule to the RTA, and must not unduly prejudice the Mt Newman Participants.
103. The RTA provides detailed guidance to the expert on the factors required to be taken into account by him or her under paragraph 6.4(i) of the CPA:
  - (a) As to criterion (i), the RTA requires reference to the actual "investment" made by the Mt Newman Participants (clause 33), the operating, capital and other costs to be incurred by the Mt Newman Participants (clauses 30 and 31) and the distance over which third party iron ore is to be carried (clause 32). More generally, it requires regard to be had to whether the rail carriage service will unduly prejudice or interfere with the operations of the Mt Newman Participants; subject to important provisos set out in clause 4, which exclude those business interests which might be considered to be "illegitimate" (namely, competitive effects in downstream iron ore sales).
  - (b) As to criterion (ii), the provision of clauses 30, 31, 32 and 33 require regard to be had to the costs to the owners of providing the service. Those costs must be the actual and direct costs of operation, "which are significant and readily discernable" (clause 1), "efficient and cost effective" levels of maintenance capital (clause 1) and calculation of the return on capital component shall have "proper regard to

generally accepted commercial practices and should include provision ... to exclude the value of any facilities and equipment which have been replaced or superseded other than in the course of routine repairs and maintenance" (clause 33). Clauses 12, 13, 14 and 19 of the Schedule to the RTA require consideration of the "costs of extending the facility", with further provisions in clauses 20 and 29 dealing with further extensions or expansions of the Mt Newman Line. Lost sales in downstream markets are not to be accounted for – see clause 4.

- (c) As to criterion (iii), clauses 12, 13 and 14 of the Schedule to the RTA clearly require for proper economic accounting (net of tax effects) as between the parties, for the contributions to be made by third parties to additional investments in the common railway system, as and when they are required.
  - (d) As to criteria (iv) and (v), the interests of all parties holding contracts for rail carriage services must be properly balanced by the combined requirements of clauses 6, 13, 20 and 29 of the Schedule of the RTA. No one third party may enjoy terms which "prejudice" another third party (clause 6); third parties must make reasonable contributions to enhance the "efficiency, cost effectiveness and general operation of the common railway system" and the independent expert is to determine the appropriate contribution, absent agreement, in accordance with those principles (clause 13); and clauses 20 and 29 prevail in relation to contributions towards further capacity required of third parties where either the Mt Newman Participants or new third parties take up or require further capacity. These last two provisions particularly, serve to ensure that over-investment in the common railway system is avoided or not taken into account for any third party.
  - (e) As to criterion (vi), only those costs that are required for the safe and reliable operation of the common rail system and the provision of the rail carriage service may be accounted to the third party, pursuant to the requirements of clauses 30, 31, 32 and 33 (as to the calculation of those costs), and clauses 23 and 25 as to scheduling and service operations. These requirements for symmetry as to service levels between the service provided to a third party and the service provided by the Mt Newman Participants to themselves will prevent or deter any "gold-plating".
  - (f) As to criteria (vii) and (viii), the expert is required to take into account the efficient operation and provision of the rail carriage service and the common railway system, by virtue of the provisions of the RTA dealing with the calculation of costs to the third party and the symmetric service levels to be provided by the Mt Newman Participants to third parties and to themselves – as to which, see references above. As to the regard to be had to the benefit of competitive markets, the expert may not have regard to lost sales of iron ore in downstream markets (see clause 4), and must determine issues in accordance with the fair and competitively neutral rules set out in the RTA generally.
104. In short, the factors which an independent expert under the RTA is required to take into account when making its decision with respect to terms and conditions of access under the RTA, are consistent with and cover the criteria in clause 6(4)(i), applying the principles in clause 6(4)(i) as guidelines.



### **Paragraph 6(4)(j) of the CPA**

105. Paragraph 6(4)(j) provides:

*The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:*

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;*
- (ii) the owner's legitimate business interests in the facility being protected; and*
- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.*

#### *The Council's approach*

106. While the wording of clause 6(4)(j) refers to extensions only, the Council considers that it is appropriate to also apply the clause 6(4)(j) principles to expansions<sup>66</sup>.

#### *Analysis*

107. The RTA complies with clause 6(4)(j) of the CPA.

108. Clause 12 of the Schedule to the RTA sets out a framework in relation to the provision and ownership of, and payment for, additional facilities and equipment which are "reasonably required" (and not otherwise) for the purpose of transporting a third party's iron ore products over the third party railway system. Clauses 12, 13 and 14 provide for an allocation of where costs properly should fall, taking into account the owner's legitimate interests as well as the interests of the third party, and for those costs to be accounted for as between the parties in a tax-neutral way.

109. Further, any extension or expansion must be done in a way which is consistent with the existing technical, operational and safety requirements of the Mt Newman Line – see clauses 16, 17, 18 and 19 of the Schedule to the RTA.

### **Paragraph 6(4)(k) of the CPA**

110. Paragraph 6(4)(k) provides:

*If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.*

#### *The Council's approach*

111. The Council has been reluctant to interpret this clause in a way that would compromise the certainty of contractual arrangements<sup>67</sup>. The Council has suggested that an appropriate way

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<sup>66</sup>NCC Guide, Part C, paras 3.184 and 3.185.

<sup>67</sup>NCC Guide, Part C, para 3.187.

in which to address a material change of circumstances may be for the parties to identify in the contract any factors that would warrant the contract being reopened in the future<sup>68</sup>. The Council has also recognised that an access regime could provide for parties to use an arbitrator to resolve disputes over what constitutes a material change in circumstances<sup>69</sup>.

*Analysis*

112. The RTA does not specifically provide for a party to apply for a revocation or modification of the access arrangement where there has been a material change in circumstances. This is however, quite consistent with the Council's concern that the requirements of this paragraph of clause 6(4) should not compromise the certainty of, what are in this case, very long term contractual arrangements. Particularly, bearing in mind the need for certainty of contractual arrangements, the RTA effectively complies with paragraph 6(4)(k).
113. Mechanisms are provided for under the RTA to deal with the situation where the capacity demands of parties change over time.
- (a) As discussed in submissions in relation to paragraph 6(4)(e) of the CPA, above, clause 24 of the Schedule to the RTA, provides a procedure whereby a third party may from time to time request (and if certain circumstances are met require) the Mt Newman Participants to carry iron ore products over and above the base tonnage.
  - (b) Clause 9 of the Schedule to the RTA provides that any increases in base tonnage shall be treated in accordance with the Schedule, and the provision of such increase shall be the subject of a further detailed contractual arrangement pursuant to the Schedule.
  - (c) Clause 20 deals with the situation where the Mt Newman Participants require further capacity in the common railway system which is not available because of use by a third party (see submission in relation to clause 6(4)(l) of the CPA, below).
  - (d) Clause 29 provides for access and cost sharing in the event additional third parties require access to the common railway system (see submission in relation to clause 6(4)(l) of the CPA, below).
114. Mechanisms are provided for under the RTA to deal with the situation where a party ceases operations.

Where a third party ceases permanently to require carriage of its iron ore products over the common railway system, clause 28 of the Schedule to the RTA provides for a mechanism dealing with the transfer of ownership by the Mt Newman Participants of all movable facilities and equipment funded solely but not owned by the third party (or alternatively payment for value thereof), and that the third party shall continue to be entitled to access to the common railway system on reasonable terms and conditions consistent with the conditions in the Schedule.

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<sup>68</sup>NCC Guide, Part C, para 3.188.

<sup>69</sup>NCC Guide, Part C, para 3.189.

115. Mechanisms are provided for under the RTA for the allocation of costs and charges in relation to changing circumstances.
- (a) Clause 13 provides for the allocation of costs incurred in the enhancement of facilities reasonably required to improve efficiency, cost effectiveness and general operation of the common railway system.
  - (b) Clause 33 provides that charges to third parties in respect of the transport of their iron ore products over the common railway system, are to be adjusted from time to time to exclude the value of any facilities and equipment which have been replaced or superseded other than in the course of routine repairs (see submission in relation to clause 6(4)(i) of the CPA, above).
  - (c) In addition, it may be assumed as discussed in the submissions in relation to paragraph 6(4)(d), above, that the State Government of WA has wholly within its power to review, except or revoke (should it decide to do so) application of the RTA to the Mt Newman Line at its discretion.
116. In the context of the long time frames generally applicable in the iron ore mining industry, and the vital need for contractual certainty over those time frames, the arrangements outlined above effectively comply with the principle set out in paragraph 6(4)(k), as a guideline.

#### **Paragraph 6(4)(l) of the CPA**

117. Paragraph 6(4)(l) provides:

*The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.*

#### *The Council's approach*

118. The Council considers that while this clause does not require an access regime to allow a dispute resolution body to impede existing rights, where the dispute resolution body can do this, it must also be empowered to consider and, if appropriate, determine compensation<sup>70</sup>.

#### *Analysis*

119. The RTA complies with paragraph 6(4)(l) of the CPA.
120. As detailed in submissions in relation to clause 6(4)(a)-(c) of the CPA above, clause 20 of the Schedule to the RTA operates so that the expert must require a third party to pay for the provision of new capacity on the common railway system where the Mt Newman Participants require further capacity which is not available "because of the use by a third party" of that system. In this way, the existing rights of the Mt Newman Participants to the use of the capacity of the common railway system are preserved. As between subsequent

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<sup>70</sup>NCC Guide, Part C, para 3.190.

third parties, then, the terms of clause 29 of the Schedule to the RTA provide for access and contributions to the costs of replacement of capacity on the common railway system in proportion to their respective base tonnages.

121. These provisions operate to ensure that neither an agreement with a third party, nor a determination by an expert, may provide for a third party to impede existing rights to capacity use on the common railway system, without considering and determining how those rights are to be preserved by the installation of further capacity for use by the holder of those existing rights – that is to say, how the holder of the existing rights may be properly compensated in relation to them.

### **Paragraph 6(4)(m) of the CPA**

122. Paragraph 6(4)(m) provides:

*The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.*

#### *The Council's approach*

123. The Council considers that an access regime may incorporate this clause explicitly or contain general provisions that have the same effect<sup>71</sup>.
124. The Council considers that in the case of vertically integrated infrastructure service providers, access may be hindered in circumstances where the service provider unfairly provides favourable terms of access to its affiliated entity<sup>72</sup>. For example, the Council has indicated that a vertically integrated rail track operator that provides track priority and the most favourable track use timetabling to its own above-track operator may effectively hinder access to the rail track by other above-track operators.

#### *Analysis*

125. There is no evidence to suggest that the Mt Newman Participants or any other user of the service under the RTA would, or would be able to, engage in conduct for the purpose of hindering access to that service by another person.
126. Any third party (as defined pursuant to the declaration of the WA Court of Appeal), may seek to appoint an expert under clause 3 of the Schedule to the RTA in relation to "any aspect of the detailed contractual arrangements" between them, immediately upon an issue emerging. This is the primary facility available to third parties to prevent conduct which might "hinder access" to the rail carriage service.
127. Although clause 22 of the Schedule to the RTA provides that the Mt Newman Participants are responsible for the control (including scheduling of trains), operation and maintenance of the third party railway system, and of such other parts of the third party's railway

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<sup>71</sup>NCC Guide, Part C, para 3.193.

<sup>72</sup>NCC Guide, Part C, para 3.194.

facilities and equipment as may be agreed, there is provision for safeguards in the Schedule to the RTA to ensure access of parties is not hindered.

128. Clause 8 provides that railway capacity for the transport of a third party's base tonnage shall be made available by the Mt Newman Participants for such period as the third party reasonably requires having regard to the estimated life of the third party's mine and the third party's contractual commitments for sales of iron ore products.
129. As set out in the submissions in relation to clause 6(4)(a)-(c) of the CPA, above, clauses 23 and 25 of the Schedule to the RTA provide for the symmetric application of the operational rules and scheduling of trains as between trains carrying the iron ore of third parties and those carrying the iron ore of the Mt Newman Participants.
130. For these reasons, the provisions of the RTA effectively comply with the principle outlined in paragraph 6(4)(m).

#### **Paragraph 6(4)(n) of the CPA**

131. Paragraph 6(4)(n) provides:

*Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.*

#### *The Council's approach*

132. The Council considers that to satisfy clause 6(4)(n), an effective access regime should include provisions that require a facility owner at least<sup>73</sup>:
  - (a) to maintain a separate set of accounts for each service that is the subject of an access regime;
  - (b) to maintain a separate consolidated set of accounts for all of the activities undertaken by the facility owner; and
  - (c) to allocate any costs that are shared across multiple services.
133. The Council has observed that more rigorous ring fencing arrangements may be required in industries with high levels of vertical integration, where a facility owner operates, or has interests in, the same markets as those in which third party access seekers participate<sup>74</sup>. The Council has noted that such arrangements should include measures<sup>75</sup>:
  - (a) to segregate access-related functions from other functions;

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<sup>73</sup>NCC Guide, Part C, para 3.197.

<sup>74</sup>NCC Guide, Part C, para 3.198.

<sup>75</sup>NCC Guide, Part C, para 3.199.

- (b) to protect confidential information disclosed by an access seeker to the facility owner from improper use and disclosure to affiliated bodies; and
- (c) to establish staffing arrangements between the facility owner and affiliated bodies that avoid conflicts of interest.

134. The Council has also observed that where vertical integration issues arise, ring fencing provisions may not be sufficient to assure market participants that the service provider will not discriminate against them<sup>76</sup>. In such circumstances, the Council has noted that competitive neutrality provisions may also be required<sup>77</sup>.

*Analysis*

135. Issues arising under paragraph 6(4)(n) of the CPA are addressed in submissions in relation to paragraph 6(4)(o), below.

**Paragraph 6(4)(o) of the CPA**

136. Paragraph 6(4)(o) provides:

*The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.*

*The Council's approach*

137. The Council considers that an effective access regime should provide the dispute resolution body and other relevant bodies (for example regulators and appeals bodies), with the right to inspect all financial documents pertaining to the service<sup>78</sup>.

*Analysis*

138. The principles in paragraphs 6(4)(n) and (o) in relation to separate accounting arrangements and the provision of information to a dispute resolution body, are not expressly required by the RTA.

139. However, in practice, pursuant to clauses 30, 31, 32 and 33 of the RTA, the Mt Newman Participants will inevitably be required in any detailed contractual arrangements struck with the third party, or determined by an independent expert, to keep clear and accurate accounts of the costs and charges and make them available to the independent expert where appropriate, so as to demonstrate compliance with those paragraphs in any dispute before an independent expert under clause 3 of the Schedule to the RTA.

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<sup>76</sup>NCC Guide, Part C, para 3.200.

<sup>77</sup>NCC Guide, Part C, para 3.200.

<sup>78</sup>NCC Guide, Part C, para 3.203.

140. Accordingly, the requirements of paragraphs 6(4)(o) and (n) are complied with by virtue of the necessary implications of other requirements on the Mt Newman Participants under the RTA, and in the manner of those requirements being guidelines only.

### **Paragraphs 6(2) and 6(4)(p) of the CPA**

141. Clause 6(2) provides:

*The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:*

- (a) *the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or*
- (b) *substantial difficulties arise from the facility being situated in more than one jurisdiction.*

142. Clause 6(4)(p) provides:

*Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.*

#### *The Council's approach*

143. The Council considers that clause 6(2) issues must be considered in regard to a facility that crosses a State border, and a facility that is wholly located within a jurisdiction but part of a wider interstate network<sup>79</sup>.
144. The Council considers that clause 6(4)(p) issues will arise in the context of a service located in more than one jurisdiction, or where multiple access regimes apply to a service located within a particular jurisdiction<sup>80</sup>.

#### *Analysis*

145. The issues raised in clauses 6(2) and 6(4)(p) are not applicable in the present case as:
- (a) the RTA has no operation beyond the Mt Newman Railway line, which is confined wholly within Western Australia; and
  - (b) no other State or Territory access regime or other rules applies to the Mt Newman railway line.

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<sup>79</sup>NCC Guide, Part C, para 3.206.

<sup>80</sup>NCC Guide, Part C, para 3.212.

## CONCLUSIONS

146. The RTA is operating, pursuant to the declaration of the WA Court of Appeal, to provide a useful and practical mechanism for the provision of a rail carriage service to potential operators of iron ore mines in the Pilbara region.
147. The rail carriage service provided for under the RTA is a close, available and effective substitute to the Service for promoters of iron ore mines in the Pilbara.
148. The RTA provides for the terms and conditions on which that rail carriage service is to be provided to be fair as between the Mt Newman Participants and third parties, to be symmetric in relation to the service levels to be provided to third parties and to the Mt Newman Participants, and to disregard the impacts of the provision of the service on sales of iron ore in downstream markets.
149. The RTA provides for the provision of a service (being a close and effective substitute for the Service) in relation to which there is an "effective access regime", as required under the terms of Part IIIA of the TPA and each of the relevant criteria set out in clause 6 of the CPA, for the reasons set out above.
150. The Mt Newman Participants have not refused to deal with any properly qualified "third party" pursuant to the RTA.
151. No prospective third party has sought to appoint an expert pursuant to clause 3 of the Schedule to the RTA – a process which is readily available to any third party in the event that it considers that the Mt Newman Participants are hindering or failing properly to agree upon settled terms for the provision of a rail carriage service. In those circumstances, there is no evidence that the terms of the RTA have failed to provide for an appropriate and openly available service for the carriage of iron ore along the Mt Newman Line to Port Hedland. Allegations to the contrary are likely to be self-serving and unreliable.
152. For the reasons expressed in this annexure, the provisions of the RTA provide a mechanism by which access to the Service is already the subject of an "effective access regime". Accordingly, the Council cannot be satisfied that criterion (e) is made out.