NATIONAL
COMPETITION
COUNCIL

Fortescue Metals Group Ltd

Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the *Trade Practices Act 1974*

Key findings from the final recommendation

23 March 2006

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1 INTRODUCTION

1.1 The following summary has been prepared to accompany the National Competition Council's Final Recommendation to the Minister under section 44F of the Trade Practices Act 1974 (Cth) (TPA) dated 22 March 2006. The Final Recommendation relates to Fortescue Metals Group Ltd's (FMG) application for declaration of a service provided through use of part of the Mt Newman railway line declared under Part IIIA of the *Trade Practices Act 1974* (TPA) (the Application).

1.2 This summary is intended to assist understanding of the Council's Final Recommendation. It is not a complete statement of the reasons for the Council's Final Recommendation to the Minister. The only complete statement of the Council's reasons is that contained in the published reasons in its Final Recommendation dated 22 March 2006. The Final Recommendation and this summary will be available on the internet at www.ncc.gov.au.

The Facility

1.3 The Mt Newman railway line – the subject of the Application – runs about 426 kilometres from Port Hedland to Newman in Western Australia. For the purposes of this application, the relevant facility consists of approximately 295 kilometres of railway track and associated infrastructure, running from near Mindy Mindy to Port Hedland (the Mt Newman Facility).

The Service

1.4 The service to which FMG seeks access is the use of a 295 kilometre segment of the Mt Newman line running from a rail siding to be constructed near Mindy Mindy in the Pilbara, to Port Hedland (Mt Newman Service). The service includes the use of bridges, passing loops, train control systems, sidings, maintenance protection systems and other associated infrastructure.

1.5 FMG seeks access to the Mt Newman Service for the primary purpose of railing ore from its Mindy Mindy project, of which it is a 50% owner, to its proposed port facilities at Port Hedland.

1.6 In the Council's view the Mt Newman Service is appropriately defined to encompass the use of the Mt Newman line to operate a transport service between a geographic area in the vicinity of Mindy Mindy to Port Hedland and the Council has evaluated the application under s. 44G of the TPA on that basis. For the avoidance

of doubt, the Council notes that a connection that sought to access the Mt Newman line to provide transport services from FMG's Chichester Ranges deposits would not be consistent with the service considered in the Final Recommendation.

1.7 The provider of this service is the Mt Newman Joint Venture Participants (comprising: BHP Billiton Minerals Pty Limited – 85 per cent, Mitsui-Itouchu Iron Pty Limited – 10 per cent, and Itouchu Minerals and Energy of Australia Pty Limited – 5 per cent). BHP Billiton Iron Ore Pty Ltd (BHPBIO), a subsidiary of BHP Billiton with responsibility for BHP Billiton's iron ore operations, operates the Mt Newman line on a day to day basis on behalf of the Mt Newman Participants.

Iron Ore Production in the Pilbara

1.8 Production of iron ore in the Pilbara region of Western Australia is controlled by BHPBIO and Rio Tinto Iron Ore (RTIO), a business unit of the Rio Tinto Group with responsibility for Rio Tinto's iron ore operations.

1.9 FMG, the applicant, proposes to become a significant producer of iron ore. FMG's plans include

(a) the establishment of mining projects at Cloud Break and Christmas Creek in the Chichester Ranges;

(b) the construction of a railway from Cloud Break to Port Hedland (the FMG Chichester line); and

(c) the construction of port facilities at Port Hedland.

1.10 There are also companies that are exploring for iron ore deposits (or mineral deposits more generally) in the Pilbara but are not (yet) producing iron ore but which intend to do so (junior explorers).

Declaration

1.11 The declaration of a service under Part IIIA of the TPA provides a means of ensuring that competition in a dependent market is not frustrated due to an inability to gain access to a bottleneck facility.

1.12 While generally owners of facilities are free to deal or not deal with whom they choose, Part IIIA modifies the property rights of facility owners in specific limited circumstances.

1.13 Declaration seeks to balance the interests of asset owners with the public interest in the promotion of competition in dependent markets. The declaration criteria and other requirements of Part IIIA provide a narrow basis for mandating access.

1.14 Declaration provides access seekers with an enforceable right to negotiate access to a declared service on reasonable terms and, if necessary, provides that access prices and other terms and conditions may be arbitrated by the Australian Competition and Consumer Commission (ACCC).

1.15 Part IIIA does not provide for free or subsidised access. Indeed if no reasonable basis for the provision of access can be found access may not be required notwithstanding declaration (Sections 44V(3) & 44X of the TPA).

2 The declaration criteria

2.1 The Council cannot recommend that a service be declared unless it is affirmatively satisfied that all of the criteria in s. 44G(2)(a) to (f) of the TPA are met. If the Council is not satisfied that one or more of the criteria are met, then it must recommend that the service not be declared.

2.2 The Council must also consider whether it would be economical for anyone to develop another facility that could provide part of the service (s. 44F(4)).

3 CRITERION (b)

Section 44G(2)(b) It would be uneconomical for anyone to develop another facility to provide the service.

3.1 Criterion (b) is satisfied if, over the relevant range of demand for the service, it is less costly for a single facility rather than multiple facilities to provide the service.

3.2 If the capacity of the facility is insufficient to meet foreseeable demand then it is necessary to consider whether it is less costly, from a social perspective, to expand or modify the facility or to construct another facility to meet foreseeable demand.

3.3 If foreseeable demand outstrips the facility's maximum potential capacity, then it is likely to be economical to develop another facility to provide the service. Criterion (b) would therefore not be satisfied.

Alternative facilities which could provide the Mt Newman Service

3.4 The Council received a number of submissions that there were, or could be, substitute facilities, which could provide the Mt Newman Service or an equivalent service. One of the alternatives proposed

was the proposed FMG Chichester line. The Council notes that the proposed FMG Chichester line does not provide the Mt Newman Service. If constructed, the FMG Chichester line would provide a different service, only part of which would overlap with part of the Mt Newman Service and would not remove the bottleneck created by the Mt Newman line.

3.5 The Council decided that none of the suggested alternative facilities could provide a substitute service for the Mt Newman Service.

Foreseeable Demand for the Mt Newman Service

3.6 The Council considers that it is appropriate to consider demand projections for the Mt Newman Service over a 20 year period.

3.7 Having considered the projected use of the Service by BHPBIO, FMG and other potential access seekers, the Council concludes that the total foreseeable demand for the Mt Newman Service over the next 20 years is likely to increase from the current level of about 100 mtpa to about 260 mtpa, with some prospect that demand could reach as high as 310 mtpa. The latter figure accounts for the potential 300 mtpa demand generated by BHPBIO, plus 5 mtpa in demand from each of FMG and junior explorers.

Measuring the capacity of the Mt Newman Line

3.8 The Council received extensive submissions from BHPBIO, FMG and RTIO on capacity related issues including a number of experts' reports. The Council sought independent advice on measuring the capacity of a railway track from G13 and Asia Pacific Rail.

3.9 In accordance with the independent expert advice it received, the Council has decided to adopt a practical rather than a theoretical approach to measuring capacity. That takes into account not only the number of theoretically possible train trips a day on the Mt Newman line but also considers the impact of operating conditions including the impact of loading and unloading the trains on the possible number of train trips per day.

3.10 The Council does not accept BHPBIO's submission that ultimately the capacity of the Mt Newman line is constrained to the maximum capacity of the 'weakest link' in the system which is said to be port capacity at Port Hedland. While, the Council accepts that limits on capacity at a mine or the port may affect utilisation of the railway, it is inappropriate to equate this with a limit on the railway's capacity. Instead, the Council has proceeded on the basis that port capacity will match the capacity of the rest of the Mt Newman line.

Current capacity of the Mt Newman line

3.11 The Council accepts BHPBIO's submission that the Mt Newman line is currently capacity constrained operating at its maximum capacity of approximately 100 mtpa.

Potential capacity of the Mt Newman line

3.12 The Council considers that the capacity of the Mt Newman line can, and is likely to be, augmented through the addition of loops and double tracked in due course to meet foreseeable demand.

3.13 The Council considers that a single tracked line with loops will have a capacity in excess of 200 mtpa and a double tracked line will have a capacity of approximately 400 mtpa.

3.14 The Council notes that a capacity of 400 mtpa exceeds the upper range of foreseeable demand for the Mt Newman Service (estimated at 310 mtpa by the year 2025).

3.15 The Council observes that historically the capacity of the Mt Newman line has been augmented to meet BHPBIO's increasing needs and that BHPBIO has ongoing plans to continue such augmentation. The Council considers that it is reasonable to assume that the costs (other than operating costs) and practicality of various augmentation options, and the relativity of these to the costs of building a new railway, will not change depending on the identity of the ultimate users.

3.16 The Council concludes that it is therefore reasonable to consider that the Mt Newman Facility's capacity can be expanded to satisfy foreseeable demand and that, given the scale economies of rail infrastructure, it is unlikely to be economical (at least in terms of capital and operating costs) to develop another facility to provide the Mt Newman Service.

Costs

3.17 Criterion (b) requires an assessment of whether it is less costly, from a social perspective, to satisfy demand for the Mt Newman Service via access to an existing facility, or via the construction of another facility. In doing so the Council must compare the cost of developing another facility to provide the Service with the cost of providing access to the Facility itself.

3.18 The Council considered evidence on:

(a) the cost of developing another facility to provide the Mt Newman Service. In this regard, the Council considered only below rail costs;

(b) the estimated costs of providing access to the Service and to *part* of the Service; and

(c) the economics of expanding the Facility .

3.19 Based on a review of the material before it, the Council considers that:

(a) the costs of constructing another facility to provide the Mt Newman Service are estimated to fall somewhere between $400 – 1020 million and are more likely to fall towards the upper end of this range;

(b) the costs of augmenting the Facility to accommodate the estimated additional demand for the Facility following access lie somewhere between $28 million to $187.2 million, as submitted by the BHPBIO modelling and G13 study; and

(c) the cost to double track that part of the Facility the subject of the Service is estimated to be $609 million as estimated in the G13 study.

3.20 Consequently, it is conceivable that it would be cheaper to expand the Mt Newman Facility to provide the Service whether by way of augmenting the existing single track line through additional loops or by double tracking part or the entire track the subject of the Service.

3.21 The Council therefore considers that augmentation of the Facility, whether through double tracking or the addition of new loops, and whether to meet the provider's own demand and/or the demand of FMG or other access seekers on a social cost benefit analysis is a more efficient outcome.

3.22 The Council notes that in reaching this conclusion it did not accept BHPBIO's estimated cost of double tracking the Mt Newman line of $1.747 billion which was based upon double tracking the entire Mt Newman Facility. As FMG seeks access to only 295km of the 400km of the Facility it is not reasonable to attribute the entire cost to double track the whole facility to FMG's requirements, particularly when considering the foreseeable demand access is to service only 4 per cent of BHPBIO's foreseeable demand.

Diseconomies of scope

3.23 BHPBIO and RTIO argue that there are additional costs associated with access that are not addressed in the conventional analysis of criterion (b) set out above as a result of BHPBIO having to share the use of the Mt Newman line with other parties if it is declared. BHPBIO estimated these costs in terms of lost iron ore sales

resulting from a loss of iron ore production. RTIO considered that such costs were "inestimable".

3.24 The Council accepts that in some contexts, access could potentially give rise to diseconomies of scope. If poorly managed, such diseconomies could be significant. However, it considers that the nature of the diseconomies of scope makes any quantitative analysis highly speculative and therefore controversial.

3.25 The impact of any diseconomies of scope will depend significantly on the extent of interface between BHPBIO and a third party or parties. The Council notes that the material before it suggests the extent of interface between BHPBIO and third parties would be relatively small.

3.26 The Council accepts that interface issues in this instance are likely to raise management issues for BHPBIO and challenges for the arbitrator. The Council observes, nonetheless, that the interface between BHPBIO and third parties is likely to be limited to dealing with a few parties for relatively low rates of track use. The Council has also noted that there appear to be strategies open to BHPBIO to minimise the interface costs (for example, bringing forward expansion plans) and that the arbitrator has scope under the TPA to mitigate or take account of other costs.

3.27 On balance, the Council is satisfied that the interface costs would not outweigh the cost savings from access. The Council concludes, therefore, that it would be uneconomic to develop another facility to provide the Mt Newman Service.

4 CRITERION (a)

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 In assessing whether criterion (a) is satisfied, the Council must:

(a) define the relevant market(s) in which competition may be promoted. The market(s) must be separate from the market for the service to which access is sought

(b) determine whether access (or increased access) facilitated by declaration would promote a more competitive environment in the additional market(s), which requires assessing:

(i) whether the incumbent has the ability and incentive to exercise market power to adversely affect competition in the dependent market(s); and

(ii) whether the structure of the dependent market(s) is such that declaration would promote competition. In particular, high barriers to entry that are unrelated to the existence of the bottleneck facility may preclude any promotion of competition following declaration.

4.2 In assessing whether criterion (a) is satisfied, the Council made the findings set out below.

The Market for the Mt Newman Service

4.3 The market for the Service is the market in which heavy-haul railway track and associated infrastructure services are provided in the Pilbara.

4.4 The Council considered whether competition may be promoted by access to the Service in the following markets:

(a) the global market for iron ore;

(b) the market for iron ore tenements in the Pilabara; and

(c) the market for rail haulage services in the Pilbara.

The global market for iron ore

4.5 The Council was satisfied that the market for iron ore is already subject to effective competition and that criterion (a) is not satisfied in relation to this market.

The market for iron ore tenements in the Pilbara

4.6 The Council decided that BHPBIO has the incentives and the ability to exercise market power in the market for iron ore tenements.

4.7 The Council concluded that the market for iron ore tenements in the Pilbara is not subject to effective competition because of:

(a) the critical role that access to rail infrastructure plays in producing iron ore in the Pilbara;

(b) the fact that the result of BHPBIO and RTIO's control of access to that rail infrastructure is that at present no party, other than entities related to RTIO or BHPBIO, has access to such rail infrastructure which is likely to act as a strong disincentive to potential purchasers of iron ore tenements in the Pilbara; and

(c) the inability of purchasers other than RTIO and BHPBIO to participate in transactions for iron ore tenements in the Pilbara is likely to have the effect of keeping the price of those tenements artificially low relative to prices that might be achieved in a genuine market to acquire such tenements or where prices reflect an opportunity for existing owners to market iron ore in their own right.

4.8 The Council considers that access will promote competition in the market for iron ore tenements in the Pilbara for a number of reasons. In summary, because declaration would:

(a) remove a significant barrier to entry, namely access to rail infrastructure, to the iron ore tenements market;

(b) expand the pool of potential purchasers; and

(c) result in a greater probability of increased entry and enhanced environment for competition in a non-trivial sense due to the removal of access to rail infrastructure as a barrier to entry into this market.

The market for haulage services

4.9 BHPBIO has the incentives and the ability to exercise its market power in the market for haulage services.

4.10 In reaching this conclusion the Council rejected a claim by BHPBIO that its ability to exercise market power was constrained by its obligations to offer third parties haulage services on the Mt Newman line to transport iron ore under the Mt Newman (Iron Ore) State Agreement and the Rail Transport Agreement (RTA) between the State of Western Australia and the Mt Newman Participants.

4.11 The Council decided it was unlikely that the State Agreement and RTA significantly constrain BHPBIO's ability to exercise its market power because of:

(a) the fact that no iron ore producer or potential producer has ever succeeded in negotiating a haulage service under the RTA, nor the State Agreement;

(b) the uncertainty as to whether a specific third party has a right to negotiate haulage under the RTA; and

(c) its view that the State Agreement and RTA are unlikely to constitute an effective access regime for third party rail haulage services.

4.12 Given the incentives and ability of rail infrastructure owners to exercise market power to adversely affect competition in the market

for haulage services, the Council is satisfied that the market is not subject to effective competition. This lack of competition manifests itself as an absence of transactions for haulage services, other than those which occur between related parties.

4.13 The Council considers that access will promote competition in the market for haulage services in the Pilbara for a number of reasons. In summary, because:

(a) there is demand for haulage services and there is no proposal presently in place for any party to construct a third railway that could provide haulage services to the majority of potential new iron ore producers in the Pilbara ;

(b) accordingly, any haulage service to be provided in the foreseeable future will require the use of the Mt Newman Service, or an analogous service on BHPBIO or RTIO railway;

(c) in these circumstances, the inability of a potential haulage service provider to gain access to the Mt Newman Service (or an analogous service) is a significant barrier to entry to the market for haulage services;

(d) declaration of the Mt Newman Service would remove that barrier, and in doing so, would constrain BHPBIO's ability to refuse to provide haulage services, in particular because declaration would improve the potential for a new haulage service provider to enter the market;

(e) even if a new haulage service provider does not enter the market, BHPBIO's ability and incentive to withhold haulage services will be constrained by the potential entry of a third haulage provider; and

(f) declaration of the Service would provide an enhanced environment for competition and greater opportunities for competitive behaviour in a non-trivial sense.

Conclusion on Criterion (a)

4.14 The Council is satisfied that access to the Mt Newman Service will promote competition in the market for rail haulage services in the Pilbara and the market for iron ore tenements in the Pilbara.

5 CRITERION (c)

Section 44G(2)(c) *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 The Pilbara region is the source of the majority of iron ore produced in Australia. The Pilbara rail systems are an integral part of the industry. The Council is satisfied that the Mt Newman Facility is nationally significant in relation to its size, its importance to constitutional trade or commerce, and its importance to the national economy. The Council concludes that the Facility satisfies criterion (c).

6 CRITERION (d)

Section 44G(2)(d) *Access to the service can be provided without undue risk to human health or safety*

6.1 Criterion (d) requires that the Council be satisfied that access *can* be provided without undue risk to health and safety. This involves an enquiry as to:

(a) the nature of the potential risks associated with access; and

(b) whether access can be provided in a manner that removes or minimises those risks, including the potential for access terms to stipulate measures providing a similar standard of safety as currently applies to the facility.

6.2 The Council acknowledges that access does give rise to a number of risks in comparison to the present situation of a single-user railway line.

6.3 The Council notes that access can (and probably would) be provided in a manner that allows the control functions over the Mt Newman Service to be retained by BHPBIO. It is unlikely that any access arrangements would require access to be granted where the third

party lacks the skills, planning and assets necessary to safely operate and maintain its trains on a multi-user facility.

6.4 In light of:

(a) the ability of access terms to allow for BHPBIO (or a similarly qualified provider) to provide the control function in respect of the Mt Newman Facility;

(b) the ability of access terms to set minimum standards for skills, training, maintenance and communications;

(c) the ability of an access seeker to gain access to essential rail safety technology – including intellectual property where necessary – under Part IIIA; and

(d) the application of relevant State rail safety legislation to an access seeker's rail operations,

the Council is satisfied that access to the Mt Newman Service can be provided without undue risk to human health or safety.

7 CRITERION (e)

Section 44G(2)(e) Access to the service is not already the subject of an effective access regime

7.1 The term "effective access regime" is not defined in the TPA. Part IIIA provides guidance on what constitutes an effective access regime implemented by a State or Territory government. For State and Territory access regimes, clauses 6(2)–(4) of the *Competition Principles Agreement* (the clause 6 principles) set out the criteria for judging effectiveness (s. 44G(3)).

Is there an effective access regime for the Mt Newman Service?

7.2 The only access regime which governs access to track services in Western Australia at present is the *Western Australian Rail Access Regime* (the WA Regime) established by the State Government through the enactment of the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) (the Code). The railways to which the WA Regime applies are set out at Schedule 1 of the Code. The regime does not cover any of the Pilbara iron ore railways, including the Mt Newman Facility.

7.3 Accordingly, there is no access regime (effective or otherwise) that provides for access to track services in the Pilbara, including the track services that constitute the Mt Newman Service.

7.4 BHPBIO claimed that the service provided under the RTA was a close and effective substitute for the Mt Newman Service for all those who might use that service and was an effective access regime for the purposes of criterion (e). Similarly, RTIO claimed that the State Agreement and the RTA create an "*effective access regime in a practical sense*" because they provide for transport of iron ore from Mindy Mindy to Port Hedland which is the sole purpose of the Application.

7.5 The Council considers that the existence of an effective access regime for a service which is a substitute for the Service is not relevant to the question of whether the application satisfies criterion (e) and as a consequence, remains of the view that the Mt Newman Service is not already the subject of an effective access regime.

8 CRITERION (f)

Section 44G(2)(f) Access (or increased access) to the service would not be contrary to the public interest.

8.1 The submissions raised a number of public interest considerations under criterion (f). The arguments broadly consider the effects of declaration on the iron ore industry and iron ore exports, investment and the environment.

8.2 The Council concludes that the benefits of declaration include the promotion of competition in the Pilbara rail haulage and tenements markets and the economic and environmental benefits of avoiding unnecessary duplication of rail infrastructure. While there are mixed views as to whether the shared use of railways, or the construction of multiple railways would better support growth in iron ore exports, the Council is not persuaded that declaration would have a negative impact on the industry's performance. In the view of the Western Australian Government, declaration would indeed bring developmental benefits for the industry and iron ore exports.

8.3 Both BHPBIO and RTIO argued that declaration of the Mt Newman Service would have a very negative impact on investment in infrastructure in the Mt Newman line and more generally in infrastructure in the Australian economy. BHPBIO focused particularly on the cost (both to itself and the Australian economy) of any delay in its planned expansions of the Mt Newman line.

8.4 The Council acknowledges that declaration might create an additional layer of risk for BHPBIO in making future investment decisions. In this sense, the Council considers that while declaration

might, in itself, create added investment risk (or perceptions of added risk), this matter can generally be addressed through the application of terms and conditions that reflect the dynamics of investment. Any deterrent of declaration on efficient investment would be mitigated by negotiated or arbitrated outcomes that account for the costs of access (including diseconomies of shared use) and which provide certainty to the parties on the allocation of costs of future capacity and technology investment. The Council notes that Part IIIA obliges the arbitrator to address these issues.

8.5 Further, Part IIIA of the TPA contains a number of safeguards that seek to minimise the risk faced by infrastructure owners of regulatory error and the increased cost of operating in a regulated environment.

8.6 Finally, the Council notes that BHPBIO, as the owner of the Mt Newman line, has the final decision as to whether it proceeds with a capacity expansion it proposes not the Regulator and not any third party access holder. In doing so it will take into account the current level of risk it faces on receiving a return on its investment, which would take into account whether any third party had been granted access to the Mt Newman line and if so what that party's attitude was to contributing to that capacity expansion.

8.7 Given the substantial amount of revenue at stake for BHPBIO (according to BHPBIO's own estimates), it is difficult to envisage a company acting rationally deciding to delay or not proceed with a specific investment due to a perceived increase in risk due to the declaration of the Mt Newman line unless it was convinced that the cost of that risk was significant in comparison to the potential for lost revenue. Neither BHPBIO nor RTIO has suggested that such a scenario is likely.

8.8 Instead, they have asked the Council to assume that the mere fact of declaration or the use of the Mt Newman line would be sufficient for BHPBIO to decide to delay the implementation of a significant capacity expansion project in a period of unprecedented global demand for Australian iron ore - that is, to act irrationally.

8.9 Given that almost all asset owners oppose declaration to some degree and can, if they are prepared to disregard their own commercial interests, threaten to refuse to undertake commercially advantageous investments, the Council is not prepared to give significant weight to such claims.

8.10 The Council recognises that declaration has the potential to impose costs that, if poorly managed, could be significant in this instance.

The Council considers, however, that there are mechanisms available to manage the risk of such costs and that, on balance the benefits of declaration are likely to outweigh the potential costs.

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

9 EXERCISE OF RESIDUAL DISCRETION

9.1 The Council has a residual discretion not to recommend declaration even if the criteria set out in s. 44G(2) are satisfied. This residual discretion includes consideration of whether:

(a) the application was made in good faith (section 44F(3)); and

(b) it would be economical for anyone to develop another facility that could provide part of the service (section 44F(4)).

Was the Application made in good faith?

9.2 The Council concludes that while FMG's declaration application cast a wide net, including some elements that are beyond the scope of Part IIIA, the primary focus of the application was made in good faith.

Would it be economical for anyone to develop another facility that could provide part of the service?

9.3 The Council received submissions that it would be economical to develop a number of other facilities to provide part of the Mt Newman Service. RTIO argued that it is economical to develop approximately 200 km of the Mt Newman line corresponding to the length of track required to be duplicated by the proposed FMG Chichester line.

9.4 The Council applied a natural monopoly test and concluded that it would be uneconomical to develop another facility to provide the Mt Newman Service. In doing so the Council accounted for all costs, including diseconomies of shared use.

9.5 There is no basis to impute a different finding in relation to the portion of the Mt Newman line that FMG proposes to effectively duplicate. The Council therefore has no basis to consider that it would be economical to develop another facility that could provide part of the Mt Newman Service.

10 DURATION OF DECLARATION

10.1 Section 44H(8) of the TPA requires that every declaration include an expiry date.

10.2 The Council considers that in this instance, a 20 year duration would provide sufficient certainty for all parties to undertake investment and other decisions in response to declaration. The Council notes that a declaration can be revoked under Part IIIA if competitive circumstances change such that the declaration criteria are no longer satisfied. A revocation inquiry can be initiated following an application from any party (s. 44J).