PLEASE NOTE THIS APPLICATION SHOULD BE READ IN CONJUNCTION WITH THE LETTER FROM THE APPLICANT DATED 6 FEBRUARY 2008 SUPPLEMENTING THE APPLICATION

The Pilbara Infrastructure Pty Ltd

Supplementary Submission

(Public Version)

Application under Part IIIA of the Trade Practices Act 1974 for Declaration of the Service Provided by the Mount Goldsworthy Joint Venture Participants Railway

18 January 2008

1 Introduction

1.1 The Pilbara Infrastructure Pty Ltd (**TPI**) provides the following supplementary submission in respect of the application for declaration of the Goldsworthy Railway of 16 November 2007 (**Declaration Application**). Unless otherwise indicated, defined terms in this supplementary submission take the definitions attributed to them in TPI's Declaration Application.

2 Service Definition

2.1 The Goldsworthy Service to which TPI seeks access would include use of the associated infrastructure set out at paragraph 3.3 of TPI's Declaration Application. One of those items of associated infrastructure is 'maintenance and protection systems' in respect of which TPI provides the following further explanation.

2.2 The term 'maintenance and protection systems' is intended to cover any associated infrastructure the use of which would be required in order to enable TPI rolling stock to access the track and to move along the Goldsworthy Railway in a safe and efficient manner.

2.3 Accordingly, for example if the Provider has hot box detectors which would ensure that any overheating TPI rolling stock could be easily identified and removed from service in order to ensure there was no damage to the service provider's facilities and in particular if the service provider would require that the rolling stock was surveyed by this element of the 'maintenance and protection systems' as a condition of access to the service, then the use of the associated 'maintenance and protection systems' must be part of what is declared.

2.4 Since TPI does not propose that it should be responsible for maintaining the Provider's track, the Declaration Application was not intended to cover track maintenance equipment unless access to such equipment was required in order to meet conditions imposed by the Provider.

3 Rail haulage service

3.1 In the Declaration Application potential iron ore tenements within an approximate distance of around 50 kilometres from the railway lines are identified.[1] In all cases the tenements will require access to transport infrastructure if they are to be efficiently developed. The most efficient method of transporting iron ore over long distances on land is rail haulage.

3.2 In its Declaration Application TPI did not attempt to identify tenement owners other than those where iron ore is involved – but that does not preclude the possibility that chromite ores or manganese may be found near to one of the rail networks or mean

[1] See paragraph 3.8 of the Declaration Application and the map at Attachment 2 to that Application.

that the tenement holders of other bulk minerals will not seek access to haulage services in order to make development of a mining operation feasible or more economical.

3.3 For example, manganese is mined by Consolidated Minerals Limited (**Consolidated Minerals**) at Woodie Woodie which is located approximately 150 kilometres south east of the Mt Goldsworthy Joint Venture's Yarrie mine (at the end of the Goldsworthy Railway). The manganese from that mine is trucked in 90-tonne trucks the 400 kilometres to Port Hedland. Instead, that ore could be transferred to trains at the far end of the Goldsworthy railway line and trucked from there to Port Hedland. Pods of manganese are commonly found in Marra Mamba iron deposits and therefore anywhere where Marra Mamba iron ore is being developed has the potential to also host a manganese mining operation.

3.4 Almost all of the tenements identified by TPI in paragraph 3.8 of the Declaration Application are exploration licences or applications for exploration licences and in most cases development of a mining operation will not proceed until an Ore Reserve has been established and finance to develop the Reserve can be raised. However, even raising the relatively modest sums required to finance the establishment of a probable/proved Ore Reserve and the undertaking of the associated feasibility study will usually require, as a precondition, that it be established that there is some feasible means of exporting any potential Ore Reserve. TPI refers to Fortescue's experience with Mindy Mindy at paragraph 6.64 of this submission.

3.5 TPI does not regard the early stage of development associated with the prospective customers identified in the Declaration Application as any indication that demand for a haulage service will not develop once guaranteed access to a potential haulage service has been established. Indeed given the likely long lag time between lodging a declaration application and concluding successful negotiations for access (or gaining access through arbitration) it is essential that the declaration process be started considerably before the time when the haulage service would ideally be offered.

3.6 TPI's discussions with third parties have necessarily been limited. Firstly most potential third parties do not believe that TPI will ultimately prove successful in getting the Goldsworthy Railway declared. They therefore believe that their best chance of developing their potential mine is to negotiate a haulage arrangement directly with BHP Billiton (**BHPB**); most are hopeful that the proposed Pilbara Railways (Third Party Haulage) Regime being developed by the State of Western Australia will ultimately deliver a solution to the problem of the existing reluctance by Rio Tinto Limited (**Rio**) and BHPB to discuss any rail haulage arrangements with access seekers. Secondly, they believe that any attempts by them to assist TPI in getting access to the railways of the Pilbara in order to be able to offer a competing service would severely prejudice their chances of successfully negotiating access to a haulage service provided by BHPB.

3.7 TPI does not have any first hand knowledge of any current attempts by third parties (other than Fortescue) to negotiate access to the Pilbara railways operated by BHPB or Rio . TPI refers to some past unsuccessful attempts by third parties to gain access to the Pilbara railways in paragraphs 6.70 to 6.89 below.

3.8 TPI refers to a confidential discussion with a company about a potential haulage service on the Goldsworthy Railway in Confidential Annexure 1.

3.9 For the avoidance of doubt, Fortescue does not propose to transport on the Goldsworthy Railway iron ore from its Cloud Break mine or other deposits in the Chichester Ranges.

4 History of Access Negotiations

4.1 Fortescue attempted to negotiate access to BHPB's rail network prior to lodging its initial application for declaration of the rail track service provided by part of the Mt Newman Railway and part of the Goldsworthy Railway in June 2004 (**Initial Application**). Fortescue's negotiations focused on gaining access to a haulage service on those railways.

4.2 As set out in Fortescue's Initial Application, Fortescue first approached BHPB seeking co-operation on development of infrastructure in relation to both the Mt Newman and Goldsworthy Railways in July 2003. Since that time, Fortescue has continued trying to negotiate access to both track services and haulage services with BHPB. **Attachment A** to this document is a chronology summarising some of the attempts at negotiating access to both the Mt Newman and Goldsworthy Railways by Fortescue with BHPB.

4.3 Fortescue was specifically seeking access to the Mt Newman and Goldsworthy Railways to enable the transportation to port of iron ore produced at the mine at Mindy Mindy that is owned by PIO. A haulage service was sought so that ore produced at Mindy Mindy could be transported from the mine site to port facilities at Port Hedland.

4.4 BHPB declined to advance negotiations on the basis that its obligations under the State Agreements[2] only apply to require BHPB to negotiate terms for rail haulage services with third parties whose plans for mining are 'well advanced'.

4.5 In a letter of 12 October 2005 from Mr Graeme P Hunt, President Iron Ore, Carbon Steel Materials, BHPB states:

> We are aware of our obligations to negotiate terms for rail carriage services with third parties whose plans for mining are 'well advanced' and would be happy to discuss terms when your plans for Mindy Mindy are sufficiently well advanced to make this practicable.

4.6 Fortescue has responded to BHPB to the effect that it is impractical to spend significant resources in proving up a Mineral Resource or an Ore Reserve at Mindy Mindy when it has not been established whether access will be made available to the necessary infrastructure to enable the deposit to be exploited.

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[2] See clause 9(2)(a) of Schedule 1 of the *Iron Ore (Mt Goldsworthy) Agreement Act* 1964, clause 9(2)(a) of Schedule 1 of the *Iron Ore (Mt Newman) Agreement Act* 1964 and the Rail Transport Agreement 1987.

4.7 **Attachment B** contains a copy of the letter from BHPB of 12 October 2005 regarding these issues, together with a letter from Fortescue of 23 August 2006.

4.8 Fortescue's discussions with BHPB were focused on gaining access to the section of the Goldsworthy Railway running west from its intersection with the Mt Newman Railway. Whilst Fortescue has not specifically engaged BHPB in discussions about access to the section of the Goldsworthy Railway running east from its intersection with the Mt Newman Railway, it would be extremely unlikely that BHPB would be prepared to discuss access to the whole of the Goldsworthy Railway when it had already refused to discuss access to only a small part of it.

5 Uneconomic to duplicate (criterion (b)) – demand and capacity

Facility is Uneconomic to Duplicate as a Matter of Economics

5.1 TPI submits that criterion (b) is satisfied on the basis that the Facility is clearly uneconomic to duplicate and that detailed modelling of the capacity of the facility is not required to make this out.

5.2 This submission is supported by a paper by Professor Joshua Gans on this issue, '*The Evaluation of Criterion (b) in Long-Haul Rail Services*', December 2007 which is **Attachment C** to this submission. In that paper Professor Gans makes the point which is pertinent to the current circumstances that whether a particular rail track or tracks have reached capacity does not necessarily preclude the existence of a natural monopoly. As he says, the issue is whether there are economies to be realised from common ownership and operation of one or more tracks.[3]

5.3 Professor Gans notes that the standard natural monopoly test assumes that when another facility is developed then demand will be optimally allocated across the new and existing facilities. However, where the facilities are separately owned and operated, such that there is no optimal reallocation of demand when another facility is built, then the natural monopoly test needs to be modified to reflect this.[4]

5.4 Professor Gans states that ignoring the social benefits in the evaluation of a natural monopoly can be misleading, particularly where there is the possibility of capacity constraints.[5] Adding this to the analysis Gans makes some reasonable assumptions to show that, where extra demand from access requires augmentation to the facility, the test ultimately comes down to whether the cost of building another railway is greater than the difference between the cost of augmentation the provider would do anyway and what the provider would do to accommodate the access seeker. He

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[3] Joshua Gans, *The Evaluation of Criterion (b) in Long-Haul Rail Services*, December 2007, p4.

[4] Ibid, p 6.

[5] Ibid, p 7.

observes that this is equivalent to the test used by the Council in previous rail access decisions.[6]

5.5 Professor Gans shows, what would seem to be uncontroversial, that if the value of extra traffic (from both provider and access seeker) is less than the costs of augmentation then it is not economical to augment the facility.[7] Without capacity constraints his framework shows, under reasonable assumptions, that it is always uneconomic to develop another facility.[8] As the Goldsworthy Railway is not capacity constrained, it is uneconomic to develop another facility to provide the Goldsworthy Service.

5.6 However, Gans notes some practical difficulties in applying a social test and so suggests a simple evidentiary test to show when economies of coordination make it more cost effective to augment an existing network than to build a new network. The test is, if the access seeker's demand was added to that of the provider, would the provider augment its network rather than build a new one.[9] If this is the case then the facility should be considered uneconomic to duplicate. On this basis, where there are efficiencies for a single operator in operating the expanded network to accommodate anticipated increases in demand rather than duplicating, then it is uneconomic to duplicate.[10]

5.7 Applying this to the current matter is straightforward. Is it likely that the amount of increase in demand for track capacity due to a third party having access would cause BHPB to build another railway if that increase in demand were BHPB's? No - it is highly unlikely that BHPB would build another railway in those circumstances, rather BHPB would seek to augment its current Facility to accommodate the additional demand. Accordingly, applying Gans' analysis, it is uneconomic to duplicate the Facility to provide the Goldsworthy Service.

Information on capacity and demand

5.8 While TPI maintains that it is clear that the Goldsworthy Railway is uneconomic to duplicate applying the economic analysis in Professor Gans' report, TPI has sought to obtain further information on capacity and demand for the Facility.

5.9 TPI observes that information on the current demand for use of the Goldsworthy Railway by the Provider and the current capacity of the Railway are both matters which are well known by the Provider. However, these are matters which third parties can only make educated guesses about because the information is not publicly available. TPI's position is that it cannot and does not know commercially confidential information concerning the expansion plans of its competitors. Nor can it accurately

[6] Ibid, p 12.

[7] Ibid, p 12.
[8] Ibid, p 14.

[9] Ibid, p 14.

[10] Ibid, p 15.

determine the future demand for services without a detailed knowledge of those expansion plans.

5.10 Nonetheless, TPI provides the information below to supplement the information provided in its Declaration Application.

Demand

5.11 TPI set out the information it had on BHPB's demand for the Goldsworthy Railway at paragraphs 3.12 and 7.2-7.4 of its Declaration Application. TPI understands that BHPB is currently operating approximately one train each way every one to two weeks on the section of the Goldsworthy Railway from Yarrie to the intersection with the Mt Newman Railway.

5.12 If the question is – what is the likely demand for TPI's haulage service in the foreseeable future? - the answer is essentially always going to be nothing more than an educated guess:

(a) Atlas Iron Limited (**Atlas Iron**) intends to produce 3Mtpa from its Pardoo project by 2010. TPI would like to be able to haul that ore from Pardoo along the Goldsworthy railway to Utah Point. **Attachment D** to this submission is an ASX release by Atlas Iron of 12 November 2007 reporting on exploration of the Pardoo Resource.

(b) Jupiter Mines Limited holds an exploration licence at Shay Gap which is located around 180 kilometres east of Port Hedland. The Goldsworthy Railway passes through the north west part of the associated project area, Although highly prospective, exploration activity is not sufficiently advanced to be able to estimate potential rates of production.

(c) Polaris Metals NL holds an exploration licence over an area of around 120 square kilometres approximately 100 kilometres east of Port Hedland. Exploration activity is not sufficiently advanced to be able to estimate potential rates of production.

(d) The Australian Premium Iron Joint Venture (a 50/50 joint venture between Aquila Resources Limited and American Metals and Coal Industries) holds an exploration licence over an area just south of BHPB's Mt Goldsworthy mine, but exploration activity has not been sufficiently advanced to enable an estimation of potential rates of production.

(e) Consolidated Minerals' mine at Woodie Woodie currently produces around 900,000 tonnes of manganese per year and the mine site has a capacity of around 1Mtpa. **Attachment E** to this submission is a Quarterly Activities Report of Consolidated Minerals for the period ended 30 September 2007 which shows that in FY2007 Consolidated Minerals produced 902,052 tonnes of manganese. **Attachment F** to this submission is a copy of Consolidated Minerals' Managing Director's Address to the 2007 Annual General Meeting. On page 4 of this document, the Managing Director states that the manganese operations at Woodie Woodie have production capacity of 1Mtpa of manganese.

5.13 TPI is not aware of anyone other than itself that wishes to seek access to the track services provided by the Goldsworthy Railway in order to operate its own locomotives and rolling stock on that Railway.

Capacity

5.14 Existing railways are built within corridors of land allocated via various mechanisms for that purpose. Expanding the capacity of an existing railway by constructing additional passing loops or by duplicating sections of track would normally take place within the existing corridor and therefore would not normally face problems associated with land rights.

5.15 Heritage could present problems but there is unlikely to be any significant heritage issues so close to an existing railway, or at least there is very unlikely to be issues that could not be dealt with utilising the existing heritage legislation. Environmental issues are unlikely to be significant either since what is in effect the widening of the existing facility by an additional 10 metres does not normally present difficulties not already dealt with when the rail was initially constructed.

5.16 On the basis of the latest figures associated with the actual costs of constructing the TPI Railway in the Pilbara, the costs for constructing a railway in the Pilbara are approximately around $3.5-4.5M per kilometre. Modern sidings are mostly between 3 and 5 kilometres in length and so would cost a ballpark figure of around $12-20M per siding depending on the length.

5.17 Depending on the existing layout, expanding capacity may require the construction of more than one siding – for example if a railway line contained just one passing siding located half way along its length increasing the capacity of that railway would normally require two more sidings to be constructed. It is always going to be cheaper to add additional sidings than it would be to construct a new stand alone track and once the track has a large number of passing sidings the costs of converting that railway to fully duplicated (by joining up the existing sidings) will also be cheaper than constructing a new stand alone track.

5.18 As set out in TPI's Declaration Application, based upon current and reasonably foreseeable levels of utilisation TPI would not expect the Provider to have to make any investment in the Goldsworthy Railway running east from its intersection with the Mt Newman Railway to accommodate third party demand.

5.19 Even if BHPB increased its demand for the service on a large scale at some point in the future, the capacity of the Goldsworthy Railway could always be more cheaply expanded than the cost of constructing a parallel facility right up to the point where the entire track has been duplicated at which point the capacity would be in excess of 400Mtpa and would exceed future demand.

5.20 The 400Mtpa capacity figure for a fully duplicated railway operated by BHPB is derived from the following assumptions:

(a) Train separation of 36 minutes.[11] This gives a theoretical maximum number of trains of 40 per day in each direction.

(b) Capacity of each train is 33,000 tonnes based upon standard BHPB three rake trains.[12]

(c) Operating days per year of 345 (20 days lost operations due to cyclones, maintenance shut downs, breakages and other stoppages).

(d) If operations take place 345 days of the year and each day of operations there are 40 train slots each capable of transporting on average 33,0000, then the capacity of the railway is 455.4Mtpa. To be conservative, this figure was scaled back to allow for additional maintenance which leads to a capacity of approximately 400Mtpa.

5.21 The section of the Goldsworthy railway line that runs between the intersection with the Mt Newman Railway and Finucane Island is being used to transport iron ore from MAC and Yandi to Finucane Island. TPI does not know the volume of traffic currently involved but it is clear that as part of expansion plans this volume is likely to grow substantially. However, TPI understands that provision is also being made for duplicating this section of rail and when duplicated its capacity will be around 400Mtpa as described in paragraph 5.20 above.

5.22 In paragraph 7.8 of the Declaration Application, TPI stated that the Goldsworthy Railway was currently capable of accommodating 12 train pathways per day in each direction. Only particular sections of the Goldsworthy Railway are capable of accommodating 12 each-way train pathways. Overall, on a conservative basis, the Goldsworthy Railway is currently capable of accommodating 6 train pathways per day in each direction on the following basis:

(a) Assume that the average speed of trains operating on the Goldsworthy railway line is 40km/hr which translates to an approximate travel time of 5 1/4 hours from Yarrie to Finucane Island.

(b) The Goldsworthy railway line has 5 passing sidings, located at 45km (Allen), 71km (Ryan), 90km (Hardy), 111km (Goldsworthy) and 136km (Taplin) from Finucane Island.

(c) The constraining factor in determining train slot capacity on a single track railway with passing sidings is the time taken to traverse the slowest section each-way.

[11] This figure is used in the Evans & Peck Report dated December 2005 entitled 'BHPBIO Pilbara Rail Network - Production Capacity Modelling' (page 5) lodged on behalf of BHPB in respect of Fortescue's application for declaration of the Mt Newman Railway.

[12] See BHPB's Submission to the Council in respect of Fortescue's application for declaration of the Mt Newman Railway entitled 'Document 3 - Impacts of Third Party Access on the Mt Newman System Operation Modelling' dated 6 January 2006'.

(d) Assume 38 minutes of additional time is associated with slowing into a siding, waiting and accelerating back out of a siding – this allows for 30 minutes waiting time to deal with signalling and scheduling delays.

(e) The final section from Taplin to Yarrie is approximately 64 kilometres and so would take approximately 96 minutes to traverse in each direction. This final section represents the constraint and would allow at least 6 each-way train movements per day ((24 x 60)/((2 x 96) + 38)) = 6.3).

(f) If the capacity of the line was considered from Taplin to the point where the Goldsworthy Railway intersects the Mount Newman Railway the most constraining section would be from Allen to the intersection and using the above methodology it would be capable of supporting 12 each-way train movements per day.

5.23 Obtaining the right to build an alternate facility to the Goldsworthy Railway would be extremely problematic. It would be difficult to obtain environmental approval for an alternate facility when the vast majority of the Goldsworthy railway line (from Yarrie to the intersection with the Mt Newman Railway) is currently so underutilised. It would also be extremely difficult to replicate the Goldsworthy Railway from its intersection with the Mt Newman Railway to Finucane Island. An alternate facility could not be located to the North of the Railway without impacting the Port Hedland Airport, the Wedgefield industrial estate and other infrastructure such as the Finucane Island Road and TPI's port facilities at Anderson Point. Similarly a route located to the South would be blocked by South Hedland, BHPB's own rail facilities and TPI's rail loop and associated facilities.

5.24 Under Western Australian legislation railways can only be constructed under the authority of a special Act - s96(1) of the *Public Works Act 1902 (WA).* Given the existence of the Goldsworthy Railway, which is capable of being expanded to accommodate likely levels of demand, there is likely to be considerable government resistance to the authorisation of a new railway serving the same route.

6 Promotion of competition in dependent markets (criterion (a))

6.1 Access to the Goldsworthy Service will promote a material increase in competition in the following dependent markets:

(a) the markets for rail haulage services on the Goldsworthy Railway and in the Pilbara; and

(b) the markets for prospective iron ore or other bulk mineral tenements in the vicinity of the Goldsworthy Railway and in the Pilbara.

Market for Rail Haulage

6.2 There are markets for rail haulage services on the Goldsworthy Railway and in the Pilbara. Access to the Goldsworthy Service will promote a material increase in competition in the markets for rail haulage services on the Goldsworthy Railway and in the Pilbara.

Market definition

Product dimension

6.3 A rail haulage service is the service of transporting commodities (in this case bulk minerals, in particular iron ore) by rail from the producer's mine site to port facilities and/or between mine sites and processing facilities.

Functional dimension

6.4 As noted in TPI's Declaration Application, the view that 'railway track services' and 'haulage services' are in functionally distinct markets is supported by the Australian Competition Tribunal's decision in *Sydney International Airport* [2000] ACompT 1 at 97 and by the Federal Court's decision in *Pacific National v Queensland Rail* [2006] FCA 91 at [935] to [966].

6.5 Further, applying an 'asset specificity' test, the assets required to provide track services (railway track, sidings, signals) are distinct from those required to provide haulage services (locomotives, ore cars, fuel facilities, rolling stock maintenance services).

6.6 The Provider itself separates the provision of track services from the provision of rail haulage services. The Mt Goldsworthy Joint Venture owns the rail tracks and provides access to those tracks to BHP Billiton Iron Ore Pty Ltd (**BHPBIO**). BHPBIO provides a rail haulage service to the Mt Goldsworthy Joint Venture.

Geographic dimension

6.7 The geographic dimension of the market is either:

(a) rail haulage services in the vicinity of the Goldsworthy Railway; or

(b) rail haulage services in the Pilbara.

Market competition

Potential providers of rail haulage services

6.8 Potential providers of rail haulage services in the Pilbara are:

(a) BHPBIO;

(b) Rio;

(c) TPI; and

(d) any third party which gains access to track services provided by existing below rail infrastructure and decides to offer a haulage service on that railway.

6.9 Access to track services is the principal barrier to entry into the market for haulage services. Other barriers to entry include locomotives, rolling stock and access to facilities for servicing rolling stock (including a rail marshalling yard and maintenance facilities).

Demand for haulage services

6.10 The demand for haulage services comes from potential iron ore producers who wish to transport iron ore mined at their deposits between the mine and port and/or between mines/processing facilities. In particular, potential iron ore producers may have iron ore deposits of insufficient magnitude to support the construction of a new railway and the purchase and operation of rolling stock. Without access to rail haulage services, many iron ore deposits are stranded.

6.11 TPI anticipates that the following mining companies might wish to purchase haulage services on the Goldsworthy Railway:

(a) Atlas Iron - Pardoo/Goldsworthy Project;

(b) Jupiter Mines Limited - Shay Gap Project;

(c) Australian Premium Iron JV; and

(d) Polaris Metals NL - Goldsworthy JV Project.

6.12 Each of the companies have tenements in the vicinity of the Goldsworthy Railway as shown on the map in Attachment 2 to TPI's Declaration Application.

6.13 These are companies that have announced that they have prospective iron ore tenements and which TPI has identified as being within a distance of around 50 kilometres of the Goldsworthy Railway. There may be other non-iron ore tenements capable of being commercially exploitable within the same area, however, TPI has not sought to identify these. Any of these companies that goes into production will likely seek rail transport between mine and port facilities.

6.14 Currently there are no non-iron ore minerals transported by rail in the Pilbara. This is because no railways in the Pilbara currently transport independent third party ores. Only BHPB and Rio transport ore by rail and the ore that they transport is exclusively iron ore. Consolidated Minerals transports around 900,000 tonnes of manganese per year by truck from Woodie Woodie to Port Hedland.

6.15 TPI understands from its discussions with consultants that long haul truck transport costs in the Pilbara are in the region of 15c per tonne kilometre. From the far end of the Goldsworthy Railway to port facilities would typically involve a distance of around 250 kilometres being driven each way. This is because railways typically travel a direct route - whereas trucks utilising existing public roads, if allowed, would usually result in much longer distances being travelled because the existing roads are not a direct route. Using the figure of 15c per tonne kilometre results in a cost of around $37.50 per tonne moved by truck. This is a 'ballpark figure' for guidance. The actual costs would vary considerably based on prevailing diesel costs, the actual distance to be moved, the condition of the roads and the amount permitted to be transported by each truck.

6.16 This compares to a marginal cost of transporting iron ore by railway of approximately $2.00 per tonne (over a distance of around 200 kilometres). This figure is based on Fortescue's March 2006 estimate of the cash operating cost of its Rail Operations of $2.27 per tonne moved when operating at 45Mtpa. (The $2.27 figure was used in the Independent Technical Review undertaken by Winters, Dorsey & Co LLC which formed Appendix B to Fortescue's August 2006 Offering Memorandum). The $2.27 figure was based on transporting iron ore a distance of around 260 kilometres. **Attachment G** contains Fortescue's ASX release of 14 August 2006 regarding the Offering Memorandum, together with relevant extracts of the Offering Memorandum. The $2.27 per tonne figure has been increased by 10% to reflect higher diesel costs and other inflationary factors operating since that time and then reduced pro rata because of the shorter distance involved (200 kilometres as opposed to 260 kilometres).

6.17 When valuing export tonnes for iron ore TPI uses a ballpark figure of $50 per tonne of iron ore. This figure is based upon the following assumptions:

(a) the price relates to Iron Ore Fines with a Fe content of 59% and containing 7% free moisture[13];

(b) the price for Fines is the same rate as achieved by Hamersley when it reached agreement with Baosteel for iron ore deliveries commencing 1 April 2007 – namely US$ 0.8042 per dry metric tonne unit. **Attachment H** contains a Rio News Release of 22 December 2006 regarding this agreement;

(c) an exchange rate of A$1 = US$0.88 was used;[14] and

(d) converting from dry metric tonne units to tonnes of iron ore, from dry to wet tonnes, and from US Dollars to Australian Dollars - a wet tonne of iron ore would sell for approximately $50 ((0.8042 x 59 x (1-0.07)) / 0.88 = $50.1437 per tonne).

<u>Size of rail haulage market</u>

6.18 The only rail haulage that BHPB and Rio undertake is for themselves and related entities. No entity independent of BHPB and Rio currently transports iron ore by rail in the Pilbara. However, Fortescue is planning on commencing to transport iron ore from its Cloud Break mine in the second quarter of 2008.

6.19 In total the amount of iron ore hauled by rail in the Pilbara is the same as BHPB's and Rio's entire annual production. For the year 2006 that figure was around 260Mtpa. BHPB transported around 110Mtpa of iron ore on its rail network and Rio transported around 150Mtpa of iron ore in total on its rail network (2006 figures). **Attachment I**

[13] Fortescue's Rocket Fines has been used as an illustrative Fines Product; it has an Fe content of around 59% and for dust suppression reasons is maintained with a free moisture content of around 7%.

[14] This was the average exchange rate prevailing over the three month period of September to November 2007 - source RBA.

to this submission is an extract from BHPB's website containing a graph showing that BHPB's Pilbara iron ore sales in 2006 were approximately 110Mt. **Attachment J** to this submission is an extract from Rio's 2006 Annual Report and Financial Statements which states that Hamersley shipped 98.1Mt of iron ore and the Robe River Joint Venture (**Robe**) shipped 52.0Mt of iron ore in 2006.

6.20 The cash operating cost of a rail haulage service from the central Pilbara to export facilities located on the coast (a distance of around 250 kilometres by rail) would be around $2.50 per tonne moved, excluding loading and unloading costs.[15] This figure is based on Fortescue's March 2006 estimate of the cash operating cost of its Rail Operations of $2.27 per tonne moved when operating at 45Mtpa (which was used in its August 2006 Offering Memorandum - see Attachment G). This cost figure was based on transporting iron ore a distance of around 260 kilometres. The $2.27 per tonne figure has been increased by 10% to $2.50 to reflect higher diesel costs and other inflationary factors operating since that time.

6.21 Any service provider offering a rail haulage service to third parties would also seek to recover its associated capital costs. Assuming that BHPB's and Rio's combined networks, excluding loading and unloading facilities, but including rolling stock, were valued at $8bn and assuming that this capital earned a 15% return – the capital cost charge associated with use of the networks would be $1.2bn, which, spread over the combined 260Mtpa, would result in a fee of around $4.60 per tonne moved.

6.22 If one also assumed that a 20% margin was applied to the operating costs then the combined capital cost, operating cost and margin would result in a fee of approximately $7.60 per tonne moved. Given that around 260Mtpa is currently moved by rail, if that service was provided by an independent company then based on the assumptions outlined above it would be worth around $2bn per year.

<u>Rail haulage services market not competitive</u>

6.23 The rail haulage services markets are not competitive. In order to compete in the market for rail haulage services in the Pilbara access to track services is essential. In order to compete in the market for rail haulage services on the Goldsworthy Railway, access to the track services provided by use of the Goldsworthy Railway is essential.

6.24 BHPB has an incentive to exercise its market power in the market for track services to adversely affect competition in the market for rail haulage services. Further, without access BHPB is the only potential provider of rail haulage services on the Goldsworthy Railway and has no incentive to provide rail haulage services itself.

6.25 As discussed below, BHPB has an incentive to use its control over rail infrastructure to prevent the development and mining of iron ore tenements by third parties. For similar reasons, BHPB has an incentive to prevent competing haulage service providers from emerging and thus retain its control over rail infrastructure.

[15] Note that this figure was also referred to at paragraph 8.10 of the Declaration Application as TPI's estimate of the marginal cost of transporting iron ore on the TPI Railway.

6.26 BHPB also has an incentive to prevent the emergence of haulage services where this would allow new competitors to enter the market for iron ore. The Western Australian Government observed in a submission to the Council in respect of Fortescue's application for declaration of the rail track services provided by the Mt Newman Railway (**Mt Newman Service**) (**Mt Newman Declaration**) that:[16]

> [R]ail transportation is a significant barrier faced by new producers. Existing producers, therefore, have a competitive advantage which they naturally wish to maximise. Owners of rail facilities therefore have both the ability and the incentive to exercise market power.

6.27 Further, in the context of the Mt Newman Declaration, the Council observed in its final recommendation that:[17]

> The possibility that RTIO might provide track services (and thus allow the entry of a new haulage services provider) does not appear to pose a significant constraint on BHPBIO's ability to exercise market power. The Council notes that the incentives for avoiding the entry of a new haulage services provider are as applicable to RTIO as they are to BHPBIO, and that the submissions of RTIO and BHPBIO are both entirely inconsistent with respect to either party offering or providing track services in the foreseeable future in the absence of declaration.

6.28 Without access, there are no effective constraints on BHPB's exercise of market power.

6.29 Under the *Iron Ore (Mt Goldsworthy) Agreement Act* 1964 (**Goldsworthy Act**), the Mt Goldsworthy Joint Venture is required to carry the freight of third parties on its railways where and to the extent it can do so without unduly prejudicing or interfering with its operations.[18] TPI is not aware of anyone who has had their freight transported by the Mt Goldsworthy Joint Venture under the Goldsworthy Act or under any other independent arrangement.

6.30 In its submissions to the Council in respect of the Mt Newman Declaration, the Western Australian Government observed that[19]:

> To date, no access seeker has been able to negotiate satisfactory access arrangements with a State Agreement company. The State Agreement access provisions, therefore have not been effective.

6.31 Any rail haulage service that might be offered by TPI utilising the Mt Newman Service, if that service is declared and access is successfully negotiated, would not service any of the mines in proximity to the Goldsworthy Railway.

6.32 While the TPI Railway is an open-access railway and TPI will offer access to third parties seeking to exploit iron ore tenements in the Pilbara, the route of the railway line would not be useful to parties seeking to develop iron ore deposits in the vicinity of the Goldsworthy Railway.

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[16] Western Australian Government's Response to the Council's 11 March 2005 Issues Paper.

[17] At [7.226].

[18] Clause 9(2)(a) of Schedule 1 of the Goldsworthy Act.

[19] Western Australian Governments response of October 2004 to the Council's Preliminary Issues Paper, p3. See also the Western Australian Governments submission of May 2005 in response to the Council's 11 March 2005 Issues Paper at pp 1, 7 and 13. (www.ncc.gov.au/publication.asp?publicationID=189&activityID=32)

6.33 The State of Western Australia is seeking to develop a State-based access regime for haulage of third party iron ore on the Pilbara railways (**State Regime**). The State is proposing to develop the State Regime between it and BHPB, initially, and may potentially extend it to other Pilbara Railways in the future. When the development of the State Regime was announced it was expected that the draft regime would be available for public consultation by mid 2007. While the State has provided the draft State Regime to some interested parties on a confidential basis, it has not yet commenced an open public consultation process. It is not known when the State Regime will be up and running or whether or not it will operate effectively.

6.34 As the State Regime will be a haulage regime, it will not provide for third parties to access BHPB's (and potentially Rio's) rail tracks to offer their own haulage service.

6.35 As the State Regime is not yet in operation, it is unclear when it will commence and if it does commence there is no evidence that it will operate effectively to enable third parties to have their iron ore hauled on Pilbara railways, the State Regime is not an effective constraint on BHPB's exercise of market power.

Promotion of Competition

6.36 Access to the Goldsworthy Service will promote a material increase in competition the markets for rail haulage services in the vicinity of the Goldsworthy Railway and in the Pilbara.

6.37 Currently the only haulage services in the Pilbara are those provided to related parties of BHPB and Rio. No third parties have been able to acquire haulage services from BHPB or Rio. The only haulage services along the Goldsworthy Railway are those provided to BHPB related parties by BHPBIO.

6.38 Once the TPI Railway is complete, TPI proposes to provide haulage services to third parties on that railway. However, the route of the railway line would not be useful to parties seeking to develop iron ore deposits in the vicinity of the Goldsworthy Railway.

6.39 As discussed above, BHPB has the incentive and ability to continue to withhold haulage services to unrelated parties. The Council found in its final recommendation on the Mt Newman Declaration that BHPB had an incentive and ability to continue to withhold haulage services to unrelated parties.[20] The Council should make that same finding in respect of this Declaration Application.

6.40 There is a demand for haulage services. Prior to its merger with Rio, Robe sought unsuccessfully to gain access to the Hamersley Railway (see paragraphs 6.76 to 6.80 below). Prior to its merger with Rio, Hope Downs also sought unsuccessfully to gain access to the Hamersley Railway (see paragraphs 6.81 to 6.89). Fortescue and Hope Downs (prior to its merger with Rio) have each sought unsuccessfully to gain access to haulage services on the Mt Newman Railway (see paragraphs 6.70 to 6.75 and 6.81 to 6.89).

6.41 There is no proposal for any company to duplicate the Goldsworthy Railway. Accordingly, without access to the Goldsworthy Railway there is no ability for a

[20] Council's Final Recommendation at [7.221], [7.228]

haulage service provider to compete with any haulage service that might be provided by BHPBIO. Access to the Goldsworthy Railway is a barrier to entry into the market for haulage services. That barrier would be removed with access to the Goldsworthy Railway. The removal of that barrier will enable new entrants to enter the market for haulage services.

6.42 Without a competing haulage service provider, BHPB has no incentive to offer a haulage service. If TPI had access to the Goldsworthy Railway, it would offer a haulage service. In addition to acting as an incentive to BHPB to offer its own haulage service, this would mean that the number of potential haulage service providers on the Goldsworthy Railway would increase from one to two (at least - there may be other companies that offer haulage services if they have access to the Goldsworthy Railway). It is clear that an increase from one to two haulage service providers on the Goldsworthy Railway would be a material increase in competition as a result of access to the Goldsworthy Service.

Market for tenements

6.43 There are markets for bulk mineral tenements (including iron ore) in the vicinity of the Goldsworthy Railway and in the Pilbara. Access to the Goldsworthy Service will promote a material increase in competition in those markets.

Market definition

<u>Product dimension</u>

6.44 The relevant product is the right to exploit a proven deposit of a bulk mineral (including iron ore) within a mineral tenement.

6.45 In order to prospect for iron ore or any other mineral on any Crown land (not the subject of a mining tenement) in Western Australia, all that is required is a Miner's Right as authorised by Section 20 of the *Mining Act 1978* (**Mining Act**). A Miner's Right is granted on payment of a prescribed fee.

6.46 A Miner's Right entitles the holder to prospect for minerals, conduct geological mapping and tests for minerals, undertake limited sampling and remove such samples (up to 20kgs), mark out mining tenements and to take water and camp for the purpose of prospecting.

6.47 If a prospector, or anyone else, believes that a particular area hosts significant iron mineralisation that person would physically mark out the area as a tenement and apply for an Exploration Licence over the tenement.

6.48 Section 66 of the Mining Act entitles the holder of an exploration licence to enter onto the land the subject of the licence, including with machinery, and to undertake activities associated with exploring for minerals such as digging, boring and tunnelling and to extract mineral bearing substances up to a prescribed limit (normally 1,000 tonnes).

6.49 Section 67 of the Mining Act gives the holder of an Exploration Licence an automatic right to apply for and have granted a mining lease (or leases) within the area of the exploration tenement. Therefore once an area of land is held under an exploration licence the holder has priority for the grant of mining leases.

6.50 The grant of exploration licences is not limited to exploring for particular commodities, for example iron ore. A person might seek an exploration licence in order to locate and prove deposits of any one or more mineral ore.

6.51 The holder of an exploration licence can sell the associated rights (to undertake exploration and to obtain a mining lease) to a third party. Equally a holder of a mining lease is able to sell the mining lease to a third party.

Functional dimension

6.52 The market for iron ore tenements is functionally distinct from the market for the production of iron ore. The activities involved in prospecting, initial exploration and the development of iron ore tenements can be undertaken by different firms from those that subsequently mine and market iron ore.

6.53 Examples of transactions in iron ore tenements include:

(a) BHP's purchase of the McCamey's monster deposit in 1992;

(b) Hamersley's purchase of CSR's Yandicoogina deposit in 1987;

(c) Rio's acquisition of a 53% interest in Robe through its acquisition of North Mining Ltd in 2000; and

(d) Rio's acquisition of a 50% interest in the Hope Downs deposit in 2005.

Geographic dimension

6.54 The geographic dimension of the market is either:

(a) bulk mineral tenements in the vicinity of the Goldsworthy Railway; or

(b) bulk mineral tenements in the Pilbara.

6.55 Purchasers for most iron ore tenements in the Pilbara are largely limited to those who have their own rail and port infrastructure in place in the Pilbara (BHP and Rio), those currently developing rail and port infrastructure (Fortescue) or those who can access infrastructure such as the TPI Railway, which is an open access railway.

6.56 Since most iron ore tenements in the Pilbara are only attractive to those with access to Pilbara rail infrastructure, such tenements are only substitutable for other iron ore tenements in the Pilbara.

Market competition

6.57 The markets for bulk mineral tenements in the vicinity of the Goldsworthy Railway and the Pilbara are not currently competitive.

6.58 The key barrier to competition in the market for bulk mineral tenements is access to rail transport. This translates into monopsony market power in that market in the hands of those entities that own rail transport infrastructure.

6.59 Fortescue acquired its large tenement holdings at low cost in an environment where there were no real potential purchasers other than the owners of rail and port infrastructure in the Pilbara.

6.60 During 2004 Fortescue announced that it intended to build the TPI Railway, which is to be an open access railway. Also during 2004 Fortescue announced its application for declaration of the rail track service provided by the Mt Newman Railway from Mindy Mindy to Port Hedland.

6.61 From 2004 there have been a number of new explorers which have acquired or registered iron prospective tenements sufficiently close to either the Mt Newman Railway or the TPI Railway to access those railways. These include Consolidated Iron Limited whose tenements were subsequently acquired by BC Iron Ltd (**BCI**), Ausi Iron Pty NL whose iron ore projects were acquired by Echelon, and Yilgarn Mining WA Pty Ltd and Iron Ore Holdings Limited which are seeking to develop their deposits. One cause of the additional exploration for iron ore is undoubtedly the increase in the iron ore price. However, the current owners of these tenements, with the exception of Echelon, are each seeking to develop their own deposits.

6.62 A tenement holder without access to rail infrastructure or a rail haulage service or an ability to fund construction of rail infrastructure has broadly three options:

(a) first, it can sell the tenement to someone with access to rail and port infrastructure;

(b) secondly, it can sell iron ore at the mine gate;

(c) thirdly, it can sell part of its interest to someone with their own infrastructure.

6.63 BHPB has an incentive to exercise its market power in the markets for track services and haulage services to adversely affect competition in the market for iron ore tenements.

6.64 It is unlikely that someone will develop an iron ore tenement into an iron ore business without access to rail transportation. For example, as noted in section 4 of this submission PIO holds a tenement at Mindy Mindy. On behalf of PIO, Fortescue has unsuccessfully sought to negotiate access to the Mt Newman Railway that is owned by the Mt Newman Joint Venture to enable the rail transportation of iron ore from Mindy Mindy to Port Hedland. Fortescue also sought declaration of the Mt Newman Service, comprising use of the track services provided by that railway line. Its application for declaration is currently before the Australian Competition Tribunal. Until securing access to rail transportation PIO is not prepared to expend any further monies proving up the estimated 70 million tonnes of mineralisation or undertaking the feasibility study required to convert a Mineral Resource to an Ore Reserve. This is because without access to transport infrastructure or a haulage service to transport the ore from the mine site, the deposit is effectively stranded and cannot be sold in the sea-borne iron ore market. It therefore does not justify expending the sum of approximately $10 million necessary to establish an Ore Reserve until the availability of suitable transport can be established.

6.65 By denying access to the Goldsworthy Railway, BHPB can seek to ensure that iron ore tenements in the vicinity of the facility are not mined out by competing producers and that the price of the tenements is maintained at a low level. This is because they will be underdeveloped and, in the absence of rail transport, unattractive to other investors. BHPB can, at the same time, avoid the cost and risk associated with developing and retaining the mining tenements itself.

6.66 There are no effective constraints on BHPB's ability to leverage its natural monopoly power to adversely affect competition in the market for bulk mineral tenements. As a result, BHPB has an ability to exercise its market power in the markets in which track services and haulage services are provided to adversely affect competition in the market for iron ore tenements.

6.67 As noted above:

(a) TPI is not aware of anyone who has had their freight transported by the Mt Goldsworthy Joint Venture under the State Agreements or under any other independent arrangement;

(b) any rail haulage service that might be offered by TPI utilising the Mt Newman Service would not service any of the mines in proximity to the Goldsworthy Railway.

(c) while the TPI Railway is an open-access railway and TPI will offer access to third parties seeking to exploit iron ore tenements in the Pilbara, the route of the TPI Railway would not be useful to parties seeking to develop iron ore deposits in the vicinity of the Goldsworthy Railway; and

(d) the State Regime is not yet in operation, it is unclear when it will commence and if it does come into operation it is not known whether it will be effective to give third parties access to haulage services on Pilbara railways.

6.68 The fact that access to rail infrastructure in the Pilbara is necessary for the successful exploitation of inland iron ore tenements means that inland iron ore tenements are not attractive to purchasers other than those with an ability to access rail infrastructure. This has the effect of keeping the price of such tenements artificially low relative to prices that might be achieved in a competitive market to acquire and develop those tenements.

6.69 This has the result that the market for bulk mineral tenements both along the Goldsworthy Railway and Pilbara wide is not subject to effective competition.

<u>Mt Newman Railway</u>

6.70 An example of BHPB's exercise of its market power to deny access to its Pilbara railway lines is Fortescue's so far unsuccessful attempt to gain access to the Mt Newman Railway.

6.71 Fortescue first sought to negotiate access to the Mt Newman Railway and the Goldsworthy Railway in July 2003. Those access negotiations were unsuccessful and are also detailed in the chronology at Attachment A to this document.

6.72 On 15 June 2004, Fortescue applied to the Council for a recommendation under s44G of the *Trade Practices Act* 1974 (**Act**) that the Mt Newman Service be declared.

6.73 On 23 March 2006, the Council issued its final recommendation that the Mt Newman Service be declared. By 23 May 2006, the 60 day period from the Council's declaration recommendation for the Treasurer to publish a decision under s44H(7) of the Act had expired. Accordingly, the Treasurer was deemed under s44H(9) of the Act to have decided not to declare the Mt Newman Service and to have published that decision.

6.74 On 11 June 2006 Fortescue applied to the Australian Competition Tribunal for review of the Treasurer's decision. That matter is still before the Tribunal.

6.75 BHPB has vigorously defended each stage of Fortescue's access attempt. This has included perpetuating proceedings in the Courts over the issue of whether or not the Mt Newman Service is the use of a production process within the meaning of the definition of service in Part IIIA of the Act.[21]

Robe

6.76 An example of Rio's exercise of its market power to deny access to a Pilbara railway is the unsuccessful attempt by Robe (prior to its merger with Rio) to gain access to the rail track service provided by the Hamersley Railway under Part IIIA of the Act. On 24 September 1998, Robe lodged an application for declaration of the rail rack service provided by the Hamersley Railway under Part IIIA of the Act. Rio owned Hamersley, but not Robe at that time.

6.77 On 30 October 1998, Hamersley applied to the Federal Court for a declaration that the rail line service that was the subject of Robe's declaration application was not a 'service within the meaning of section 44B of the Act'. Hamersley sought a declaration that the Council did not have the jurisdiction or power to either accept or review the declaration application or make a recommendation of that rail line service (see *Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203).

6.78 On 28 June 1999, the Federal Court found that the use of the rail track service provided by the Hamersley Railway was the use of part of a production process and that Part IIIA of the Act did not apply to the service Robe sought.

6.79 On 19 July 1999, the Council and Hope Downs Management Services Pty Ltd (**Hope Downs**), an interested party joined to the proceedings, separately lodged appeals from the Federal Court's decision of 28 June 1999. These appeals were due to be heard by the Full Federal Court together on 22 November 1999. However, the Council was notified by Robe by fax of 18 November 1999 that it was discontinuing its declaration application and that Hamersley agreed to pay the costs of the proceedings and the appeal incurred by Hope Downs and the Council (see *Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd* [1999] FCA 1652).

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[21] BHPB appealed to the Full Federal Court the decision of Middleton J in Fortescue's favour in *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2006] FCA 1764. Further, BHPB has sought leave to appeal to the High Court from the decision in Fortescue's favour of the Full Federal Court in *BHP Billiton Iron Ore v The National Competition Council* [2007] FCAFC 157.

6.80 Subsequently, in early 2000, North Mining Ltd was acquired by Rio, giving Rio a 53% interest in the Robe operations. Robe's iron ore produced from the West Angelas mine (the mine which was to produce the ore Robe wished to transport on the railway line the subject of Robe's declaration application made in September 1998) is now transported to the Cape Lambert port using the same part of the Hamersley Railway to which Robe sought access under Part IIIA of the Act.

Hope Downs

6.81 A further example of BHPB and Rio exercising market power to deny access to Pilbara rail infrastructure is Hope Downs.

6.82 Hope Downs holds tenements in the vicinity of Hamersley's Yandicoogina mine and BHPB's Area C and Yandi mines.

6.83 In 1998 Hope Downs was sufficiently interested in gaining access to the Hamersley Railway to successfully apply to be joined as a defendant to the action commenced in the Federal Court by Hamersley (*Hamersley Iron Pty Ltd v National Competition Council* (1999) 164 ALR 203).

6.84 Hope Downs continued in its attempts to gain access to railways, seeking to have BHPBIO carry Hope Down's iron ore on the Mt Newman Railway under rights to a haulage service created by the *Rail Transport Agreement 1987* (**Rail Transport Agreement**).

6.85 In September 2002 the WA Supreme Court rejected Hope Downs's application for a declaration that BHP was required by the Rail Transport Agreement to negotiate with Hope Downs the terms on which BHP would haul Hope Down's iron ore on the Mt Newman Railway as Hope Downs was not a 'third party' under the terms of the Rail Transport Agreement as Hope Downs was not operating a mine (*Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2002] WASC 224).

6.86 Hope Downs appealed against this decision and, on 6 November 2003, its appeal was upheld (*Hancock Prospecting Pty Ltd v BHP Billiton Iron Ore Pty Ltd* [2003] WASCA 259). Although negotiations were subsequently commenced, no haulage agreement was concluded and none of Hope Downs' ore has been carried on the Mt Newman Railway.

6.87 On or about 1 July 2005, Hancock Prospecting Pty Ltd (**Hancock Prospecting**) acquired from Downs Holding BV (a wholly owned subsidiary of Kumba) the 50% interest in the Hope Downs Project that it did not already own.

6.88 Also on 1 July 2005, Rio and Hancock announced an agreement for Rio to purchase a 50% interest in the Hope Downs iron ore tenements owned by Hancock Prospecting. The two companies issued a press release stating that they would enter into a:

> '50:50 unincorporated joint venture to develop the Hope Downs iron ore assets, with the development and ongoing operation of the assets to be managed by Rio Tinto. The project will use Pilbara Iron managed port, rail and power infrastructure.'

6.89 **Attachment K** is a copy of the press release issued by Rio on 1 July 2005. The "Pilbara Iron managed... rail... infrastructure" referred to in the press release includes the Goldsworthy Railway.

Access would promote competition in the tenements market

6.90 Access to the Goldsworthy Railway would remove the principal barrier which currently restricts demand for bulk mineral tenements in the Pilbara. This would reduce the monopsony market power that BHPB currently has in this market.

6.91 Access to the Goldsworthy Railway would mean that:

(a) the pool of potential purchasers of bulk mineral tenements would expand to include entities that currently do not have access to Pilbara rail infrastructure;

(b) there would be increased competition for bulk mineral tenements in the Pilbara;

(c) there would be an increase in exploration efforts in the region because successful explorers would more easily realise returns from discovery of mineral deposits;

(d) the price of bulk mineral tenements would increase to more closely reflect price in a competitive market for those tenements;

(e) prices would reflect the valuation put on tenements by the most efficient developer and marketer of tenements' output rather than the restriction of access to naturally monopolistic infrastructure;

(f) there would likely be an increase in the number of bulk mineral tenements that are developed and the speed at which these are developed;

(g) there would likely be an increase in the options for exploiting a developed iron ore deposit;

(h) there would be greater incentives for junior explorers that wish to develop bulk mineral tenements to do so, and thereby increase the number of potential suppliers of bulk mineral tenements; and

(i) there would likely be an increase in the aggregate output of iron ore from the region in the vicinity of the Goldsworthy Railway.

6.92 Accordingly, access to the Goldsworthy Railway will promote a material increase in competition in the markets for iron ore tenements in the vicinity of the Goldsworthy Railway and in the Pilbara.

Examples of how competition in the rail haulage and tenement market would be promoted if there is access to the Goldsworthy Railway

6.93 BCI and Flinders Diamonds Limited (**FDL**) are examples of the promotion of competition in the tenements and rail haulage markets that can be achieved as a result of access to rail infrastructure.

6.94 On 6 July 2007, BCI announced its entry into a non-binding memorandum of understanding with TPI for the future provision of bulk commodity transport services for its Nullagine Iron Ore Project in the Pilbara.[22] That project is located adjacent to the TPI Railway.

6.95 Under the memorandum of understanding, where BCI successfully completes a Bankable Feasibility Study, the parties will seek to agree to commercial terms on which TPI will provide BCI with rail haulage, port handling and ship loading facilities.

6.96 A copy of BCI's ASX releases of 6 July 2007 and 10 December 2007 which refer to the memorandum of understanding are attached as **Attachment L**.

6.97 On 22 November 2007 FDL announced that it had identified an Exploration Target of potentially 325 to 390 million tonnes. In its ASX release, FDL stated:

> FDL's Managing Director, Dr Kevin Wills, said today the company's awareness of **FMG's ongoing central Pilbara activity had prompted FDL** to commission its own independent study of 100%-owned E47/882 licence area over the past five months.
>
> "the upshot of that independent review of our own Pilbara ground has outlined the large 325-390 million tonnes target which, if confirmed by drilling, would provide a company-making project for FDL," Dr Wills said.
>
> [Emphasis added]

6.98 A copy of FDL's two ASX releases of 22 November 2007 regarding this Exploration Target are attached as **Attachment M**.

7 National significance (criterion (c))

7.1 In paragraph 9.3 of the Declaration Application, TPI observed that in the past the Goldsworthy Railway had carried around 7Mtpa of iron ore from Yarrie which at today's prices would be worth around $350m per year. The 7Mtpa figure was the level of production achieved prior to the suspension of mining activities at Yarrie/Nimingarra by BHPB. The $350m export amount was achieved by multiplying 7Mtpa by the ballpark figure for the price of iron ore of $50 per tonne referred to at paragraph 6.17 (7Mtpa x $50 = 350m).

[22] BCI ASX release of 6 July 2007 entitled 'Memorandum of Understanding Signed with Fortescue Metals Group Limited'.

8 Application of an effective access regime (criterion (e))

8.1 As noted in paragraph 6.33 above, the State of Western Australia is seeking to develop the State Regime being a State-based access regime for haulage of third party iron ore on the Pilbara railways.

8.2 When the development of the State Regime was announced it was expected that the draft regime would be available for public consultation by mid 2007. While the State has provided the draft State Regime to some interested parties on a confidential basis, it has not yet commenced an open public consultation process. It is not known when the State will commence this process.

8.3 Further, it is not known whether the State Regime will ever in fact commence operation and, if it does, whether it will operate effectively to give third parties haulage services on Pilbara railways.

8.4 As the State Regime will be a haulage regime, it will not provide for third parties to access BHPB's or Rio's rail tracks to offer their own haulage service to themselves and/or to other parties. It will not enable TPI to offer the haulage service on the Goldsworthy Railway that is the reason for TPI's Declaration Application. It therefore will not cover the Goldsworthy Service sought by TPI in its Declaration Application.

8.5 The State Regime therefore has no impact upon the operation of criterion (e) in respect of TPI's Declaration Application. As the State Regime will not cover the Goldsworthy Service, it cannot be an effective access regime for the purpose of criterion (e).