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RIO TINTO

IRON ORE

APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY THE HAMERSLEY RAILWAY

AND

APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY THE ROBE RAILWAY

SUBMISSION BY RIO TINTO IRON ORE

DATED 30 APRIL 2008

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A. Executive Summary

1. Executive Summary

(a) Introduction

1.1 This submission is made by Hamersley Iron Pty Ltd and Hamersley-Yandi Pty Ltd (collectively ***Hamersley***) and the Robe River Iron Associates Joint Venture (***Robe***)[1]. The submission is a joint response to the applications lodged with the National Competition Council (the ***Council***) by The Pilbara Infrastructure Pty Ltd (***TPI***) for declaration of a service provided by the Hamersley railway line (the ***Hamersley Service***) dated 16 November 2007 (the ***TPI Hamersley Application***) and for declaration of a service provided by the Robe railway line (the ***Robe Service***) dated 18 January 2008 (the ***TPI Robe Application***) (collectively, the ***TPI Applications***). In this submission, the term 'RTIO' means Rio Tinto Iron Ore, the division of Rio Tinto Limited (***Rio Tinto***) responsible for managing the Hamersley and Robe mining and infrastructure assets. Except where the context otherwise indicates, the term RTIO includes a reference to Hamersley and Robe.

(b) Differences from the Mount Newman Application

1.2 It is important to note at the outset that the TPI Applications raise very different issues from those which the Council considered were raised by the Fortescue Metals Group Limited (***FMG***) application for declaration of a service (the ***Mount Newman Service***) provided by the BHP Billiton Iron Ore Pty Ltd (***BHPBIO***) Mount Newman railway line (the ***Mount Newman Application***). Key differences include the following:

- the Mount Newman Application related to a 'point to point' service between Mindy Mindy and Port Hedland. FMG intended to use that service solely for the purpose of transporting ore from the small potential Mindy Mindy mine to Port Hedland. As a result, the Council found that this was the only service in respect of which declaration was sought and that the maximum third party demand for the Mount Newman Service was only 10 million tonnes per annum (***mtpa***). However, each of the TPI Applications seeks declaration of an 'all points service', potentially allowing access between any points along the Hamersley and Robe railway lines. TPI states that it wishes to use these services, not for the purpose of transporting ore from any particular mine, but rather for the purpose of providing rail haulage services to unascertained third parties from as yet unidentified mines owned by those third parties to as yet unspecified destinations (in addition to potential services to mines operated by TPI or its related parties such as FMG). Demand for such an 'all points' service is unknowable (even TPI describes its estimate of demand as no more than an 'educated guess'), but is potentially very high indeed;

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[1] Robe is comprised of the following participants:

- Robe River Mining Co. Pty Ltd
- Mitsui Iron Ore Development Pty Ltd
- North Mining Limited
- Cape Lambert Iron Associates
- Pannawonica Iron Associates.

- circumstances have changed dramatically since the Council considered the Mount Newman Application. In particular, FMG has now built the Chichester railway line linking its Cloud Break deposit to Port Hedland (the ***Chichester railway line***) and has constructed a port at Port Hedland. Further, FMG is now studying building the 'Kennedy railway line', linking its deposits in Western Pilbara to the Chichester railway line (the ***Kennedy railway line***). Demand for iron ore, from China in particular, has grown exponentially. Chinese demand and the resultant increases in iron ore prices mean that a number of other new entrants are likely to commence iron ore production in the Pilbara in the near term. Some of these new entrants are studying the development of further infrastructure, including a proposed new port at Cape Preston and a rail line linking deposits in the Pilbara to Cape Preston or alternative ports. Significantly, many of these other new entrants are owned in whole or in part, or are otherwise supported by, Chinese steel mills;
- Part IIIA of the *Trade Practices Act 1974* (Cth) (the ***TPA***) has been amended since the Mount Newman Application was considered. In particular, criterion (a) has been amended to clarify that declaration should occur only where access would promote a 'material' increase in competition. It is clear that a minimal or purely theoretical increase in competition is no longer sufficient. An objects section has also been included in Part IIIA, stating that a key object of Part IIIA is to 'promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided'.

(c) TPI Applications are invalid

1.3 The TPI Applications are invalid for a number of reasons, which are summarised below and explained in more detail in Part B of this submission.

Failure to identify a 'particular service'

1.4 The TPI Applications in substance seek declaration, not of a single service, but rather of **all** services that might conceivably be provided by the relevant infrastructure, from any point to any point, without identifying any particular iron ore deposit from which iron ore would be taken or any particular point to which iron ore would be delivered.

1.5 This approach suffers from two fundamental flaws. First, it is inconsistent with section 44F(1) of the TPA, which provides that an application must be made in respect of a '***particular*** service' [emphasis added]. Secondly, the infinite number of services that in substance have been applied for makes it impossible to meaningfully apply the declaration criteria (hence the 'particular service' requirement in section 44F(1)). For example, it is impossible to estimate foreseeable demand for each of an infinite number of 'services'. The Council cannot assess whether it would be uneconomical for another facility to be developed without having regard to foreseeable demand for each of these services. Hence it becomes impossible to apply criterion (b) in any meaningful way. Consequently, the TPI Applications must be rejected as invalid.

Prior determination – Justice Kenny

1.6 Hamersley has brought proceedings in the Federal Court (the ***current proceedings***) seeking orders that the Council does not have power to consider, or make a recommendation in relation to, the TPI Hamersley Application because of orders made by Justice Kenny of the Federal Court on 28 June 1998 and by the Full Federal Court on 22 November 1999 (collectively, the ***Orders***). The current proceedings were heard by Justice Weinberg on 26 March 2008 and the Court's decision has been reserved. This submission is made without prejudice to Hamersley's contentions in the current proceedings.

Production process

1.7 Irrespective of the outcome of the current proceedings, the Council has no power to deal with, or make a recommendation in respect of, the Hamersley Service or the Robe Service because each such service is a 'production process' and is therefore not a service capable of declaration under Part IIIA (see paragraph (f) of the definition of 'service' in section 44B).

1.8 On 7 March 2008, BHPBIO and others obtained special leave from the High Court to appeal from the Full Federal Court's decision in *BHP Billiton Iron Ore Pty Ltd v National Competition Council*, dated 5 October 2007. RTIO, or any other interested party, may initiate proceedings at any time contending that the Hamersley Service and Robe Service are an integrated production process, but may also choose to defer doing so until after the High Court appeal has been determined. RTIO reserves its rights in this regard and makes this submission without prejudice to its contention that the Hamersley Service and Robe Service are production processes and therefore not capable of declaration.

Amendments to TPI Applications

1.9 TPI has, by a variety of documents, purportedly amended and supplemented its declaration application, including altering the service providers against whom declaration is sought. Part IIIA does not include any mechanism to permit declaration applications to be amended in this way. Hamersley and Robe reserve their rights in this regard and this submission is made without prejudice to that contention.

(d) Access criteria

1.10 If the Council proceeds to consider the TPI Applications, notwithstanding the points made above, it is clear that several of the declaration criteria are not met for the reasons summarised below and discussed in more detail in Part D of this submission.

Criterion (f) – Public Interest

1.11 Access to the Hamersley and Robe Services would cause immense damage to the public interest and generate no public benefits.

1.12 The Hamersley and Robe rail networks (which are run together as part of an integrated network (the ***RTIO Rail Network***)) are amongst the most efficient in the world. That efficiency is made possible because RTIO controls and is the sole user of that infrastructure. RTIO can decide how to operate, and how and when to expand the RTIO Rail Network, without needing to agree matters in advance with a regulator or a third party user. RTIO's unprecedented expansion of iron ore exports from the Pilbara has been possible only because its infrastructure is not regulated or multi-user infrastructure. If the Hamersley and Robe Services were declared, the efficiency of the RTIO Rail Network would be reduced and the following types of costs and diseconomies would arise:

- ***Delays to expansions*** would inevitably occur because of the need to obtain co-users' consent or acquiescence to expansions and because of users' rights to participate in expansions;
- ***Displacement costs*** would be incurred because RTIO would have to build further rail capacity in order to accommodate requests for access by third parties. In the current environment in the Pilbara, this would necessarily require RTIO to divert scarce resources away from, and thereby delay, its own capacity expansion programs;
- ***Loss of system capacity*** will inevitably occur as a result of having to accommodate multiple users on the RTIO Rail Network;
- ***Disincentives to invest*** will be created by converting the single-user system into a multi-user system.

The problems of the East Coast coal industry are an excellent illustration of what happens when infrastructure is shared between multiple users and is subject to some form of regulation. Declaration would transpose the problems of the East Coast coal industry to the highly successful Pilbara iron ore industry and would cost RTIO and Australia tens of billions of dollars.

1.13 An economy-wide study by Access Economics demonstrates that the cost to Western Australia and Australia arising from delays to expansions and loss of system capacity are in the order of A$29 billion. This is without taking into account the impact of disincentives to invest caused by converting the RTIO Rail Network into a multi-user system.

1.14 Access would not promote competition in any market or generate any other public benefits. Although TPI claims it will provide rail haulage services using the RTIO Rail Network, no business plan or detail suggesting TPI has a serious intention of doing so has been presented. More significantly, the history of FMG and of the Pilbara generally shows that the market will deliver infrastructure solutions if viable iron ore deposits are found. Regulatory intervention, in the form of declaration and ACCC arbitration, is not needed in order to enable deposits to be developed or to promote competition in any market.

1.15 Consequently, the costs of access will vastly outweigh any possible public benefit arising from declaration. Accordingly, it is clear that access is overwhelmingly contrary to the public interest.

Criterion (b) – Uneconomical for anyone to develop another facility to provide the service

1.16 In RTIO's view, a private investment test should be applied when considering the declaration criteria, including criterion (b). A private investment test is suggested by the natural meaning of the words in criterion (b). There are also sound economic and public policy reasons for applying a private investment test. It is for these reasons that the United States (***US***) essential facilities doctrine applies what is essentially a private investment test. To date, however, the Council has interpreted criterion (b) as involving a natural monopoly test.

1.17 Whichever test is applied it is important to note that criterion (b) does not ask whether it would be uneconomical for anyone to develop precisely the same facility in an identical location; rather, criterion (b) will not be satisfied if it is economic to develop another facility that meets the same operational ends (eg, a spur line linking a third party mine to FMG's Chichester/Kennedy railway lines).

1.18 Even applying a natural monopoly test it is impossible for the Council to be satisfied that criterion (b) would be met in this case for the following reasons:

- TPI has not specified the particular services it wishes to have declared, making it impossible to know whether there are either economies of scale in relation to the provision of each and every service or economies of scope;
- it is impossible to forecast reasonably foreseeable demand for the services TPI has sought to have declared, given the lack of detail in the description of the services to which access is sought and uncertainty about the development of iron ore resources in the Pilbara over a 20 year period. Demand could literally range from anywhere between nil and hundreds of millions of tonnes per annum. Without a meaningful estimate of demand, it is impossible to satisfy a natural monopoly test and hence impossible to conclude that criterion (b) is met;
- RTIO is expanding its Pilbara iron ore operations as rapidly as possible. Modelling by TSG Consulting (***TSG***) suggests that RTIO will not have spare capacity available on key segments of its network in the foreseeable future to accommodate third parties. Therefore substantial sections of the RTIO Rail Network would need to have an entirely new parallel line built to meet third party demand. Even without taking into account diseconomy costs, the direct cost of building what is effectively a separate railway line for about 250 kilometres will exceed the cost that any third party would be likely to incur in building the minimum facility required to link up to other rail networks or ports; and
- as discussed in relation to criterion (f), the costs that access would cause (especially the diseconomy costs) would dwarf the cost of constructing another facility, even if the entire RTIO Rail Network was to be duplicated (rather than a spur line built to the FMG Chichester/Kennedy lines, which would satisfy third party demand more cheaply).

1.19 For all these reasons the Council cannot be satisfied criterion (b) is met, applying the Council's proposed natural monopoly test.

1.20 Similarly, if a private investment test is applied, criterion (b) cannot be met. FMG's construction of the Chichester railway line and its proposal to build the Kennedy railway line show that there are no practical or economic obstacles to constructing an alternative facility if the demand for such a facility exists. Therefore, whether a natural monopoly or private investment test is applied, criterion (b) is not satisfied.

Criterion (a) – Promote a material increase in competition in another market

1.21 TPI claims that access would promote a material increase in competition in the 'iron ore and other bulk mineral tenements market' in the Pilbara and in the 'rail haulage market' in the Pilbara. TPI does not suggest that access would promote a material increase in competition in the global iron ore market.

1.22 In relation to the claimed 'tenements' market:

- the iron ore tenements market is not a separate market from the global iron ore market. Companies that acquire or trade in tenements also produce iron ore or intend to produce iron ore. In the absence of any evidence to suggest that there is a market made up of participants who are interested only in developing and selling iron ore tenements (rather than producing iron ore), the Council cannot be satisfied that there is a separate iron ore tenements market;
- even if it is assumed that there is a separate market for iron ore or bulk mineral tenements, this is a global market. Evidence of tenements trading in the Pilbara shows that the buyers of tenements are in no way limited to parties that own infrastructure in the Pilbara. The potential buyers of tenements in the Pilbara include international iron ore players, such as Vale Inco (***Vale***), formerly Companhia Vale do Rio Doce, and Anglo American, international steel mills, notably Chinese steel mills, and numerous iron ore juniors;
- even if an iron ore or bulk mineral tenements market confined to the Pilbara exists, any such market is already competitive. As set out in Part D of this submission, there is currently significant trading of tenements and interests in companies with tenements in the Pilbara. Moreover, most buyers are companies other than RTIO and BHPBIO. This is not surprising given that the history of the Pilbara shows that viable iron ore deposits can be developed and infrastructure solutions found without the need for access declarations. Accordingly, any Pilbara iron ore tenements market is already subject to effective competition and access would not promote competition;
- even, if, contrary to RTIO's submission, the Council concludes there is a Pilbara iron ore tenements market that is not already subject to effective competition, access would not promote a material increase in competition in any such market for three reasons:
  - it would be cheaper for TPI to provide rail haulage services using its own Chichester/Kennedy rail line and, where necessary, build extensions to serve particular deposits, than to use the RTIO Rail Network, particularly once diseconomy costs caused by access are taken into account. As a result, access will not increase the likelihood of TPI (or any other party) actually providing rail haulage services and, therefore, will not promote a material increase in competition in any tenements market;
  - TPI has not identified how iron ore that is transported using the Hamersley or Robe Services would be shipped through a port. In the absence of any evidence to demonstrate that ore could be shipped through a port, such as FMG's port at Port Hedland, the Council cannot be satisfied that a declaration would result in any change in the marketplace, much less that it

would result in a material increase in competition in a Pilbara tenements market;

- finally if, ***contrary to RTIO's submission and all the available evidence***, there was spare capacity available on the RTIO Rail Network that could accommodate third party demand AND there are deposits that could be developed if they obtained access, that would not be economic to develop (or would be more costly to develop) if they built their own infrastructure, access would still not promote a material increase in competition. In such a hypothetical scenario, without access, an agreement will be struck between the owner of that deposit and RTIO that will see the deposit developed. Both RTIO and the deposit holder have every commercial incentive to reach an agreement, sharing between them any profits that would arise from the development of the deposit (or any increase in profits resulting from RTIO providing access instead of the tenement owner building its own infrastructure). As the global iron ore market is already competitive (as the Council has previously found and TPI implicitly acknowledges) RTIO has no incentive to prevent iron ore from such a deposit entering the global market. Therefore the only effect access could have, even accepting all of FMG's arguments, would be to create the potential for TPI as a provider of rail haulage services to share in the profits generated by the deposit rather than RTIO; access would not result in a tenement being developed that would not be developed anyway without access. As a result access will not promote efficiency in any way and would not lead to a material increase in competition. RTIO reiterates, however, that this scenario is purely hypothetical. RTIO will not have spare capacity available on key segments of its network in the foreseeable future to accommodate third parties. Furthermore, the costs of access (especially the diseconomy costs) would dwarf the cost of a deposit owner constructing its own infrastructure.

1.23 In relation to the claimed 'rail haulage market':

- bulk iron ore rail haulage, like track access, is part of the global iron ore market. There have been no transactions in relation to rail haulage in the Pilbara. Further, there is no potential for transactions to occur. TPI claims that it will provide haulage services on the Hamersley and Robe railway lines, but TPI has provided no detail about its plans and its claim is sustainable only if TPI will not have to bear, or pass on to third party iron ore producers, the diseconomy costs that access would cause. If TPI is not, in effect, subsidised and must bear the true diseconomy costs its access will cause, there will be no potential for haulage transactions in the claimed market;
- RTIO has no incentive or ability to exercise market power to affect competition in any rail haulage market. Currently, RTIO does not provide any general rail haulage service and, as a result, is not making 'monopoly rents' from haulage charges. Further, the suggestion that RTIO is able to leverage its power in relation to rail haulage in the Pilbara tenements market ignores the evidence of competitive

trading of tenements in the Pilbara. Therefore, it is clear that RTIO has no incentive or ability to exercise market power in any rail haulage market;

- even if, contrary to RTIO's submission, the Council concludes that RTIO does have market power in the rail haulage market, access would not promote competition in that market in any event for four reasons:
  - as discussed above in relation to the tenements market, it would be cheaper for TPI to provide rail haulage services using its own Chichester/Kennedy rail line and, where necessary, build extensions to service particular deposits than to use the RTIO Rail Network. As a result, access will not increase the likelihood of TPI (or any other party) providing rail haulage services and, so, will not promote a material increase in competition in any rail haulage market;
  - TPI does not identify how iron ore that is transported using the Hamersley or Robe Services will be shipped from a port. It is therefore not possible for the Council to be satisfied that access would result in any change to the marketplace much less result in a material increase in competition in any rail haulage market;
  - as discussed in relation to the tenements market, if (contrary to RTIO's submission and all the evidence), all of TPI's arguments were accepted, the only effect of access would be to create the potential to transfer profits from RTIO to TPI; it would not result in any change in the tenements developed or the volume of rail haulage services provided. Such a transfer of profits does not promote efficiency in any way and could not be said to amount to a material increase in competition in the rail haulage market; and
  - finally, even if TPI did provide haulage services using the RTIO Rail Network, TPI would be a monopoly rail haulage operator. Access would not lead to a competitive Pilbara rail haulage market because RTIO is unlikely to enter the asserted rail haulage market in the current environment.

1.24 Accordingly, access would not promote a material increase in competition in any market.

Criterion (d) – Undue risk to human health or safety

1.25 The Council cannot be satisfied, on the limited material available, that access to the Hamersley Service and the Robe Service could be provided without undue risk to human health and safety. It is not adequate to simply rely on assertions by TPI that it will comply with 'best practice' and 'all relevant safety and other regulations'. TPI's presence on the network will necessarily increase system complexity and will create undue risks to human health and safety. RTIO's intention to move to driverless trains increases these risks if access is granted.

Criteria (c) and (e)

1.26 Because the Council cannot be satisfied that criterion (a), (b), (d) or (f) are satisfied, this submission does not go on to address criteria (c) (national significance) or (e) (effective access regime). RTIO reserves its right to make further submissions on these criteria.

(e) Structure of this submission

1.27 This submission is set out in four parts:

- ***Part B: TPI Applications are invalid:*** discusses in more detail the reasons why the TPI Applications are invalid;
- ***Part C: Pilbara Iron Ore Industry:*** describes the development of RTIO, BHPBIO and FMG's vertically integrated operations in the Pilbara and their proposed future expansion plans. An understanding of the development of the Pilbara and the recent dramatic expansion in iron ore exports is essential in order for the Council to understand the effects declaration would have and why declaration is unnecessary;
- ***Part D: Declaration criteria:*** considers whether declaration would satisfy each of the criteria for declaration set out in Section 44G and concludes that criteria (f), (b), (a) and (d) in particular would not be satisfied;
- ***Part E: Other matters:*** considers a number of other relevant matters, including RTIO's 'protected contractual rights' and their implications for declaration and confidentiality.

(f) TPI Goldsworthy Application

1.28 RTIO notes that by application for declaration dated 16 November 2007 (as supplemented) (the ***TPI Goldsworthy Application***) TPI also seeks declaration of an "all points" service provided by the Goldsworthy railway line from a location near Yarrie to a location near Finucane Island within the Port of Hedland.

1.29 Where in this submission RTIO raises issues of principle concerning:

- TPI's failure to identify a particular "service";
- TPI's amendment of the applications it has made;
- the proper approach to the construction and application of the criteria; and
- the diseconomies that are likely to flow from a single user facility becoming a multi-user facility.

RTIO maintains those submissions in relation to the TPI Goldsworthy Application.

B. TPI Applications are invalid

2. TPI Applications are invalid

2.1 The TPI Applications do not comply with the requirements of the TPA for the four separate reasons discussed below. As a result the Council does not have power to consider the TPI Applications.

(a) Failure to seek declaration of a 'particular service'

2.2 Paragraph 3.4 of the TPI Hamersley Application states:

> The service which TPI seeks to have declared is the use of the facility comprising the Hamersley Rail Network:
>
> 3.4.1 the railway line from Paraburdoo to Dampier, including all points in between;
>
> 3.4.2 the railway line from Yandicoogina to Rosella Siding, including all points in between; and
>
> 3.4.3 the railway line from Brockman No 2 to Rosella Siding, including all points in between.

2.3 Paragraph 3.3 of the TPI Robe Application states:

> The service which TPI seeks to have declared is the use of the facility comprising the Robe Railway from a location near Mesa J to Cape Lambert and all points in between.

2.4 In each Application, TPI explains that it is seeking access in order to offer an above rail haulage service to mining companies that are seeking to move bulk materials between 'any two points on the Hamersley Rail Network, including without limitation interconnection points with other rail networks and railway lines' (paragraph 3.6 of the TPI Hamersley Application) and 'between any two points on the Robe Railway, including without limitation interconnection points with other rail networks and railway lines' (paragraph 3.8 of the TPI Robe Application).

2.5 Although the TPI Applications speak of a 'service' in the singular, the Applications in substance seek declaration of a multitude of services from any point on the Hamersley railway line to any other point on the Hamersley railway line and from any point on the Robe railway line to any other point on the Robe railway line.

2.6 FMG conceded in its submissions to the Full Court of the Federal Court of Australia in Proceeding No VID 600 of 2007 [2] that an application for an 'all points' service is an application for 'multiple services' – ie. it is, in FMG's words, an 'atomistic' application.

2.7 The Council, in its 2002 publication entitled '*The National Access Regime: A Guide to Part IIIA of The Trade Practices Act 1974, Part B Declaration*' (**the Council Guide**), recognises that a facility the subject of a declaration application may provide more than one service. For example, at paragraph 4.25, the Council points out that 'a facility that provides a service that is the subject of a declaration application is unlikely to provide only that service'. In support of this statement, the Council quotes the following passage from Church and Ware:

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[2] Paragraphs 50 and 51

> Natural gas transportation service from Alberta to Ontario is a very different product than transportation service from Alberta to New York. However, both are provided by the same regulated firm and use of the same pipeline.

2.8 The Council reasonably assumes, however, that where a facility can provide multiple services, a declaration application will be made for a particular service, not the entire range of services that the facility could conceivably provide. For example, at paragraph 4.76(b), the Council concludes that a facility is a natural monopoly facility if:

> (b) for a multiple-service facility, the facility exhibits:
>
> (i) economies of scale in the provision of each and every service provided by the facility, ***particularly in serving the reasonably foreseeable demand for the service subject to declaration*** ; and
>
> (ii) economies of scope. [emphasis added]

(See also the discussion at paragraphs 4.78 and 4.82 of the Council Guide about whether it is reasonable to assume that, if economies of scale exist for ***the service subject to declaration***, economies of scale would exist for each and every service provided by the facility).

2.9 The TPI Applications fail in substance to specify a particular service or services in respect of which a declaration is sought. Instead, the TPI Applications seek declaration of all services that might conceivably be provided by the relevant facility. This approach suffers from two fundamental flaws.

2.10 First, it is inconsistent with section 44F(1) of the TPA, which provides that an application must be made in respect of a '***particular*** service' [emphasis added]. RTIO does not necessarily contend that an application cannot be made for more than one service, but each such service must be sufficiently defined so as to comprise a 'particular service'. The TPI Applications make no attempt to do this. In fact, it is clear from subsequent paragraphs in each TPI Application[3] that TPI does not, indeed cannot, know which service or services it intends to use, let alone the service or services that a third party might use. All that can be said is that each service will comprise the use of some part of the Hamersley railway line or some part of the Robe railway line, but the number of such services and the particular infrastructure providing each such service are unspecified.

2.11 Secondly, this approach makes it impossible to meaningfully apply the declaration criteria. For example, criterion (b) of section 44G(2) , as interpreted by the Council, cannot even be applied, let alone satisfied. This is further discussed in section 6 below. In summary, if there are an infinite number of possible services for which declaration is sought, without any precise definition of each of those services, the Council cannot:

- be satisfied that there are the requisite economies of scale in the provision of each and every service;
- be satisfied that there are economies of scope (ie. that it is more cost efficient for the relevant facilities to provide the entire set of services);

[3] Paragraph 3.6 of TPI Hamersley Application and para 3.9 of TPI Robe Application

- forecast the reasonably foreseeable demand for each service over the period of declaration; or
- be satisfied that it would be cheaper or more efficient (in terms of costs and benefits to the community as a whole) for one facility to provide those services rather than more than one facility.

2.12 The fact that the text of section 44F(1) requires that an application be made for a 'particular service' indicates that Parliament recognised the impossibility of applying the declaration criteria to an infinite number of unspecified services. TPI's failure to apply for declaration of a 'particular service' renders its application invalid under section 44F(1) and the Council should reject it on this basis.

(b) Prior determination by Justice Kenny

2.13 By application filed in the Federal Court on 24 December 2007, Hamersley seeks declaratory orders in the form of prohibition and other relief against the Council, as a consequence of the Orders of Justice Kenny of the Federal Court, made on 28 June 1999 in proceeding No. VG 581 of 1998 and the Full Court of the Federal Court made on 22 November 1999. Hamersley maintains that, by reason of those Orders and certain undertakings given by the Council to the Court, the Council has no power to consider or otherwise deal with the TPI Hamersley Application.

2.14 The current proceedings were heard by Justice Weinberg on 26 March 2008 and the Court's decision has been reserved.

2.15 Accordingly, to the extent that this submission relates to the TPI Hamersley Application, it is submitted without prejudice to Hamersley's contention that the Council does not have power to consider, or make a recommendation in relation to, the TPI Hamersley Application.

(c) Production Process

2.16 RTIO maintains that the Council has no power to deal with, or make a recommendation in respect of, either of the TPI Applications as the Hamersley and the Robe Services are an integrated production process and, therefore, are not capable of declaration within the meaning of section 44B. This contention is made independently of the outcome of the proceeding referred to in paragraphs 2.13 to 2.15 above. RTIO reserves its rights in this respect.

2.17 On 7 March 2008, BHPBIO and others obtained special leave from the High Court of Australia to appeal the decision of the Full Court of the Federal Court of Australia in *BHP Billiton Iron Ore Pty Ltd v the National Competition Council*, dated 5 October 2007. RTIO, or any other interested party, may initiate proceedings in any competent court or tribunal relating to this issue at any time, but may also choose to defer doing so until after the High Court appeal has been determined.

(d) Documents constituting TPI Declaration Application

2.18 In a letter of 23 January 2008 (the ***AAR letter***), the solicitors for RTIO, Allens Arthur Robinson, notified the Council of various errors in the original application by TPI for access to the Hamersley railway line. In particular, the application incorrectly stated that

Hamersley was the sole owner of the railway lines from Paraburdoo to Dampier and from Yandicoogina to Rosella Siding. In fact, the railway line from Paraburdoo to Dampier contains a dual track section between Rosella Siding and Emu, part of which is owned by Robe. Further, the Juna Downs to Yandicoogina section of the Yandicoogina to Rosella Siding railway line is owned by Hamersley Iron-Yandi Pty Ltd. Finally, the applicant incorrectly named the Pilbara Rail Company as the relevant provider of the service. The rail operations of Hamersley, Hamersley Iron-Yandi Pty Ltd and Robe are actually managed and operated by Pilbara Iron Pty Ltd. The AAR letter noted that the application therefore did not comply with the conditions prescribed in regulation 6A of the *Trade Practices Regulations 1974* (Cth) (the ***regulations***). Further, these errors meant that the definition of the service that the applicant was seeking to have declared was unclear.

2.19 The Council responded in a letter of 1 February 2008, stating that it had notified the applicant of the AAR letter and that it had subsequently received letters on 31 January 2008 from TPI and its solicitors, DLA Phillips Fox. The letter from TPI attempted to 'supplement' the original application by amending the definition of the service, ownership of the facility, the identity of the service provider and manager of the Hamersley railway line and ownership of the mines cited in the application. Further, it erroneously identifies the access which TPI seeks by reference to facilities, rather than any particular service.

2.20 The Council asserts that, in the case of the TPI Hamersley Application, the Application is now made up of the following documents:

- an application for declaration dated 16 November 2007;
- a supplementary submission dated 18 January 2008 (the ***Supplementary Submission***);
- a report by Simulation Modelling Services Pty Ltd (***SMS***) regarding rail capacity modelling received by the Council on 31 January 2008; and
- the letter from TPI to the Council dated 31 January 2008.

2.21 In the case of the TPI Robe Application, by letter dated 7 February 2008, the Council informed Robe that it is acting on the basis that the application comprises the following documents:

- an application for declaration dated 18 January 2008;
- an SMS report regarding rail capacity modelling dated 31 January 2008; and
- a letter from TPI to the Council dated 6 February 2008.

2.22 Hamersley and Robe respectively contend that TPI is not entitled to submit, and the Council does not have power to accept, what are plainly amended declaration applications. Hamersley and Robe reserve their rights in this regard, and this submission is made without prejudice to that contention.

C. The Pilbara Iron Ore Industry

3. The Pilbara Iron Ore Industry

(a) Introduction

3.1 This section of the submission sets out a brief summary of the development of Hamersley, Robe, BHP Billiton Limited (***BHPB***) and FMG's activities in the Pilbara, their current operations and their significant expansion plans. It also briefly mentions the expansion plans of some of the other potential iron ore producers in the Pilbara.

(b) Hamersley and Robe

Development

3.2 Hamersley was incorporated in 1962 and, by 1963, had identified considerable reserves of high grade iron ore (greater than 60% iron content) in the Pilbara region of Western Australia. In July 1963, Hamersley entered into an agreement with the State of Western Australia (the ***Hamersley Range State Agreement***) to provide for further exploration and development of these reserves, including the construction of a mine and related infrastructure.

3.3 The first mine to be developed pursuant to the Hamersley Range State Agreement was at Mount Tom Price. Production of high grade Brockman-type iron ore commenced from the mine in 1966.

3.4 As well as constructing the mine and on site processing facilities at Mount Tom Price, Hamersley built processing, stockpiling, port and shiploading facilities at Dampier, power generation and distribution facilities and a 290 kilometre railway linking the mine at Tom Price to the new port. Permanent townships at Mount Tom Price and Dampier were also established to house Hamersley employees and their families.

3.5 In the mid to late 1960's, there was a rapid expansion in steel production worldwide creating an increased demand for iron ore supplies. With this in mind, Hamersley decided to open its second mine at Paraburdoo in 1968. Subsequently, the construction and development of the Paraburdoo mine and related facilities, including a 104 kilometre rail extension and establishment of a township at Paraburdoo, were undertaken pursuant to an amendment to the Hamersley Range State Agreement. Commercial production commenced from Paraburdoo in 1973.

3.6 A third mine, Channar, commenced commercial production in 1990. Channar is a joint venture between Channar Mining Pty Limited, a wholly owned subsidiary of Hamersley Holdings and a 60% participant in the joint venture and Sinosteel Australia Pty Ltd (formerly CMIEC (Australia) Pty Limited), a member of the China Iron and Steel Industry Trade Group of Companies. Development of this mine occurred pursuant to a separate agreement with the State of Western Australia, signed in 1987. Ore mined at Channar is transported by conveyor to Paraburdoo where it is processed and blended with Paraburdoo ore.

3.7 The fourth mine to come onstream was Brockman No. 2 Detritals in 1992. Development of this deposit, which consists of high quality hematite detritals (gravels) and hematite conglomerate, was designed to support and enhance the flexibility of Hamersley's operations and raise the proportion of lump ore in Hamersley's product mix. The development of the mine and the 42 kilometre rail spur to the mine from Rosella siding on the Dampier to Paraburdoo main line took place following amendments to the Hamersley Range State Agreement.

3.8 In 1994, the mine at Marandoo was commissioned and a 55 kilometre rail spur from the mine site to Rosella siding was built. The mine produces high grade Marra Mamba ore.

3.9 In 1998 Hamersley constructed its sixth Pilbara iron ore mine at Yandicoogina, which included the construction of a 150 kilometre rail link from the mine site to Marandoo. Development of the Yandicoogina mine took place under a separate agreement with the State of Western Australia,

3.10 Rio Tinto's acquisition of North Limited in 2000 saw it become a majority joint venture participant in the Robe joint venture. In doing so, Rio Tinto gained a 53% interest in Robe's assets, which at the time included the Mesa J mine, the railway line from Cape Lambert to Pannawonica (the ***Robe railway line***), and the port located at Cape Lambert.

3.11 Construction of the initial Robe Valley mines, processing facilities, railway and two company towns at Pannawonica and Wickam began in 1970. Robe commenced production 2 years later and in October 1972 the first shipment of ore left Cape Lambert. Subsequently, Robe developed a new mine at West Angelas, which commenced production in 2002. A rail spur was also constructed to connect West Angelas to the Hamersley railway line, and the port at Cape Lambert was expanded to handle product from West Angelas. The Robe railway line and the Hamersley railway line were also connected where they previously crossed each other, to enable the uninterrupted railing of ore from the Hamersley railway line to Cape Lambert.

3.12 The Eastern Range Mine (***Eastern Ranges***) commenced operations in 2004. The mine is a joint venture owned 54% by Hamersley and 46% by Shanghai Baosteel Group Corporation. Ore from the Eastern Range Mine is transported by conveyer to Paraburdoo where it is processed and blended with ore from the Paraburdoo and Channar mines.

3.13 The Hamersley and Robe operations were further integrated with the creation of Pilbara Iron Pty Ltd (***Pilbara Iron***) in 2004. Pilbara Iron was appointed to manage the rail and port system on an integrated basis for Robe and Hamersley in the Pilbara. The involvement of Pilbara Iron has resulted in the operation and maintenance of the Hamersley and Robe mining, rail, port and power facilities on an integrated basis, with Hamersley and Robe able to use and expand each other's infrastructure through Pilbara Iron.

3.14 The Nammuldi mine commenced operations in 2006. The mine is 100% owned by Hamersley and is located near the Brockman mine. Ore from Nammuldi is transported on the Hamersley rail system.

3.15 In 2005, Hamersley entered into a joint venture agreement with Hope Downs Iron Ore Pty Ltd (a wholly owned subsidiary of Hancock Prospecting) to develop a new mine at Hope Downs and construct the Lang Hancock Railway connecting the Hope Downs mine to the Hamersley rail system. The Hope Downs mine commenced production in late 2007.

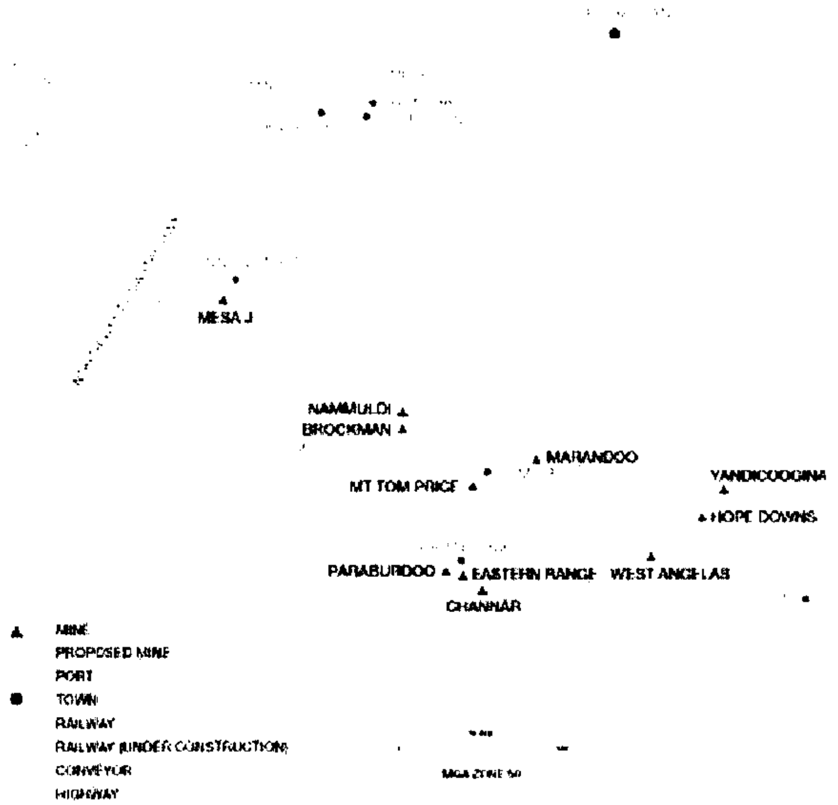
Summary of existing operations

3.16 In summary, RTIO, through Pilbara Iron, now operates a network of 11 mines and associated ore treatment facilities in the Pilbara, being:

- Mount Tom Price, Paraburdoo, Brockman, Marandoo and Nammuldi, each developed pursuant to the Hamersley Range State Agreement and owned 100% by Hamersley;
- Yandicoogina, developed under the auspices of the *Iron Ore (Yandicoogina) Agreement Act 1996* (***Yandi State Agreement***) and owned 100% by Hamersley-Yandi Pty Ltd (a wholly owned subsidiary of Rio Tinto Limited);
- Mesa J and West Angelas, developed under the auspices of the *Iron Ore (Robe River) Agreement Act 1964* and owned 53% by Rio Tinto pursuant to the Robe joint venture;
- Channar, developed pursuant to the *Iron Ore (Channar Joint Venture) Agreement Act 1987* and owned 60% by Hamersley pursuant to the Channar Joint Venture with Sinosteel Corporation;
- Eastern Ranges, developed pursuant to the Hamersley Range State Agreement and owned 54% by Hamersley pursuant to the BaoHI joint venture with Shanghai Baosteel Group Corporation; and
- Hope Downs, developed pursuant to the *Iron Ore (Hope Downs) Agreement Act 1992* and owned 50% by Hamersley pursuant to a joint venture with Hancock Prospecting Pty Ltd.

3.17 The mines are serviced by three shipping terminals located at the ports at Dampier and Cape Lambert, and the largest privately owned heavy haul rail network in Australia. In 2007, over 160 million tonnes of iron ore were produced from the mines.

3.18 A map of the RTIO's current operations in the Pilbara is set out below.



Expansion plans

3.19 It is also important for the Council to understand RTIO's committed and planned expansions in the Pilbara and the environment in which it is now, and for the foreseeable future will be, operating. This environment is relevant to the application of all of the criteria in section 44G(2), especially criterion (b) (whether it is uneconomical for anyone to develop another facility to provide the service) and criterion (f) (whether access to the service would not be contrary to the public interest).

3.20 RTIO is currently experiencing unprecedented demand for iron ore and the consensus amongst industry analysts is that this is unlikely to change in the foreseeable future. The rapid rise in demand has been fuelled by the industrialisation and urbanisation of China. China's seaborne imports of iron ore have grown from 70 million tonnes in 2000 to 384 million tonnes in 2007 and are estimated to reach about 850 million tonnes by 2015. The report by Port Jackson Partners Limited (***PJP***) attached as Annexure 5 (the ***PJP Report***) describes the factors that have brought about the current situation and outlines the consensus view that future demand and prices are likely to be at historically high levels for some time.

3.21 Australia, with its proximity to China and other Asian customers, is well positioned to capitalise on this unprecedented demand, provided it can expand its capacity quickly enough to capture the opportunities presented. If it does not, then the opportunities are likely to be lost to foreign competitors, particularly the world's largest iron ore miner, Vale.

3.22 In light of these conditions, RTIO has embarked on unprecedented expansion programs for its mine, rail and port facilities.

3.23 Since 2003, RTIO's growth strategy in the Pilbara has seen approximately US$5 billion committed to port, rail, power and mine assets to increase capacity and capitalise on strong international demand. Its export capacity has increased from 125mtpa in 2002 to 195mtpa in early 2008.

3.24 RTIO is currently implementing expansions that will increase production and supply capacity at its Pilbara operations (including joint venture operations) to a rate of 220mtpa by early 2009. This has involved:

(a) upgrading the Dampier port to 140mtpa capacity (completion announced in January 2008);

(b) upgrading the Cape Lambert port to 80mtpa capacity (target end 2008); and

(c) developing the Hope Downs mine (with expansion to 30mtpa by early 2009).

3.25 RTIO intends to be operating at a rate of 320mtpa from the Pilbara by 2013. RTIO has already announced significant investment in the development of Mesa A and Brockman No. 4 iron ore deposits in the Pilbara (expected to be completed in 2011 and 2012 respectively). Mesa A will have an initial production of 20mtpa, increasing to 25mtpa by 2011. Mesa J production will reduce to 7mtpa, thus sustaining Robe Valley production at 32mtpa over the next decade. The first phase of the Brockman No. 4 development will have an annual output of 22mtpa, with a potential for further expansion. RTIO also intends to develop a fourth terminal at Cape Lambert, which will increase that port's capacity by 100mtpa to 180mtpa.

3.26 RTIO is considering expansion beyond 320mtpa after 2013. RTIO has foreshadowed that any such expansion would likely involve expanding Cape Lambert by an additional 100mtpa, taking RTIO's Pilbara capacity to 420mtpa. As described in the PJP Report, if RTIO is to maintain market share for its Pilbara production over the next 20 years it will need to expand its Pilbara export capacity to more than 500mtpa by 2027.

3.27 This expansion activity has been undertaken at the same time as other substantial capital projects were, and are, being undertaken in the Pilbara by companies such as BHPB, FMG and Woodside. The challenge in obtaining resources to undertake such large capital works cannot be overstated. In short, RTIO has been expanding its rail, port and mine facilities as quickly as possible and this situation is likely to continue for the foreseeable future.

(c) BHPB

Development

3.28 Like Hamersley, BHPB developed a vertically integrated iron ore operation in the Pilbara in the 1960s.

3.29 The Mount Newman joint venture was formed in the early 1960's to develop the large iron ore deposit discovered by prospector Stan Hilditch in 1957. The deposit, which was five kilometres southeast of Mount Newman, was christened 'Mount Whaleback' by Hilditch. In 1964, the *Iron Ore (Mount Newman) Agreement Act 1964* (***Mount Newman State Agreement***) was enacted, ratifying the agreement between the State of Western Australia and the joint venture vehicle Mount Newman Iron Ore Company Limited (the ***Mount Newman Iron Ore Company***) to develop Mount Whaleback. In 1966, BHPB became party to the Mount Newman Joint Venture and gained a 20% shareholding in the Mount Newman Iron Ore Company (which increased to 85% by 1985). Between 1967 and 1969, under the auspices of the Mount Newman State Agreement, Bechtel Pacific, an American company, established the Mount Whaleback mine, built the town at Newman, constructed a railway line from Newman to Port Hedland (***Mount Newman railway line***), and upgraded port facilities at Port Hedland. In April 1969, the first shipment of ore was transported from Port Hedland to Japan.

3.30 The integration of mine, port and rail infrastructure has continued with the expansion of BHPB's iron ore operations in the Pilbara, as illustrated by the construction of:

- a 32 kilometre spur line to link the Jimblebar mine with the Mount Newman railway line;
- a 30 kilometre spur line linking the Yandi mine with the Mount Newman railway line; and
- a 38 kilometre spur line linking Mining Area C with Yandi (and thus with the Mount Newman railway line).

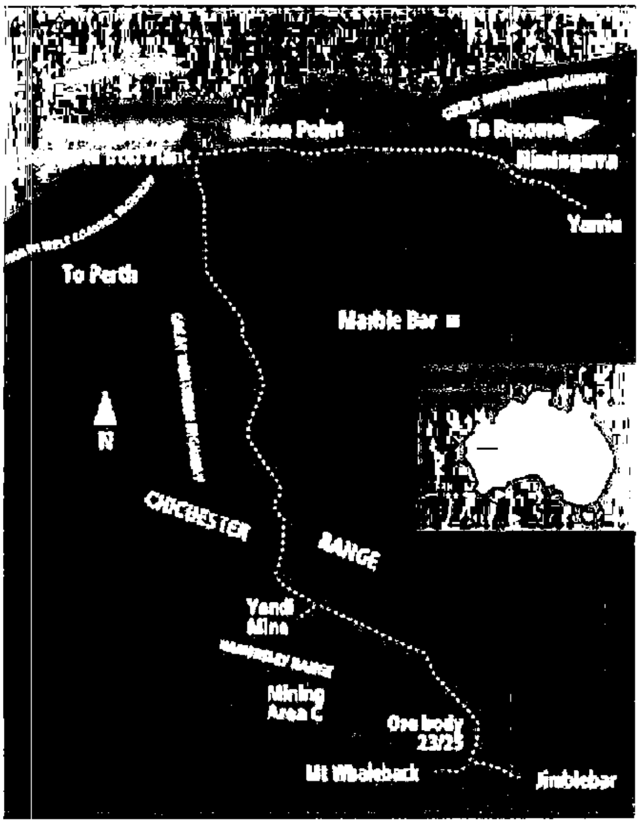
3.31 When BHPB became party to the Goldsworthy Joint Venture, it continued to have vertically integrated operations with ore from the Goldsworthy, Nimingarra and Yarrie mines being transported by a purpose-built railway from Goldsworthy to Port Hedland (the ***Goldsworthy line***).

Summary of existing operations

3.32 In summary, BHPB's iron ore production operations in the Pilbara include:

- six mining operations (mostly in joint ventures in which BHPB had an 85% interest), which RTIO understands currently produce around 107mtpa in total;
- two heavy haulage rail lines, one running 426 kilometres from Newman, Yandi and Area C mines (the Mount Newman line) and the other 210 kilometres from the Yarrie mine (the Goldsworthy line);
- processing and shipping facilities at Nelson Point and Finucane island, Port Hedland, which are connected by a 1.4 kilometre under harbour tunnel conveyer. A stylised map of BHPB's current Pilbara operations is set out below.

BHPB's current Pilbara operations



Expansion plans

3.33 BHPB has publicised its expansion plans as follows:

- BHPB has announced that Rapid Growth Project 4 will increase system capacity across its Western Australian iron ore operations to 155mtpa by the first half of 2010;
- BHPB has also announced that it is considering Rapid Growth Project 5 which would provide an additional 50mtpa of capacity by 2012;
- beyond 200mtpa, BHPB has indicated it will need to develop the outer harbour at Port Hedland, which could initially increase its system capacity to 300mtpa by 2015 (Rapid Growth Project 6 and Quantum), with scope to eventually go to 400mtpa.

(d) FMG

Development

3.34 FMG's flagship iron ore and infrastructure project in the Pilbara, which currently involves the construction of a mine at Cloud Break, a railway line from Cloud Break to Port Hedland, and a new port at Point Anderson in Port Hedland, is being developed under two State Agreements:

- the *Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006*; and
- the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004.*

3.35 FMG's First Ore On Ship is due in mid-May 2008. As at December 2007, stockpiling of iron ore had begun. FMG's initial production rate is expected to be 45mtpa. The Cloud Break deposit has a JORC compliant resource of 850 million tonnes. In addition, FMG owns the nearby Christmas Creek deposit which has a JORC compliant resource of 1400 million tonnes. RTIO understands that FMG is considering whether to extend its Chichester rail line through to Christmas Creek or to truck ore from Christmas Creek to Cloud Break, when the Christmas Creek deposit is developed.

Expansion plans

3.36 FMG plans to increase its production to up to 200mtpa. FMG has broadly described the detail of its expansion plans in various presentations. The main elements of its plans appear to be as follows:

- the first stage is to increase production at the Cloud Break deposit area from 45mtpa to 60mtpa (***Cloud Break Expansion***). An increase from 45mtpa to 55mtpa is unlikely to require any fixed infrastructure. However an increase from 55mtpa to 60mtpa will require further fixed infrastructure;
- the second stage involves the extraction of 50mtpa from the Christmas Creek deposit area (***Christmas Creek Expansion***). The combined increase in production capacity from the Cloud Break Expansion and the Christmas Creek Expansion would be 110mtpa, which would require additional mine, rail and port infrastructure;
- FMG is also considering increasing production beyond 110mtpa by mining ore reserves at the Texture X/CC, Mt Lewin, White Knight, Flinders and Solomon sites.

3.37 The 'Solomon project' is currently one focus of FMG's expansion efforts. FMG has recently announced that its Solomon project has iron ore resources that total in excess of 1.7 billion tonnes[4]. The Solomon project is approximately 25 kilometres east of the Hamersley railway line (see the first map behind Part 1 of Annexure 1).

3.38 Importantly, FMG is investigating the possibility of building the Kennedy railway line, the first stage of which would link the Solomon project deposits with FMG's Chichester railway line (see again the first map behind Part 1 of Annexure 1)[5]. It appears from FMG's public statements that as part of its proposal to expand its annual production to 200mtpa by 2010, FMG intends to construct the Kennedy railway line, produce at least 80mtpa from the Solomon project deposits and transport that ore using the Kennedy railway line to FMG's port at Port Hedland (see the second map behind Part 1 of Annexure 1[6]).

[4] On 15 November 2007 FMG announced an estimate of inferred resources of 1.014 billion tonnes in the Serenity area, comprising the Western one-third of its Solomon project. On 19 December 2007 FMG announced an estimate of inferred resources totalling 700 million tonnes for the Solomon East area, comprising the eastern portion of its Solomon project. A copy of these announcements is behind Attachment C of TPI's Supplementary Submission.

[5] Map taken from FMG March 2008 Project Update presentation published on the FMG website.

[6] Map taken from FMG November 2007 project update presentation published on the FMG website.

3.39 FMG is also investigating a number of other prospective deposits. Initial drilling at White Knight and Flinders has established a JORC inferred resource of 105 million tonnes. FMG's proposed Kennedy railway line (Stage 1) runs past the Flinders deposit. The White Knight deposit is about 40 kilometres from FMG's Chichester railway line or an equivalent or shorter distance to the proposed Kennedy railway line.

3.40 In addition to these deposits, FMG has a number of deposits in the Western Pilbara, including Eliwana, Flying Fish, Solomon West and Fire Tail (see again the first map behind Part 1 of Annexure 1). FMG has announced that

- initial drilling at the Flying Fish deposit has revealed intersections of up to 46 metres and FE grades ranging from 57% to 64%;
- the Eliwana deposit is located approximately 40 kilometres west of the Flying Fish deposit and comprises three prospects, two in Brockman Iron formation and one in Marramamba; and
- the Eliwana project is subject to a joint venture with Talisman Mining Limited.

3.41 As discussed above, FMG is investigating the possibility of building a second and third stage of the Kennedy railway line linking the Solomon deposits and Eliwana and which would run past the Solomon West and Flying Fish deposits.

(d) Other infrastructure developments

3.42 Other companies are also looking at developing iron ore deposits in the Pilbara and constructing rail and port infrastructure, including the following:

- Citic/Mineralogy at Cape Preston: CITIC Pacific Mining Management Pty Limited (***CITIC Pacific Mining***) is a wholly-owned Australian subsidiary of Hong Kong listed company CITIC Pacific Ltd and has been established to manage the company's Sino Iron project. As part of the Sino Iron project, CITIC Pacific Mining will construct and operate a mine and processing plant at Cape Preston. The company will also invest in significant infrastructure, including the construction of port facilities, a gas fired power station, a desalination plant and materials handling equipment;
- API: Australian Railroad Group has created a model of rail construction and operating data with conceptual pooling diagrams generated for a 150 kilometre rail line at potential mine production profiles of 10, 15 and 20mtpa. A Port Options Study has been commissioned and advice has also been received on the capacity of road haulage at high tonnages. A map showing the rail and port options being studied by API is taken from Aquila Resources Ltd's (***Aquila***) 30 November 2007 AGM presentation and is set out behind Part 2 of Annexure 1.

(e) Conclusion

3.43 The following points can be drawn from the above brief history of the development of the iron ore industry in the Pilbara:

- the iron ore industry has been developed very successfully by vertically integrated operators;

- in recent years FMG has established a new iron ore operation in the Pilbara again as a vertically integrated operator building its own rail and port systems and without relying on third party access;
- RTIO, BHPB and FMG are each expanding their iron ore exports and their infrastructure systems as rapidly as possible to meet the explosion in demand from China. Chinese demand growth is also prompting significant other new entry in the Pilbara, including the potential development of further rail and port infrastructure.

3.44 These facts are relevant to the TPI Applications in a number of respects as more fully developed in the balance of this submission. In summary:

- RTIO has been, and is likely to continue to be, engaged on expansion projects consistently and has no capacity (and is not likely to have any capacity) to undertake further expansions to accommodate third parties without affecting its own programs. Even if the project being undertaken by RTIO at the relevant time is focused primarily on a facility other than the Hamersley or Robe railway lines, many of the same resources in terms of management, contractors, equipment and materials will be required for any such rail expansion project and the project then being undertaken by RTIO. At the very least, diversion of resources to a third party rail expansion program will delay the other RTIO expansion projects then being undertaken;
- the cost to RTIO (and Australia) of not capturing the opportunities that now present themselves are huge. This can be measured by calculating the lost revenue if exports are delayed or the opportunity is taken up by a foreign competitor such as Vale;
- the likelihood of congestion and disruption to operations from overcrowding infrastructure facilities is starker than ever given the projected level of demand on these facilities by RTIO. For a regulator to decide that RTIO's rail facility can theoretically satisfy more demand without unacceptable cost is a huge risk. The precedent exists on the east coast of Australia where multi-user facilities have created bottlenecks that are clearly curtailing Australia's coal export performance. The bias should be against changing what is working so well (in stark contrast to the East Coast facilities);
- the conditions described above in terms of iron ore demand and pricing make it impossible to forecast the likely level of demand by third parties for rail access. These conditions also make it more likely that, as new iron ore mining opportunities are identified, a means will be found to develop those mines. This could include the construction of rail spur(s) to join up with then existing infrastructure (such as the proposed Kennedy railway line being considered by TPI), the construction of an independent rail facility to a new port, rail haulage by an existing operator or a joint venture or other commercial arrangement (such as mine gate sales) with an existing producer.

D. Declaration Criteria Issues – Section 44G

4. Introduction

4.1 Section 44G(2) of the TPA provides that the Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to;

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

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

4.2 Further, section 44F(4) requires the Council to consider, in making its recommendation, whether it would be economical for anyone to develop another facility that could provide part of the service.

4.3 It is clear from the plain words of section 44G(2) that the Council cannot recommend declaration unless it is positively satisfied, at least on the balance of probabilities, that each of the criteria in section 44G(2) is met. As the Council recognises in the Council Guide, the Council:

> must be affirmatively satisfied that all of the declaration criteria in section 44G are met before it can recommend declaration; 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.[7]

4.4 One consequence of this is that it is not open to the Council to make assumptions about future or contingent events occurring and find that, based on those assumptions, the declaration criteria are met. If satisfaction of a declaration criterion is conditional upon the occurrence of a future event, then the Council would need to be positively satisfied (at least on the balance of probabilities) that the future event will occur before it can find that the declaration criterion is met. For example, it is not open to the Council to make assumptions that the current status (in terms of access) relating to any port or rail facility will change (eg, that the Mount Newman Rail Line will be declared under Part IIIA).

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[7] National Competition Council, 'Guide to Part IIIA of the *Trade Practices Act* 1974, Part B Declarations December 2002', paragraph 1.12.

4.5 Part D of this submission will consider first, whether criterion (f) is met, followed by criterion (b), criterion (a) and then criteria (c), (d) and (e).

4.6 The submission considers criterion (f) first, because it is so readily apparent that access to the services that TPI is seeking to have declared would be contrary to the public interest. Declaration would cause immense damage to the efficiency of Australia's most successful export infrastructure and cost RTIO and Australia tens of billions of dollars. Conversely, declaration would generate no public benefits. The history of the Pilbara (including the history of FMG/TPI itself) shows that third party access is not needed in order for viable iron ore deposits to be developed and reach the international market. The huge costs of access and the lack of any public benefits mean that criterion (f) cannot be satisfied. These points also mean, however, that criterion (b) is not satisfied (the costs of access would dwarf the cost of any stand alone facility) and that criterion (a) is not satisfied (access will not promote a material increase in competition in any market). Because of the technical nature of aspects of criteria (b) and (a), however, the two key points being made are best understood by starting with criterion (f).

5. Criterion (f) – Public Interest

(a) Introduction

5.1 Section 44G(2)(f) of the TPA requires the Council to be positively satisfied:

> that access (or increased access) to the service would not be contrary to the public interest.

5.2 For the reasons discussed below, access would be overwhelmingly contrary to the public interest. Turning the RTIO Rail Network into a multi-user, regulated system would severely damage its efficiency and cost RTIO and Australia tens of billions of dollars. Furthermore, access would not promote competition in any market or generate any other public benefits.

(b) Meaning of Criterion (f)

5.3 The Australian Competition Tribunal (the ***Tribunal***) has stated that criterion (f) is an independent and self contained criterion of which it must be satisfied.[8] Criterion (f) is neither an additional positive requirement which can be used to call into question the results obtained by the application of the other criteria,[9] nor, as TPI claims in the TPI Applications, is it presumed to be satisfied where the other criteria have been satisfied.[10]

5.4 The concept of 'public interest' is necessarily broad.[11] It requires the Council to consider all the costs and benefits associated with providing access to the service and ask itself whether, on balance, access is contrary to the public interest. The Tribunal has stated:

> This criterion does not require the tribunal to be affirmatively satisfied that declaration would be in the public interest. Rather, it requires that it be satisfied that declaration is not contrary to the public interest. **It enables the consideration of the overall costs and benefits likely to result from declaration and the consideration of other public interest issues which do not fall within criteria (a) - (e).**[12] [emphasis added]

5.5 In *Sydney Airport Corporation*, the Full Federal Court held that criterion (a) is concerned with whether *access or increased access* would promote competition and does not ask whether *declaration* under Part IIIA would promote competition.[13] TPI asserts that the proper construction of section 44G(2)(f) is to consider whether *access or increased access* to the service would not be contrary to the public interest, and not whether *declaration*

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[8] Re *Virgin Blue Airlines Pty Ltd* (2005) FLR 242, paragraph 588.

[9] The Tribunal, when considering a provision identical to criterion (f) (criterion (d) of the Gas Code), stated that 'Criterion (d) accepts the results derived from the application of pars (a), (b) and (c), but enquires whether there are any other matters which lead to the conclusion that coverage would be contrary to the public interest. *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) ATPR 41-821, paragraph 145.

[10] See TPI Hamersley Application dated 16 November 2007, paragraph 12.1

[11] In the context of an authorisation under Part IV of the TPA, 'public benefit' has been given a wide ambit and is said to be 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements, in the context of trade practices legislation, the achievement of economic goals of efficiency and progress'. 'Plainly the assessment of efficiency and progress must be from the prospective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today), efficiency is a concept that is usually taken to encompass 'progress' and that commonly efficiency is said to encompass allocated efficiency, production efficiency and dynamic efficiency.' (*Re 7 Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42, 677).

[12] Re *Application by Services Sydney* 227 ALR 140, paragraph 192.

[13] *Sydney Airport Corporation v Australian Competition Tribunal* [2006] FCAFC146, paragraph 83.

would be contrary to the public interest.[14] Even if this assertion were correct, TPI's further assertion that the Council should not take into account any costs of access regulation, in its assessment of criterion (f) is plainly wrong. Such a blinkered approach would be absurd. Access, under whatever regime, will necessarily entail significant costs including regulatory costs (both the direct regulatory costs of dealing with the arbitration of access terms and conditions etc and, much more significantly, the indirect costs of regulation arising from inefficiencies caused by turning a unregulated single-user system into a regulated, multi-user system).

(c) The public interest in efficient infrastructure investment and operation

5.6 Before the criterion (f) cost-benefit analysis is undertaken, it is useful to note that paramount importance must be given to the public interest in promoting the efficient operation of, use of, and investment in infrastructure.

5.7 In the Productivity Commission's Review of the *National Access Regime* report dated 28 September 2001, the Commission criticised the operation of Part IIIA of the TPA, stating that (at xxi):

> the national access regime does not do enough to guard against the possibility that investment in essential infrastructure will be deterred.

5.8 As a consequence, the Productivity Commission recommended inserting a new objects clause into Part IIIA. Subsequently, in 2007, section 44AA was inserted into the TPA. The objects of Part IIIA are stated to be to:

> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

5.9 As a result, the criteria in section 44G (and indeed Part IIIA generally) must be construed so as to promote these objects.[15] The Council's consideration of 'public interest' in criterion (f) should therefore make of prime importance the economically efficient operation of, use of, and investment in infrastructure.

5.10 The rest of section 5 of this submission sets out the enormous costs that access will cause, explains that access would not generate any public benefits and concludes that, when the costs of access are compared with the benefits access would generate, it is clear beyond question that access would be contrary to the public interest.

(d) Costs of access

Introduction

5.11 RTIO's Pilbara rail and port infrastructure is among the most efficient in the world. Fisher and Rose in 'Export Infrastructure and Access: Key Issues and Progress', *Australian*

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[14] See *TPI Hamersley Application*, paragraph 12.2.

[15] *Acts Interpretation Act 1901* (Cth), Section 15AA.

Commodities, June Quarter 2006 (Annexure 12 to this submission), state, for example, that (page 372):

> Among Australia's export facilities, the Pilbara iron ore export chains stand out for the way that mine production, transport, cargo assembly and blending, loading and shipping are integrated. Relative to an integrated logistics chain with one owner, market processes with multiple owners of various parts of the chain often involve efficiency losses as a result of less effective coordination, particularly in those chains for bulk commodities.

5.12 The Hamersley and Robe railway lines' economic efficiency would be seriously jeopardised by allowing access by third parties. One need only compare the efficiencies and rapid expansion of the vertically integrated operations of RTIO in the Pilbara with the poorly performing East Coast coal chain, to see how having multiple users and regulated infrastructure reduce efficiencies, slow expansions and deter investment.

5.13 The costs of access that would arise as a result of changing the RTIO Rail Network from a single-user vertically integrated facility, to a regulated multi-user facility can be grouped into the following four categories:

- ***delays to expansions:*** that will flow as a result of a facility being a multi-user facility compared with the position applying when it is a single-user facility;
- ***displacement costs:*** that will arise as a result of RTIO having to build new capacity for third parties in substitution for its own capacity expansions;
- ***loss of system capacity:*** that will arise from changes in the way the facility operates as a result of third party access; and
- ***disincentives to invest:*** that arise in multi-user infrastructure.

Diseconomies are greater for the Hamersley and Robe Services than for the Mount Newman Service

5.14 Before going on to consider the four categories of costs, it is worth noting that when considering the Mount Newman Application, the Council discounted the impact of multi-user diseconomies. The TPI Applications are, however, very different from the Mount Newman Application and, as a result, diseconomies cannot be discounted by the Council in this case, for the reasons set out below.

The Mount Newman Application

5.15 The Council discounted the impact of diseconomies in the Mount Newman Application. In paragraphs 3.7-3.10, 6.70 and 6.263 of the Council's final recommendation, dated 23 March 2006, in respect of the Mount Newman Service (the ***Mount Newman Final Recommendation***), the Council made it clear that it regarded the Mount Newman Service as being confined to a service from a point in the vicinity of the proposed Mindy Mindy mine to Port Hedland and that it did not include a service between other points on the Mount Newman railway line.[16]

[16] The point to point nature of this service was confirmed by the Full Federal Court in *Rio Tinto Limited v Australian Competition Tribunal* [2008] FCAFC 6.

5.16 The Council relied on the limited 'point to point' nature of the service in its assessment that the foreseeable third party demand for usage of the Mount Newman Service would be limited to 10mtpa (see paragraphs 6.65 – 6.80 of the Mount Newman Final Recommendation). As total third party demand would be limited to 10mtpa, and to one or two third party users, the Council maintained that it was able to discount the diseconomies that would be likely to eventuate from third party access.[17] On the same basis, the Council also discounted comparisons with the problems in the multi-user facilities used for coal exports on the East Coast of Australia. For example, in paragraph 6.269, the Council said:

> In comparison, BHPBIO, as the provider of the Mt Newman Service, would likely be obliged to negotiate with one, or possibly two, track service customers that would account in total for less than 4 per cent of total foreseeable demand for the Mount Newman Service.

and in paragraph 6.270, the Council concluded:

> Given the different nature of access, the Council therefore considers there is little value in extrapolating to the current matter from issues associated with the Dalrymple Bay Coal Terminal and the Hunter Valley coal chain.

Greater diseconomies at risk by declaration of the Hamersley Service and Robe Service

5.17 The Hamersley Service and the Robe Service are different from the Mount Newman Service in a number of key respects, and for that reason, the Council cannot discount the diseconomies that would flow from a declaration of the Hamersley Service and the Robe Service in the same manner as it did for the Mount Newman Service. The key differences are:

- the Hamersley Service and the Robe Service are clearly 'all points' services, that is they are services that would permit the railing of bulk materials between any two points on the 'Hamersley Rail Network' (paragraph 3.6 of TPI Hamersley Application) and 'Robe Rail Network' (paragraph 3.8 of the TPI Robe Application). In this respect, the TPI Applications differ markedly from the 'point to point' service, to which access was sought by FMG in the Mount Newman Application;
- given the 'all points' nature of the Hamersley Service and the Robe Service, there are potentially many more users of these services than the Mount Newman Service and the foreseeable demand for these service is potentially very high;
- neither the Council, TPI nor RTIO can predict with any confidence whether, and how many, new third party mines will be developed, and where they might be developed, as this depends on many factors such as the outcome of numerous exploration programs and the demand and price for iron ore over the 20 year period for which declaration is sought;
- iron ore demand and prices have grown at a much faster rate than was forecast at the time that submissions were made regarding in the Mount Newman Application. Consequently, demand and price forecasts have increased and keep increasing (both of which increase the impact and cost of disruptions created by third party users).

[17] Paragraphs 6.260 – 6.263 of the Mount Newman Final Recommendation

5.18 The four categories of diseconomies and other costs that will flow from allowing third party access, and the quantification of the costs associated with them, are discussed below.

Delays to Expansions

Experience shows access will cause delays to expansions

5.19 The single-user integrated infrastructure facilities that have been a feature of the Pilbara iron ore industry have been widely acknowledged as the reason that the iron ore industry has been able to be so responsive to the surge in demand that was triggered by the unexpectedly rapid rise in the industrialisation of China from 2001.[18] By contrast the coal industry has failed to capture the same opportunity, which was equally available to it.

5.20 Attached as Annexure 4 is a report by Dr Brian Fisher (the ***Fisher Report***), formerly Executive Director of the Australian Bureau of Agricultural and Resource Economics (***ABARE***) and the Chairman of the Exports and Infrastructure Taskforce that was commissioned by the Prime Minister in 2005 (the ***Exports and Infrastructure Taskforce***) to identify and report on bottlenecks in Australia's export infrastructure. In the Fisher Report, Dr Fisher compares the growth in world trade of coal and iron ore and focused, in particular, on seaborne trade. Dr Fisher points out that between 1998 and 2006, there was very significant growth in the demand for both commodities, underpinned by the industrial transformation of China,

Table 1: Global trade in coal and iron ore, 1998-2006

Exports (Mt)	1998	1999	2000	2001	2002	2003	2004	2005	2006
World – coal	543.3	549.7	615.8	671.7	674.0	727.3	779.3	789.4	854.6
World – seaborne coal	464.5	471.6	534.7	568.7	582.1	626.0	653.2	688.7	755.6
World – iron ore	453.9	437.5	499.0	493.3	533.9	581.6	672.5	735.9	762.9
World – seaborne iron ore (a)	354.5	349.2	389.7	390.2	423.9	470.6	518.5	598.0	624.1

Source: Australian Commodity Statistics (2006) and Kate Penney, Research economist, ABARE (pers. Com. 5 and 13 November 2007)

(a) Exports from the major seabome exporters, Australia, Brazil, India, South Africa, Mauritania and Venezuela

5.21 In the case of both commodities, there was a significant upswing of price from about 2002 presenting an opportunity for Australian exporters to capitalise on that price surge by increasing exports.

5.22 However, only Australian iron ore was able to take advantage of that opportunity. The increase in coal exports from Australia remained on a relatively steady path of approximately 4.5% per annum, notwithstanding the significant surge in demand and price. Dr Fisher concludes that 'there is no statistical evidence to suggest that Australian coal

[18] See, for example, Fisher and Rose, page 372 and page 395.

exporters have responded positively in terms of total coal shipped to the positive price signal from the international market in the early part of the decade'[19].

5.23 By contrast, from 2002 the growth in Australian iron ore exports increased from 4.4% per annum to 10.5% per annum. Iron ore exporters were able to, and did, respond to price increases associated with increasing demand from China in the early part of this decade. As a result, Australia held its share of the world seabome iron ore trade, but lost share to overseas competitors in the world seaborne coal trade.

5.24 Dr Fisher concludes that the reason for the difference in response is the fact that coal exporters had to rely on 'multi-user, regulated infrastructure whereas iron ore exporters utilise single-user, owner operated integrated infrastructure'.[20]

5.25 This conclusion is consistent with the findings of the Exports and Infrastructure Taskforce. In the report released by the Exports and Infrastructure Taskforce in May 2005 (the ***Taskforce Report***[21]), the following observations were made:

- Even though capacity issues at the coal ports are now being addressed to some extent, it is worth noting the contrast with iron ore ports. While these ports too have had capacity problems, there is every sign that, first, there have been few difficulties in efficiently allocating spare capacity and, second, a coordinated response has been rapidly deployed that will result in integrated expansion of mine, rail and port. (Page 30)
- There is a stark contrast here. Where Australia's logistics chains are vertically integrated and are subject to much less economic regulation, the response to increased global demand has been timely, effective and efficient. In contrast, in those parts of the economy where economic regulation sits between investors in export related infrastructure and users, lengthy delays have been widespread, as infrastructure owners, users and regulators focus more on shifting slices of the pie than on ensuring that the pie expands to meet competing demands. (Page 2)
- Difficulties in the response of infrastructure providers to changes in demand can also arise from the need to ensure coordination of investment decisions between the infrastructure owner and the users of that asset ... Even when the number of users is relatively small, the task of efficiently coordinating investments in infrastructure services may pose substantial challenges. (Page 17)
- Historically, vertical integration between infrastructure providers and the activities that most rely on their services has been a way of avoiding these complications ... Difficulties in organising all the parties required for complementary investments to occur, and in securing agreement as to the sharing of the costs of needed capacity expansion, can paralyse the capacity expansion process – perpetuating bottlenecks that all parties would be better off resolving. (Pages 17 to 18).

5.26 Rio Tinto Group Companies are heavily involved in the coal industry in Eastem Australia and have experienced the frustration and cost of not being able to increase coal exports to capitalise on the opportunities presented by the surge in coal demand. The following table

[19] Fisher Report, page 6.

[20] Fisher Report, page 10.

sets out, for the period between 2002 and 2007, the total tonnage of coal shipped from the three multi-user ports from which Rio Tinto companies export coal (***Throughput***):

Table 2

Year	Throughput (MT)
Port Waratah Coal Services - Newcastle	
2002	70.5
2003	74
2004	77.8
2005	80.3
2006	79.8
2007	84
Gladstone RG Tanna and Barney Point	
2002/03	38.2
2003/04	42.5
2004/05	43.6
2005/06	45.2
2006/07	51.0
Dalrymple Bay Coal Terminal (DBCT)	
2002/03	43.1
2003/04	43.6
2004/05	50.5
2005	51
2006	52
2007	45.5

5.27 It should be noted from the above table that DBCT has had almost no increase in throughput and that throughput at Port Waratah and Gladstone increased by about 24% in total over a 5 year period. There was, in fact, no significant capital expansion of DBCT until 2005 or of Port Waratah or Gladstone until 2006. This failure to significantly increase throughput or undertake capital expansions has occurred, notwithstanding the increase in demand for world seaborne coal from 568.7 million tonnes in 2001 to 755.6 million tonnes in 2006 (see Table 1 above).

5.28 The above figures for coal should be contrasted with the throughput increases that have been realised at the Dampier and Cape Lambert ports through which RTIO exports iron ore via an integrated single-user infrastructure chain. The corresponding statistics for the RTIO ports combined, between 2002 and 2007, are as follows:

[21] Attached as Annexure 13.

Table 3

Year	Throughput
2002	103.9
2003	107.7
2004	127.1
2005	143.1
2006	150.1
2007	160.8

5.29 Thus, exports from RTIO's single-user integrated facilities over the past 6 years increased by about 55%, compared with a 19% average increase at the multi-user facilities which Rio Tinto's coal operations use.

5.30 In order to achieve these increases in iron ore throughput RTIO undertook significant mine, rail and port capacity expansion programs. This investment included upgrades to the Port of Dampier and Cape Lambert, significant rail duplication and the construction of the new Lang Hancock railway and the construction of new mines and mine expansions.

5.31 The figures in Tables 2 and 3 above illustrate the findings by the Exports and Infrastructure Taskforce and the observations by Dr Fisher in the Fisher Report. It is clear that expansions to multi-user infrastructure are not undertaken, or are delayed, when compared with expansions to a single-user integrated operation.

Reasons why access will cause delays in expansions

5.32 The reasons delays are inevitable in a multi-user environment are twofold:

- first, even if the third party user does not have the right to participate or be involved in any expansion (an unlikely scenario, as access terms are likely to require the facility owner to consult with co-users about expansion plans and offer participation rights) in practice the co-user's consent or acquiescence will be required (a ***Consent Requirement***);
- secondly, if (as is usually the case) the access terms require the facility owner to consult with co-users about expansion plans and offer rights of participation, the time taken to agree or determine all relevant aspects of the expansion is significantly longer than in a single-user situation (a ***Consultation Requirement***).

Each of these causes of delay is discussed below.

The Consent Requirement

5.33 It is invariably the case that the access provider or a user cannot unilaterally insist on expansion or modification to a multi-user facility (either in its physical configuration or in how it is operated) if this will impact the rights of any other users. The terms of access will always guarantee each user certain minimum rights to obtain track access. Examples of how expansions can impact on users , and where their consent may be required, fall into the following categories:

- ***Temporary impact of project works***: expansion works will commonly involve some temporary reduction in capacity, impacting users. Users may have an absolute right to capacity (meaning project works cannot be carried out without their consent) or, at minimum, would have rights around the timing and extent of project works that interrupt their track access and consultation rights.

- ***Changes to infrastructure***: a capacity expansion programme may involve changes to physical rail infrastructure which could affect users. An extreme example of such a change would be a change to the gauge of the rail. Clearly one would expect such a fundamental change not to be made without the consent of users. Less extreme infrastructure changes that could be made that would affect users include such things as a reduction in axle loads (for example, if one side of a dual track constructed for the purposes of an expansion has a lower axle load), changes to train control systems, changes to communication systems etc.
- ***Changes to network operating practices***: that would impact users of the network (which may also require changes to third party infrastructure or equipment). Examples of such changes include:
  - a move to automated trains requiring new equipment and operating procedures for each train;
  - a change in train equipment (eg new control systems in locomotives, faster more efficient locomotives or new track protection equipment);
  - more flexible scheduling to maximise efficiency but requiring larger stockpile facilities at both ends;
  - a change to optimal train lengths, requiring consequential changes to loading and unloading facilities (such as loop size) or an increase in the number of locomotives for each train;
  - a decision to increase capacity by increasing the number of consists (thereby increasing cycle times (due to increased waiting times), meaning that all users will need to increase consists simply to maintain capacity).

5.34 If the rights of co-users are affected by any proposed change, and those users consider it in their interests to object, they will invariably do so. Once a dispute arises, there is inevitably delay. Ultimately, it may be a very lengthy delay with parties having to resort to a regulator or arbitrator or the courts to settle the dispute. The Council recognised that these delays could occur in the Mount Newman Final Recommendation:[22]

5.35 The Council accepted that the impact of diseconomies of scope will be influenced by the extent to which arbitrated outcomes (ie – the terms of access) allow the provider to retain operational control of its facility. The Council suggested that if the ability to make '***reasonable decisions***' on capacity expansion, technological change, maintenance and scheduling are left in the hands of the provider, the extent of diseconomies are likely to be minimised[23].

[22] Paragraph 6.279 of the Mount Newman Final Recommendation

[23] Paragraph 6.279 of the Mount Newman Final Recommendation

5.36 The fact that the Council limited the situations where the provider could act unilaterally to cases where the decisions were '**reasonable**' demonstrates the problem. It is most unlikely that access terms would allow the provider to act unilaterally and thereby affect the rights of users or impose costs on users if the action was unreasonable. However, the fact that the requirement to be 'reasonable' exists allows endless scope for a difference of view to arise. If a third party user wishes to frustrate the expansion plans of the infrastructure owner and other users, it has only to claim that the action is unreasonable and litigation or arbitration will ensue.[24]

The Consultation/Participation Requirement

5.37 If the access terms allow co-users the right to be consulted and/or to request or consider participation in expansions (as could be expected), the decision making process is much more complex and drawn out than in a situation where there is a single-user. Indeed, irrespective of the access terms, if a service is declared under Part IIIA a third party could trigger an access dispute in which it sought to have a facility expanded to accommodate its requirements (see Section 44V(2)(d)). Given the existence of this right, as a practical matter, the facility owner would need to coordinate its own expansions with any third party users and others who may require expansions. In such a multi-user environment there are inevitably differences to be negotiated over when to expand, the extent of the expansion, the allocation between the users of the expanded capacity, the expansion costs and how they will be allocated, the responsibility for cost over-runs and the project management of the expansion program. Examples of the reasons for such difference include:

- some parties may be production constrained;
- some parties may have strategic motives such as a desire to frustrate expansion by their competitors;
- some parties may be reluctant to flag to their co-users (who are their competitors) whether or not they wish to expand as they see this as market sensitive;
- some parties are likely to be more financially constrained than others;
- parties may have a genuine difference of view as to whether or not demand warrants expansion.

5.38 These and other issues often lead to disputes which need to be resolved through arbitration or regulation before an expansion is commenced. In the context of expansions, one need only consider the scenario in which a user of the Hamersley Service or Robe Service, with consent or consultation rights, had no requirement for further capacity. Their involvement in such decision making creates a misalignment between risk and accountability for performance. Even if there is a group of users who all want to participate with the access provider in an expansion, the time taken to obtain consensus about the

[24] Section 44ZZD empowers the Federal Court to make a variety of orders, including injunctions and damages awards, if a party to an access arbitration determination contravenes that determination. The ability of third parties to bring Federal Court proceedings seeking an injunction or damages for contravention of a determination reinforces the point that RTIO could not interfere with rights of access conferred by a determination through the implementation of an expansion programme without users' consent.

size and form of the expansion, and for all parties to obtain financing, is considerably longer than is the case for a single-user facility. It is axiomatic that when a number of parties need to be involved in, or can be affected by, a decision, that decision will take longer and be more difficult than if there is only one interested party. The experience with multi-user facilities on the East Coast of Australia demonstrate this. It is no answer to state (as the Council suggests in paragraphs 6.266 to 6.271 of the Mount Newman Final Recommendation) that the East Coast facilities have different features from the anticipated features of a declared Pilbara facility. Each East Coast facility has different features from the others such as independent operation of the facility (as at DBCT) and operation by a company primarily comprising user representatives (as at Port Waratah). As Dr Fisher observes:

- the common denominator is that these facilities have not been expanded as rapidly as single-user facilities to meet the surge in global demand; and
- once there are multiple parties there is a 'disaggregation of interests' and in such cases 'parties invariably look after their own welfare even if this is against the interest of the industry/facility as a whole'.

As Dr Fisher concludes (at page 15):

> The disaggregation of interests may stem from any number of sources, including differences in production and risk profiles, differences in market expectations, differences in access to capital, required rates of return on investment and hurdle rates, and/or informational asymmetries. There may also be strategic competitive reasons why one firm or user may wish to delay expansion projects while another may wish to proceed forthwith. As noted by the Prime Minister's Exports and Infrastructure Taskforce, disagreement over the distribution of gains from additional investment will also hinder efficient, profitable and timely development of infrastructure in multi-user systems. No such issue exists in single owner vertically integrated systems.

Conclusion on Expansion Delays

5.39 In summary, as Dr Fisher and the Exports and Infrastructure Taskforce conclude, and as Rio Tinto has consistently experienced, multi-user facilities invariably lag behind single-user integrated facilities in responding to opportunities for expansion. In the environment that has been experienced in the resources sector over the past five years and the environment that is foreshadowed to continue for the foreseeable future, the cost of failure to capture these opportunities is huge as discussed below.

Quantifying Expansion Delay Costs

5.40 RTIO commissioned Port Jackson Partners Limited (***PJP***), a management consulting company with extensive experience in analysing the iron ore industry, to estimate the economic impact of delays to expansion that would be occasioned as a result of the RTIO Rail Network becoming a multi-user facility. The PJP Report is attached as Annexure 5.

5.41 In the PJP Report, the dynamics of the iron ore industry are analysed and, based on RTIO expansion announcements and analyst forecasts of future iron ore demand, PJP forecast the rate of expansion that RTIO will need to undertake over the next 20 years to meet its announced production targets and, thereafter, to maintain its percentage share of seaborne iron ore sales. PJP then examines the direct impact on iron ore sales and revenues if RTIO's expansions are delayed.

5.42 As PJP points out, if RTIO fails to bring its expansions into production according to the timetable projected, it is highly likely that another producer will seize that opportunity and, once this occurs, it will not be feasible for RTIO to 'win back' the lost share of sales. Accordingly the effect is that every delay in bringing expansions into production results in a permanent loss of share of sales to RTIO. Moreover, the party that is best placed to seize this opportunity is Vale, the largest iron ore producer in the world with vast deposits of high grade iron ore in Brazil. The loss to RTIO will almost certainly lead to a permanent loss in share of seaborne trade for Australia.

5.43 To quantify the impact of delays to expansions, PJP assumes that each expansion program over a 20 year period (which would in a single-user scenario take about two years to complete) takes three years instead of two years and that 80% of the 'lost' volume is taken by Vale or some other non-Australian producer. Based on the average price forecasts by industry analysts the impact of this is a net revenue loss to Australia of $A63.8 billion (NPV of $A31.2 billion) over a 20 year period. Sensitivities were then conducted. The most optimistic sensitivity (ie that each two year expansion program is delayed for only six months and only 50% of the lost volume is taken by overseas producers) still yields a huge net cost to Australia ($A23.9 billion revenue, NPV of $11.7 billion).

5.44 Whilst these figures are very substantial, the outcome is not surprising given the tonnages and values involved. Even one delay of one year in completing one 20 million tonnes expansion would cost in the order of A$2.0 billion in lost revenue (based on average analysts price forecasts applied in the PJP Report) without taking into account the loss in subsequent years of that tonnage having been captured by a foreign competitor. The magnitude of the potential losses are such that it is futile to question whether the projected delays will occur for every expansion. The experience at the East Coast coal facilities would indicate that this is likely and that the delays may well exceed 12 months. **Any** delay will lead to a significant loss of revenue.

Displacement Costs

Access will cause displacement costs

5.45 The second category of cost that would inevitably be caused by access in the current environment is the cost that will be incurred by RTIO when it has to accommodate each request for capacity made by a third party (whether this is the initial request for capacity by a new entrant or a request by an incumbent for increased capacity). RTIO's Rail Network and its mine and port facilities are being expanded to cater for RTIO's requirements as quickly as possible. If RTIO is required to accommodate third party tonnage, it will have to:

- model what is required to accommodate the third party;
- agree on the scope of work required to accommodate that tonnage (or have it determined by an arbitrator/regulator); and
- undertake that work.

5.46 In the current environment, it is inconceivable that such a distraction will not interrupt RTIO's own expansion timetable. The limited resources for undertaking major project work are well known and it is logistically not possible to undertake an expansion project to cater for a third party as well as a major RTIO expansion project. The effect of this is that the third party tonnage will be likely to substitute for RTIO tonnage. As Dr Fisher points out in the Fisher Report:

> Effectively, ore from a small higher cost firm or firms will displace output from an integrated operation. In my opinion, such an outcome would be welfare reducing and to the overall detriment to Australia.[25]

5.47 There is ample evidence available to support the position that there is not an endless capacity to undertake expansion projects and that if resources are devoted to one project this will be at the expense of other projects. RTIO Expansion Projects currently has vacancies for 27 engineering staff, including four project managers. Two of its major contractors, Calibre and SKM, have vacancies for 103 and 172 engineering staff respectively. This is the situation before RTIO's 320mtpa expansion works move into the full construction phase when total staff demand will increase from about 1200 in 2008 to 2000 in 2010. RTIO believes it will need to increase its Pilbara labour force by around 1800 employees between 2008 and 2013 as a result of the proposed 320mtpa expansion. These additional staff will need to be obtained in an environment of acute skilled labour shortages in Western Australia. There are currently in the order of 76 major infrastructure projects being undertaken in Western Australia, 43 of which have a forecast capital budget of in excess of $1 billion.[26] The Western Australia Chamber of Commerce and Industry in a discussion paper entitled 'Building Human Capital' dated November 2007 concluded that:

> ... if economic growth can be maintained at the average rate of growth experienced over the past six years, then it is expected that an additional 400,000 workers will be required in the WA economy over the next 10 years. In the absence of measures to grow the workforce sufficiently, it is estimated that there will be a shortfall of 150,000 workers in Western Australia by 2017.[27]

5.48 In this environment, it is simply not possible for RTIO to undertake a project to accommodate third party access without impacting RTIO's own expansion projects.

5.49 This problem is exacerbated by the lead times in obtaining equipment and facilities consistently becoming longer. For example, just to obtain camp accommodation and office facilities for a substantial team engaged on a major project in the Pilbara has a lead time of twelve months. If long lead time items have to be diverted from an RTIO project to accommodate third party requests (for example, if a camp facility has to be diverted) then again this will lead to RTIO projects being delayed to accommodate the third party access requests.

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[25] Fisher Report, page 16.

[26] The Pit Crew Report, December 2007.

[27] Page 105-106. See also The Australian Newspaper on 17 April 2008 which reported that:

> The [Australian Chamber of Commerce and Industry] policy director Daniel Tehen said the labour shortage was the most critical issue affecting the services sector, which accounts for 78% of GDP. He said that the mining boom has led to a movement of labour away from the services sector.

Quantifying Displacement Costs

5.50 Because no firm forecast of third party demand can be made (both in terms of quantum and timing), it is very difficult to estimate the cost of the tonnage lost by RTIO due to its being displaced by third party tonnage. As RTIO has noted at paragraph 5.17 above, no-one can predict with any confidence what the demand for the service will be. As discussed in paragraphs 6.46 to 6.58 below, modelling indicates that further expansion (or, more likely, duplication) of substantial key sections of the RTIO Rail Network is likely to be required to provide capacity for ***any*** third party tonnage. It is reasonable to assume that any third party capacity added will displace at least the same RTIO capacity. As mentioned in paragraphs 5.45 to 5.49 above, this result ensues simply because, in the current environment, expansions are being undertaken as quickly as possible and there is no ability to accelerate the expansion program. Diverting resources to expand rail capacity for the needs of a third party will therefore delay RTIO's own expansion works.

5.51 Based on the analysis in the PJP Report, it can be extrapolated that a loss of only 20 million tonnes capacity (the impact of third party tonnage displacing RTIO's volume) will equate to lost RTIO sales of 369 million tonnes over 20 years and lost sales revenue of A$22.3 billion.

5.52 Whilst it might be argued that this is not a net loss to Australia (in the sense that the RTIO tonnage will be displaced by other Australian tonnage supplied by the new entrants), it is highly likely that the quality (and therefore value) of the new product will be lower than the high quality RTIO ore that it displaces. Even if the value differential were only 10%, the cost to Australia would be approximately A$2 billion.

Loss of System capacity

Access will cause loss of system capacity

5.53 In addition to the delays to expansion and the displacement of RTIO's capacity, there are losses in operating efficiencies and system capacity that invariably come about as a result of multi-usage compared with single usage.

5.54 In his affidavit of 21 December 2007 filed in the Tribunal proceeding relating to the Mount Newman Application, Mr Stephen O'Donnell estimates that between 10 and 20% of system capacity is lost because of the scheduling that has to be imposed to cater for multiple users compared with the situation that pertains in a single-user system (paragraph 25 of affidavit). This is consistent with the submission made at paragraph 11.11 in RTIO's submission of 6 May 2005 in relation to the Mount Newman Application, where Mr David Irwin, then Business Manager – Coal of Pacific National, related his experience of multi-user systems and the inevitable loss of capacity.

5.55 The loss of capacity that flows from multi-usage is a direct result of the inevitable operational clashes and resulting inefficiency. Once more than one operator has rights to share the same facility, clashes and inefficiencies are inevitable. In an integrated operation run by one party, if an unexpected delay occurs (for example, a breakdown at a mine loading facility), the operator immediately becomes aware of the issue and can reschedule trains. When this happens to a third party, there is inevitably a delay in communicating the problem (if it is communicated at all, eg, a third party may avoid reporting an equipment problem to avoid trains being diverted away from its mine and a possible loss of volume). Further, re-scheduling trains must be agreed between multiple operators which, in turn, delays a response to the problem and compounds the impact of the delay on the overall system. In its application TPI states that it 'will accept flexible arrangements and times for the running of its trains on the Hamersley railway line and work with the Provider to ensure that such access does not unduly interfere with or prejudice the Provider's existing operations' (TPI Hamersley Application, paragraph 3.12). Even if fixed timetables are not necessary to accommodate a third party, some degree of scheduling, coordination negotiation and interaction between the service provider and the access user is unavoidable. The example used above of what would happen when a TPI train breaks down is a good illustration of the fact that having a third party on the system would cause a loss of system capacity. No matter how flexible the arrangements are that TPI 'accepts', some significant loss of capacity will inevitably flow from multi-usage.

5.56 The incentives of users in multi-user systems are different from the incentives in operating a single-user system. While in both scenarios each producer aims to maximise its own throughput, only in a single-user system is this consistent with maximising throughput for the entire facility. In a multi-user system, producers are unwilling to give up any capacity – even if giving up some capacity would result in a greater total system throughput. For example, if a producer's load-out breaks down in a multi-user system, it is optimal for trains to be sent to an alternative load out. This does not happen in a multi-user facility because there is no incentive for it to happen. Capacity is therefore wasted.

Specific operational inefficiencies

5.57 In addition to the loss of system capacity and operational efficiencies that would arise inevitably from turning any single-user facility into a multi-user facility, the operational inefficiencies are even more likely to arise and have a significant impact in relation to the TPI Applications for the following reasons:

- the fact that the TPI Applications could result in very significant third party demand for the Hamersley and Robe Services; and
- the impact that third party use would have on RTIO's proposed introduction of driverless trains.

Each of these specific operational inefficiencies is discussed below.

Potentially significant volume

5.58 As discussed elsewhere in this submission, TPI does not attempt to forecast the reasonably foreseeable demand for the Hamersley and Robe Services. There is potential, however, for the demand to be very significant given the multi-point nature of the application, the number of companies with tenements close to the Hamersley and Robe railway lines and the continuing growth in the world's demand for iron ore.

5.59 The O'Donnell affidavit and the statement from David Irwin were made in the context of the Mount Newman Application, where the Council concluded that there would be third party demand of only 10mtpa and only one or two third party users. Although having even one or two users and 10 million tonnes of demand would cause a significant loss of system capacity, the larger number of third party users and the greater the demand, the greater will be the loss of system capacity.

Driverless trains

5.60 RTIO announced on 18 January 2008 that it intends to adopt Autonomous Train Operations technology (ie driverless trains). It is expected that this will be introduced on a progressive basis from mid-2009. The trains will be operated from a Remote Operations Centre (***ROC***) located in Perth.

5.61 Automated trains are expected to yield significant improvements in efficiency. One such improvement will be the elimination of crewing issues. RTIO has experienced increasing difficulty in arranging availability of train crews, especially at remote locations when the existing crew's permitted hours of operation have expired.

5.62 Third party trains on RTIO's rail network would be manned. It is clear that the service sought in the TPI Applications does not extend to require RTIO to operate TPI's trains for it. If TPI required RTIO to operate its trains through the ROC a separate application for declaration of such a service would be needed. Furthermore it is unlikely that such an application could be accepted given the intellectual property exception to the definition of 'service' in Section 44B.

5.63 Manually operated third party trains on RTIO's Rail Network are likely to experience the same inefficiencies as RTIO currently faces with its manned fleet. Moreover delays experienced as a result of such inefficiencies will flow through to RTIO's operations and thereby deprive RTIO of much of the efficiency gains that it would otherwise have gained from its automated fleet.

5.64 For example, if a third party train is required to change crews and the new crew does not arrive on time, the 'parked' train will occupy a siding and thereby delay other trains that require access to that siding. This is one impact currently experienced by RTIO as a result of crewing problems.

5.65 Another example is train breakages (ie decoupling of ore cars). This can be caused by driver error (eg accelerating or braking at the wrong time – something which is often counterintuitive due to the length of the trains requiring braking when the locomotive is on an uphill grade but most of the train is in descent or vice versa). A train breakage can be very disruptive to the entire system, but with fully automated trains, breakages due to driver error should be eliminated.

5.66 There are likely to be other clashes and inefficiencies flowing from the mixing of manually operated third party trains with RTIO's automated trains. There are several examples throughout the world of automated rail systems (eg metro lines in Paris, Lille, Lyon, Singapore, Dubai, Copenhagen, Nuremburg and San Francisco). These systems are dedicated to automated trains, not a mixture of manned and automated trains. Apart from technical challenges, the efficiencies generated by automation would be severely impeded if it were otherwise.

5.67 The 10-20% loss of capacity estimated by Mr O'Donnell to arise as a result of inefficiencies flowing from a change in a railway from single-user to multi-user status is based on traditional rail operations where all trains are manually operated. On the RTIO system it is likely that this estimate is conservative, as the change in status will involve the added complication of seeking to operate manually driven trains on a system that would otherwise be fully automated, thereby attracting all the inherent inefficiencies described above.

Quantifying the Loss of System Capacity

5.68 It is possible to seek to quantify the cost of lost capacity due to operating inefficiencies. Mr O'Donnell estimates the cost to capacity to be 10-20% (which, for the reasons given above, may be conservative). To rectify this, there would need to be an increase across the board of capacity of the entire RTIO Rail Network. However, this would produce no net gain in capacity compared with the situation that occurs under the current single-user integrated system. Further, for the reasons outlined in paragraphs 5.45 to 5.49 above, undertaking an expansion program in the current environment is likely to be at the expense of another expansion program that would achieve a real increase in capacity. Accordingly, in the current environment this lost capacity cannot realistically be regained and the effect of the lost capacity will have to be borne.

5.69 Based on extrapolation from the analysis in the PJP Report, the cost of a loss of 10-20% (say 15%) of RTIO production using the RTIO Rail Network, over a 20 year period, results in a loss of 923 million tonnes of sales, which means foregone revenue of $A55.6 ($A31.4 billion NPV). This is the loss compared with the situation that would exist if these system losses were not imposed by changing the nature of the facility from single-user to multi-user. It is possible that some percentage of the loss may be captured by other Australian producers, provided they are not also suffering from similar inefficiencies. Consistent with the assumptions in the PJP Report, if 80% of the loss were captured by non-Australian producers, the costs to Australia will be lost tonnes of 738 mtpa and lost revenues of A$44.5 billion (A$25.1 billion NPV).

Disincentives to invest

5.70 The final category of costs that would arise from access is the huge disincentive to invest that access will impose.

5.71 As stated above, the 2007 amendment to the TPA inserted an objects clause that provides that one of the objects of Part IIIA is to 'promote the economically efficient operation of, use of and ***investment in*** the infrastructure by which services are provided ...' [emphasis added].

5.72 In the Taskforce Report, the Exports and Infrastructure Taskforce made a clear link between vertically integrated supply chains and the economically efficient investment in infrastructure (at page 2):

> Where Australia's logistics chains are vertically integrated and are subject to much less economic regulation, the response to increased global demand has been timely, effective and efficient. In contrast, in those parts of the economy where economic regulation sits between investors in export related infrastructure and users, lengthy delays have been widespread, as infrastructure owners, users and regulators focus more on shifting slices of the pie than on ensuring that the pie expands to meet competing demands.

5.73 As discussed below, the very nature of multi-user systems operates as a disincentive to investing in the expansion and improvement of facilities, when compared with single-user systems.

<u>It is vital that there be sufficient investment in infrastructure</u>

5.74 There is no more pressing issue facing Australia's economic development at present than the underinvestment in infrastructure, and the consequential bottlenecks that are created and subsist in supply chains, which in turn adversely impact on Australia's overall economic performance. Investment in infrastructure is a problem that the Commonwealth, State and Territory governments and their agencies have sought to address for some time.

5.75 The Exports and Infrastructure Taskforce has highlighted that the delay and deterrence to investment is the key problem facing infrastructure. It stated:

> What is concerning, however, are the difficulties that have been encountered in responding to those pressures [on capacity caused by increased demand] by investors in some parts of our infrastructure. If our problem in earlier years was at times profligate investment by government owned monopolies, the risk today is that efficient, commercial investment will be delayed or even deterred by inappropriate policy settings. Simpler, more transparent, predictable and accountable regulation is of key importance in this respect.[28]

5.76 In its Statement on Monetary Policy in February 2005, the Reserve Bank of Australia (the ***RBA***) indicated that, with the rise in both global demand for commodities and in commodity prices, a key issue for the Australian economy would be Australia's ability to meet that demand and whether further increase in demand would give rise to capacity constraints (and consequently upward pressure on wage and price inflation). In 2004, production was unable to keep up with the strength of global and domestic demand. The RBA particularly drew attention to the ability of infrastructure in the mining sector to meet demand. It stated (at page 2):

> The clearest indication of emerging pressures on capacity has been in the disappointing performance of exports to date, which has been associated with a widening of Australia's current account deficit. While there has been a modest recovery in export volumes from the trough reached in mid 2003, this has so far only lifted exports back to around their level at the start of the decade. One factor likely to have contributed to this disappointing performance is the strong growth of domestic demand over recent years, which may have adversely affected manufactured and service exports. **Additionally, there are a number of areas in the mining sector where supply bottlenecks have held back export growth recently, though there are indications that capacity expansions in that area are now in train.** [emphasis added]

5.77 The Commonwealth government has recognised investment in infrastructure as vital to the national interest. In January 2008, the Federal government announced the establishment of Infrastructure Australia as a key driver in the plan to fight inflation. The Hon Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, stated that Infrastructure Australia will help fight inflation by boosting the economy's productive capacity, unlocking infrastructure bottlenecks like clogged ports and congested roads.[29] Part of Infrastructure Australia's mandate is to review the extent to which governments can better facilitate infrastructure investment. Minister Albanese cited 'decades of underinvestment in the nation's transport, water, energy and communication

[28] Taskforce Report, page 6.

[29] 21 January 2008 Media Release

assets' and the need for Infrastructure Australia to develop 'long term solutions to infrastructure bottlenecks'.[30]

Access will provide a disincentive to future investment

5.78 Numerous independent inquiries and parliamentary committee reports have warned that third party access to infrastructure will act as a disincentive to private investment in infrastructure. The disincentives arise from the increased risk associated with regulated infrastructure and the decreased return on investment when compared with unregulated infrastructure.

5.79 The concern that mandated access would act as a disincentive to future investment was expressed in 1993 in the *Competition Policy Report by the Independent Committee of Inquiry* (the ***Hilmer Report***), the report which ultimately led to the introduction of Part IIIA of the TPA. At page 248 of the Hilmer Report, the following is noted:

> The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment.

5.80 Further, at page 251, it is noted that:

> ... when considering the declaration of an access right to facilities, any assessments of the public interest would need to place special emphasis on the need to ensure access rights did not undermine the viability of long-term investment decisions, and hence risk deterring future investment in important infrastructure projects.

5.81 Similar concerns were recognised by the House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform in a report published in 1998 entitled 'Tracking Australia'[31]. The Productivity Commission has repeatedly raised concerns that mandated access may diminished incentives for investment. For example, in the Productivity Commission's report *Progress in Rail Reform* in 2000, the Commission commented, at page 163:

> Mandated access to the privately owned integrated railways supporting large export operations (like the Pilbara iron ore operations) may benefit new mining operations but this may be at the expense of incumbents and the national interest as a whole. When incumbent track owners lose their ability to act in their own commercial interest they may withdraw from future investment.

5.82 Further, at page 175, the Productivity Commission noted that:

> Regulation may diminish incentives for business to invest in infrastructure facilities. The negative impacts on investment are particularly important in the rail industry since the lack of suitable investment in rail infrastructure is a major factor limiting the industry's growth and future prospects.[32]

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[30] 26 February 2008 Media Release

[31] See pages 73 and 74.

[32] See also Productivity Commission's *Review of the National Access Regime Enquiry Report (2001)* in the overview at pages xviii and xix and page 67 and the Productivity Commission's report on the *Review of National Competition Policy Reforms* released on 14 April 2005 at pages 296 and 298-299

5.83 Dr Fisher in the attached Fisher Report also comments on disincentives to invest created by the imposition of access. Dr Fisher comments (at page 14):

> **Any access granted ex post to an existing firm's transport or handling infrastructure will reduce the incentive of the incumbent to invest in additional capacity to manage market fluctuations. Further it will add to the risk of taking advantage of the cost savings associated with making a larger initial infrastructure investment to meet planned development needs.**

Multi-user logistics groups do not succeed in promoting investment

5.84 Methods of co-ordination in multi-user infrastructure contexts may succeed in facilitating agreement on allocation of existing capacity, but they are ill equipped to address the disincentives to invest in expanding capacity.

5.85 The Hunter Valley Coal Chain Logistics Team (***HVCCLT***) was established to facilitate and co-ordinate the response to capacity constraints in the Hunter Valley coal chain. Subsequently the Capacity Balancing System (***CBS***) was introduced, which, as a result of the common user provisions in the terminal lease, requires existing users to 'squeeze up', to allow infrastructure owners to allocate capacity to new mines that come on line. The ACCC stated that the mere existence of the CBS 'is reducing the incentive for the development of a long term solution to these ongoing issues'. In its Final Determination on applications for authorisation in relation to the Hunter Valley Coal Chain dated 23 April 2008, the ACCC recognised that underinvestment is a likely outcome if a facility that is paid for by one party can be accessed by another.[33]

5.86 The ACCC stated that amongst the public detriments of the CBS was the impact on investment in the Hunter Valley Coal Chain.[34] Although the ACCC noted that expansion activities had been undertaken in the Hunter Valley Coal Chain in the past three years, it also noted that there was a reduced incentive to develop a long term solution to ongoing capacity constraints (ie, to expand the capacity).[35] The ACCC stated that no significant progress had been made in long term planning for addressing the capacity constraints in the coal chain.[36] It then stated that one of the hindrances to developing the long term solution was the fact that the port was subject to 'common user' provisions which allow multi-user access to the port (ie, third party access rights).

5.87 Fisher and Rose also acknowledged the successes of the HVCCLT, but stated (at pages 372 to 373):

> **To date, the gains from operation of the logistics team have arisen almost entirely from its focus on operations, rather than through its influence on investment patterns.**

[33] ACCC Final Determination on Applications for Authorisation lodged by Newcastle Port Corporation and Donaldson Coal Pty Ltd in respect of a Capacity Balancing System in the Hunter Valley Coal Chain dated 23 April 2008, page 33.

[34] ACCC Final Determination on Applications for Authorisation lodged by Newcastle Port Corporation and Donaldson Coal Pty Ltd in respect of a Capacity Balancing System in the Hunter Valley Coal Chain dated 23 April 2008, page 28.

[35] ACCC Final Determination on Applications for Authorisation lodged by Newcastle Port Corporation and Donaldson Coal Pty Ltd in respect of a Capacity Balancing System in the Hunter Valley Coal Chain dated 23 April 2008, page 32.

[36] ACCC Final Determination on Applications for Authorisation lodged by Newcastle Port Corporation and Donaldson Coal Pty Ltd in respect of a Capacity Balancing System in the Hunter Valley Coal Chain dated 23 April 2008, page 33

5.88 The Exports and Infrastructure Taskforce also recognised that whilst capacity allocation schemes might play a useful short term role in allocating existing capacity, there is a risk that these schemes will reduce the incentive to increase capacity.[37]

Investment in iron ore infrastructure is threatened by access

5.89 The investment in, and development of, mining infrastructure in the Pilbara is the stand out exception to the Australian infrastructure story. Whilst development in Australian infrastructure is largely under funded (or unfunded) and almost always subject to delays, infrastructure in the Pilbara has expanded rapidly to meet growing demand and higher commodity prices. The rationale for the success of single-user vertically integrated facilities is that the very nature of the facilities encourages confidence in investment.

> Those positive aspects of the design and operation of the chains are highly dependent on the integrated planning, investment and operational processes used by the owners. In turn, investment in both the physical infrastructure and intellectual capital components of the chains depends on their owners' confidence about future access and use of the facilities. Changes in access rules may greatly lower that confidence. Such a reduction in confidence about the future value of infrastructure investments may have much broader application than the particular case at hand and have a negative impact on economic activity more generally.[38]

5.90 As set out above, the most commonly quoted (and lamented) example of underinvestment in infrastructure is in the NSW and Queensland coal chains. The reasons for the difference between the operations of the Pilbara supply chain and the East Coast coal chains are obvious. In the Pilbara there are single-user integrated systems whereby the producers/investors have been confident that investment in the entire chain from mine to port will enable them to capture the export opportunities as they arise. No such confidence in the East Coast coal chains exists. Instead, opportunities to increase exports are lost as the decisions on investment in supply chain bottlenecks are delayed by owners and users with diverse and often competing interests

5.91 The Exports and Infrastructure Taskforce highlighted the contrast between coal and iron ore infrastructure. The Exports and Infrastructure Taskforce characterised the development of regulated infrastructure generally as 'adversarial, cumbersome, complicated, time consuming, inefficient and subject to gaming by participants' with 'too many regulators and regulatory issues...slowing down investment in infrastructure used by export industries'.[39] By contrast, although iron ore ports had experienced capacity problems, 'there have been few difficulties in efficiently allocating scarce capacity and...a coordinated response had been rapidly deployed that will result in integrated expansion of mine, rail and port'.[40]

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[37] Taskforce Report, page 27.

[38] Fisher & Rose, page 395.

[39] Taskforce Report, page 2.

[40] Taskforce Report, page 30

Conclusion on disincentives to invest

5.92 The myriad problems associated with the East Coast coal chains will arise in the Pilbara if the current integrated single-user facilities are declared and become multi-user facilities. Third parties will have the right to claim capacity and there will be no certainty in the minds of investors that they will recoup the true costs that they will incur.

5.93 The inevitable result will be a greater reluctance by infrastructure owners to invest in spare capacity – precisely the conditions that plague the coal industry (as well as several other industries such as water, oil refining, etc) - with detrimental impacts on the Australian economy.

5.94 Thus, there is a 'double whammy'. In a multi-user scenario, not only is there a much more cumbersome and time consuming process to undergo before implementing capacity expansions (resulting in delays with enormous costs as outlined in the PJP Report), but there is a greater reluctance to undertake the investment in the first place.

Economy Wide Study

5.95 Because the 'public interest' test in criterion (f) looks at the public or national interest (as distinct from the interest(s) of any particular entity or entities – such as RTIO or TPI), RTIO engaged Access Economics to undertake general equilibrium modelling to assess the economy wide impact of the RTIO Rail Network becoming a multi-user facility. From this work the economy wide impact has been estimated of the:

- Expansion Delay Costs; and
- the combined impact of Expansion Delay Costs and Loss of System Capacity Costs.

Because most of the Displacement Costs would not be incurred by Australia (in the sense that the displaced ore would be exported by a third party) this was not modelled by Access Economics, although as stated in paragraph 5.52 above, because the third party iron ore would almost certainly be of lower quality than the ore it displaces it would result in a loss in revenue and an adverse impact on Australia (about A$2 billion gross assuming 10% lower value ore displaces RTIO ore).

5.96 A copy of the Report from Access Economics is attached as Appendix 6 (the ***AE Report***). The AE Report describes in detail the modelling technique used. In essence it estimates a Western Australia wide impact and an Australia wide impact of the changed policy settings (ie lower iron ore exports).

5.97 The analysis reveals how substantial the costs would be, notwithstanding that there are offsets to the direct loss in the iron ore industry throughout the State and Federal economies. For the Expansion Delay Costs alone the AE Report reveals that for the base case (Scenario 2A in the AE Report, described in the following paragraph of this submission as the '***Base Case***') assumed by PJP (ie, each expansion being delayed by 12 months and 80% of the loss of sales being captured by overseas competitors) the net present value (NPV) of the impact over 20 years on GSP (State) and GDP (Australia) would be as follows:

Western Australia (GSP)	Australia (GDP)
-A$13.4 billion	-A$14.1 billion

5.98 Based on this analysis Access Economics then calculated the additional impact that would flow from Loss of System Capacity Costs by applying the relevant assumptions to the Base Case. Loss of System Capacity of 15% would (assuming an 80% loss to Australia) result in additional lost export sales of 738 million tonnes over 20 years. Access Economics estimates that a combination of Expansion Delay Costs and Loss of System Capacity Costs (Scenario 2B in the AE Report) the net present value (NPV) of the impact over 20 years would be as follows:

Western Australia (GSP)	Australia (GDP)
-A$28.9 billion	-A$29.6 billion

5.99 Thus the macro-economic impact of access to the RTIO Rail Network is potentially very substantial for both the State and Federal economies, even without taking into account the revenue losses arising as part of Displacement Costs, the potentially huge costs arising from Disincentives to Invest (discussed at paragraphs 5.70-5.94 above) and the increased operating costs that TPI would incur as a result of its being required to operate at less than full wagon capacity because of axle load restrictions on the RTIO Rail Network (discussed at paragraphs 6.61-6.69 below). It is inconceivable that any perceived benefit from access could outweigh such costs.

Conclusion on costs: Single-user iron ore infrastructure is vital to the Australian economy

5.100 On the basis outlined above, the costs of access would amount to tens of billions of dollars, even before taking into account the unquantifiable impact of disincentives to invest.

5.101 These figures are very large and represent an enormous cost to RTIO and Australia. Those advocating declaration of the Hamersley Service and the Robe Service (and perhaps the Council) may assert they are exaggerated. However, when total revenue anticipated from RTIO's operations over the next 20 years is considered ($A450 billion), it is not surprising that any impediment to expansion or efficiency will result in lost export revenue amounting to many billions of dollars.

5.102 All empirical evidence points to the fact that multi-user export facilities operate much less efficiently than single-user integrated facilities – no one can point to evidence of the contrary. Indeed, TPI does not even attempt to do so in the TPI Applications, nor did the Council attempt to do so in the Mount Newman Final Recommendation. Only relatively small export tonnages need to be permanently lost to foreign competitors to justify preserving the efficiencies of RTIO's current single-user system, even if that requires the construction of another facility.

5.103 It is therefore vital to the Australian economy that RTIO's iron ore infrastructure is retained as single-user unregulated infrastructure. A single-user facility is infinitely better equipped to address bottlenecks in Australian infrastructure, as it can better respond to demand by expanding facilities, utilising existing capacity and facilitating investment. The removal of infrastructure bottlenecks is critical to the Australian economy in terms of increasing productivity and improving Australian economic growth. The Exports and Infrastructure Taskforce drew the direct link between removal of infrastructure bottlenecks and Australia's economic wellbeing. It stated (at page 15):

> However, the need to lift productivity is ongoing. It is important that any infrastructure bottlenecks be removed as this will lift productivity and Australia's potential economic growth rate. While removing bottlenecks will not guarantee increases in actual exports, it provides the potential for increases if demand conditions allow them.

(e) Benefits of Access

No tangible benefits

5.104 In the TPI Declaration Applications, TPI does not articulate any tangible benefits that would flow from access to the Hamersley Service or the Robe Service. Instead, TPI asserts it will provide a rail haulage service using the RTIO Rail Network and that doing so will result in competitive terms for rail haulage being offered to tenement holders. TPI asserts this in turn will promote competition in the market for iron ore tenements in the Pilbara (see paragraph 12.3 of the TPI Applications). TPI has not provided any evidence, however, that it will actually provide rail haulage services if the Hamersley Service or Robe Service was declared. No business case has been explained and no customers who have indicated that they will purchase such services have been identified. No tangible benefits of declaration have therefore been identified. Even if TPI does provide rail haulage services, for the reasons given in section 7 below, this would still not promote competition in any market or promote economic efficiency in any way.

5.105 TPI otherwise states that the public interest is served by using the full capacity of the Hamersley and Robe railway lines before building an alternative railway that might adversely impact on native title rights or the environment. As discussed in paragraphs 6.46-6.58 below, key sections of the RTIO Rail Network will be at full capacity in the near future. Any expansion of output will, therefore, require additional facilities to be constructed with or without declaration. Further, for the reasons outlined in paragraphs 5.53 to 5.69 above, it is single-user facilities that are best able to manage operations to ensure that all available capacity is used as efficiently as possible. In these circumstances, the public interest in avoiding environmental damage and interference with native title rights, would not be advanced by declaration.

Haulage of stranded ore

5.106 In the TPI Applications, TPI identifies companies that might wish to use TPI's haulage service on the Hamersley and Robe railway lines. It then states that these companies have no economically viable way of transporting their bulk materials to port other than by way of access to the Hamersley and Robe railway lines (see paragraphs 3.8 and 3.9). Although TPI does not put its criterion (f) argument in this way, they appear to be arguing that there is a public benefit in providing an economically viable manner for the resources of these mining companies to be transported to port.

5.107 However, a close consideration of the companies identified by TPI in paragraph 3.8 of the TPI Hamersley Application and paragraph 3.10 of the TPI Robe Application and other companies with deposits in the vicinity of the RTIO Rail Network reveals that they have alternative transportation options if viable deposits are found. To illustrate this point, it is constructive to consider three companies, all of whom have announced significant increases in iron ore reserves, since the date of the TPI Hamersley Application: FMG, the Aquila/AMCI joint venture (***API***) and Brockman Resources Ltd (***Brockman Resources***).

FMG Solomon project

5.108 In the Supplementary Submission, at paragraph 5.10(a), TPI refers to FMG's resource at Solomon and alludes to the possibility of transporting that ore on the Hamersley rail network from Solomon to a point south of Dampier and then building a rail spur from there to Mineralogy's Cape Preston port. However, it is very clear that if access is not granted, FMG will still be able to develop the Solomon Project. As TPI states at paragraph 6.41 of the Supplementary Submission, FMG is proposing to construct the Kennedy railway line from its Solomon iron ore deposit to join with the Chichester railway line. This will enable TPI to transport iron ore from the Solomon deposit along the Kennedy and Chichester railway lines to port facilities at Port Hedland. (See the maps behind Part 1 of Annexure 1, as well as Annexure C to the TPI Hamersley Supplementary Submission).

5.109 In a television interview of 18 November 2007 for the ABC's *Inside Business*, on whether access to BHP or RTIO's infrastructure is a 'make or break issue' for FMG, Executive Director Graeme Rowley responded:

> That's not critical for our current operation out of the Chichesters at all. And in fact we can operate from our new find on the Solomon area with a rail connection to our current line, and operate successfully through Port Hedland.[41]

Mr Rowley stated that access is therefore 'icing on the cake' for FMG. Consistent with that position, FMG's public announcements and presentations have ***not*** asserted that development of the Solomons deposit or FMG's other Western Pilbara deposits is in any way conditional upon access to the RTIO Rail Network. This stands in stark contrast to submissions made by FMG in relation to Mindy Mindy in connection with the Mount Newman Application.

5.110 The history and announced plans of FMG demonstrate that it does not need access to other companies' rail infrastructure in order to get its iron ore to market. FMG was able to obtain project financing to construct a mine at Cloud Break, a new port at Port Hedland and a rail line linking Cloud Break and Port Hedland on the basis of a 45mtpa development at Cloud Break. FMG's stated plans seem to contemplate that at least 80mtpa of iron ore would be produced at the Solomon deposits and transported down the Kennedy railway line, nearly twice the volume of ore that underpinned the much larger initial Cloud Break/Chichester rail line/Point Anderson port development. There is every reason to believe, therefore, that if the Solomon deposits are viable, they will support the development of the first stage of the Kennedy railway line. Furthermore, there is every reason to believe that if FMG's deposits in the Western Pilbara, such as Solomon West, Flying Fish and Eliwana are viable, they will support the development of the second and third stage of the Kennedy railway line.

[41] http://www.abc.net.au/insidebusiness/content/2007/s2093968.htm

The API Joint Venture: West Pilbara project

5.111 The West Pilbara iron ore project has been the major focus of the Australian Premium Iron (***API***) joint ventures exploration program since 2005. The joint venture partners are Aquila and American Metals and Coal Industries (***AMCI***). API's West Pilbara projects are:

- Red Hill joint venture (API 60%, earning up to 80% and Red Hill Iron Limited 20-40%);
- Mount Stuart joint venture (API 70%, Cullen Resources Limited 30%);
- Mount Elvire (API 100%); and
- Yallen joint venture (API earning 70%, Helix Resources Limited 30%).

5.112 In May 2007, Aquila announced an initial JORC indicated and inferred resource for the West Pilbara iron ore project of 203 million tonnes at 57.44 FE. On 7 March 2008 that was increased when Aquila announced that the West Pilbara resource hosts a 493 million tonnes hematite iron ore resource, and that API is looking at the West Pilbara project supporting a 30mtpa direct shipping ore operation.[42]

5.113 The West Pilbara deposits are located approximately 160 kilometres from Cape Preston (the port being constructed by Citic Pacific) and 240 kilometres from a potential port at Dixon Island. Aquila is currently investigating the possibility of constructing a rail line to either of these ports (behind Part 2 of Annexure 1 is a slide taken from Aquila's 30 November 2007 AGM presentation showing the rail and port options being investigated).

5.114 In summary, if the API Western Pilbara deposits are economically viable, it appears likely that Aquila and its joint venture partners will be able to get their ore to market by constructing their own rail line, linking their deposits to ports at either Cape Preston or Dixon Island, without rail access to RTIO's Rail Network.

Brockman Resources: Marillana project

5.115 Brockman Resources' main project is the Marillana iron ore project, covering a 16 kilometre strike length along the base of the Hamersley Range. On 30 August 2007, Brockman Resources upgraded its exploration target to 100 million tonnes after continued drilling success. Drilling last year confirmed a JORC compliant indicated initial resource of 43.5 million tonnes. On 5 March 2008, Brockman Resources announced a 1.1 billion tonne resource at Marillana, with an inferred and indicated resource including 1.06 billion tonnes requiring beneficiation and 56.2 million tonnes of direct shipping ore. In all, Brockman predicts the Marillana project could produce 550 million tonnes of marketable product.[43]

5.116 The Marillana project is located approximately 5 kilometres from the BHPB rail line, 40 kilometres from the Hamersley railway line and 40 kilometres from Cloud Break and FMG's Chichester railway line. As a result, Brockman Resources has a number of options without declaration, including obtaining the rail haulage services from TPI using FMG's Chichester railway line.

[42] Haycock K, 'Aquila boosts its iron ore hold in the Pilbara by 85% *UPDATE*', *MiningNews.net*, 7 March 2008

Other deposits

5.117 TPI may claim that, although the three companies cited in the illustrations above do have alternative options, other smaller and/or more remote deposits may not have options unless the Hamersley and Robe Services are declared and TPI provides rail haulage services to the owners of those deposits using the Hamersley and Robe Services. Three key points are made in response.

5.118 First, now that FMG has constructed the Chichester railway line, the cost of extending that line first to its Solomon deposits, then to FMG's deposits further west in the Pilbara (stages 2 and 3) and then potentially to connect up with other deposits is relatively small. As TPI has stated it will provide rail haulage services to third parties using its own rail network there is no reason to assume that it would not be possible for FMG to extend its rail line to serve other deposits if economically viable.

5.119 Secondly, if the deposit is not sufficiently economically viable to support either the construction of its own infrastructure or the extension of FMG's open access infrastructure, then it would clearly not be viable if it (or TPI) had to bear the full diseconomy costs that third party access would cause as described above. If TPI or the third party does not bear the full diseconomy costs it causes this would amount to RTIO subsidising the new entrant. New entry facilitated by such subsidisation is economically inefficient and not in the public interest.

5.120 Thirdly, for reasons discussed further in relation to criterion (a) in paragraphs 7.56 to 7.59 below, in a hypothetical scenario in which there is spare capacity on the RTIO Rail Network and there are deposits that could be developed if they obtained access, but would not be economic to develop (or would be more costly to develop) if they built their own infrastructure, then RTIO (provided it is able to carry third party ore without impeding its operations) has every incentive to reach commercial agreement with the owner of that deposit that will see that deposit developed, with the profits shared between the deposit owner and RTIO. RTIO may do so through purchasing the deposit, entering into a joint venture arrangement, enter into a mine gate sales arrangement or some other arrangement that does not impose the diseconomies of track access.

Conclusion on benefits of access

5.121 In summary, declaration would not generate any public benefits:

- TPI has not identified any tangible benefits likely to flow from access;
- for the reasons discussed in relation to criterion (a), access would not promote competition in any market;
- because key sections of the RTIO Rail Network will operate at full capacity in the near term and are being expanded as rapidly as possible, access would not avoid the need for construction of further infrastructure and hence would not avoid environmental damage or interference with native title rights;

[43] Haycock K, 'Brockman boosted on the back of massive new resource' *MiningNews.net*, 5 March 2008

- access is not necessary in order for iron ore deposits in the Pilbara to be developed, as the history of the development of the Pilbara, the history of FMG and the analysis above shows.

(f) Comparison of costs and benefits

5.122 Since *Services Sydney*, it is clear that criterion (f) requires a cost benefit analysis to be undertaken, in which the relevant decision maker (whether the Council, the Minister or the Tribunal) weighs the costs of access against the benefits to be gained from access, and asks whether, on balance, access would be contrary to the public interest. Given that access will result in tens of billions of dollars of costs, and generate no public benefits, it is overwhelmingly clear that access would be contrary to the public interest.

6. Criterion (b) – 'Uneconomical for anyone to develop another facility to provide the service'

(a) Introduction

6.1 Section 44G(2)(b) of the TPA provides that the Council cannot recommend that a service be declared unless it is satisfied:

> that it would be uneconomical for anyone to develop another facility to provide the service.

(b) Interpretation of criterion (b)

The Council's view

6.2 The Council has interpreted criterion (b) as requiring an assessment of whether a facility is a natural monopoly facility. For example, in the Mount Newman Final Recommendation, the Council stated, at paragraph 6.15:

> Criterion (b) requires an assessment of whether a single facility can serve the range of reasonably foreseeable demand for the service to which access is sought at a lower social cost than two or more facilities.

6.3 When assessing the 'social cost' the Council looks at 'the costs and benefits to the community as a whole'[44] and determines whether access to the existing facility will result in a lower net social cost than developing another facility to provide the service.

6.4 In RTIO's view the natural monopoly test applied by the Council is incorrect. RTIO submits that criterion (b) requires the Council to be satisfied that it would be uneconomical in a private investment sense for anyone to develop another facility (or expand or extend an existing facility) to provide the service.

6.5 RTIO holds this view for two reasons:

- the natural meaning of the words in criterion (b) strongly suggest a private investment test;
- there are sound economic and public policy reasons for applying a private investment test. It is for these reasons the US essential facilities doctrine applies what is essentially a private investment test.

6.6 Attached as Annexure 7 is a report of Professor Joseph Kalt. Professor Kalt explains that (at pages 2-3):

> ...if an entrant can profitably (ie, with expected revenues greater than cost) enter by building its own facility, the incumbent has compelling incentives to respond by offering access to the entrant over the incumbent's facilities under reasonable terms and conditions, when doing so does not inefficiently disrupt the operation of the facilities. When the cost of providing access (i.e., the incumbent's direct cost plus any net revenue lost due to service degradation) is less than the cost of building new facilities, it would be wasteful to build new facilities. The same services could be provided using the incumbent's facilities, and the incumbent will willingly provide access when it generates revenues that are greater than the costs to the incumbent. By the same token, the entrant will choose access over the

[44] Paragraph 6.2 of the Mount Newman Final Recommendation.

incumbent's facilities when what it must pay for access is less than the cost of building new facilities. And when relative costs are reversed (i.e., it is socially less costly for the entrant to build new facilities than to utilize access on the incumbent's facilities), the incumbent cannot offer access at a low enough cost to block the entrant, and new facilities will be built. In these ways, the marketplace correctly performs the social cost test.

6.7 As a result regulatory intervention is only appropriate where the competitor is unable practicably or reasonably to duplicate the essential facility.

6.8 Despite the force of these views, the Council has consistently applied a natural monopoly test in considering criterion (b). As a result, this submission focuses primarily on the application of a natural monopoly test in the current scenario. RTIO reserves its right to argue further that a private investment test should be applied.

Meaning of 'another facility to provide the service'

6.9 Whether a private investment test or a natural monopoly test is applied, it is important to understand how the phrase 'another facility to provide the service' should be interpreted in the current context where there are already three rail networks operating in the Pilbara (the RTIO Rail Network, the BHPB rail network and the FMG rail network), with proposals being investigated to significantly extend the FMG rail network and API investigating the possibility of building its own rail line.

6.10 In RTIO's submission, criterion (b) does not ask whether it would be uneconomical for anyone to develop precisely the same facility in an identical location; rather, a common sense approach should be taken where the question asked is whether it would be uneconomical to develop another facility that could meet the same operational ends. For example, in the *Duke Energy*[45] case the Tribunal held that the Moomba to Sydney Pipeline was not capable of being developed to provide the same services as the Eastern Gas Pipeline because the Moomba to Sydney Pipeline did not accommodate the physical transport of gas between Longford and Sydney. The Tribunal and the Council accepted, however, that the 'Interconnect' could be a potential substitute for the Eastern Gas Pipeline because it could be used to transport gas from Longford to Sydney, notwithstanding the fact that it took a very different route to the Eastern Gas Pipeline.

6.11 Here, the service being sought in substance is track access for the purpose of enabling iron ore to be transported from unidentified deposits to a port for the purposes of iron ore being sold into the global iron ore market. As a result, the Chichester railway line (and the proposed Kennedy railway line) could be a potential substitute for the Hamersley and the Robe railway lines because the Chichester railway line and the proposed Kennedy railway line could, or could be developed to, provide transportation from unidentified deposits in the Pilbara in the region of the Hamersley and Robe railway lines to a port for the purpose of iron ore being sold into the global iron ore market. The validity of this approach is underlined by the fact that third parties are most likely to want to have their iron ore transported to Port Hedland because there is a public user berth at Port Hedland and because FMG has developed its own port at Port Hedland. The State Agreement under which FMG has constructed the port at Port Hedland requires that that port be open for

[45] *Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1, at paragraphs 135 and 136

third party access. There is no public user or FMG port at either Dampier or Cape Lambert (the ports served by the RTIO Rail Network).

6.12 Ultimately, however, whether a natural monopoly test or a private investment test is applied and whether or not you ask if an identical facility or an operationally equivalent facility must be uneconomic to duplicate, the Council cannot be satisfied that criterion (b) is met here.

6.13 The balance of section 6 of this submission considers first whether criterion (b) would be met if a natural monopoly test is applied and then goes on to consider whether criterion (b) would be met if a private investment test was applied.

(c) Application of natural monopoly test

Introduction

6.14 The Council Guide discusses what constitutes a natural monopoly at paragraphs 4.16-4.83. The Council Guide concludes, at paragraph 4.76, that:

> ... the assessment of criterion (b) under the natural monopoly facility approach depends on the characteristics of the facility's cost function in meeting the reasonably foreseeable demand for the service subject to declaration. Applying the conditions for the existence of a natural monopoly, the facility is a natural monopoly facility if:
>
> (a) for a single-service facility, the facility exhibits economies of scale over the entire range of reasonably foreseeable demand for the service; or
>
> (b) for a multiple-service facility, the facility exhibits:
>
> (i) economies of scale in the provision of each and every service provided by the facility, particularly in serving the reasonably foreseeable demand for the service subject to declaration; and
>
> (ii) economies of scope.

6.15 Economies of scope are addressed in paragraphs 4.26-4.29 of the Council Guide. The Council concludes that 'economies of scope occur if joint production of two or more products is less costly than producing the products individually' (paragraph 4.26) and 'economies of scope imply that it is cost efficient to produce the entire set of products' (paragraph 4.27).

6.16 In the Mount Newman Final Recommendation, the Council:

- first, sought to identify the reasonably foreseeable demand for the service (paragraphs 6.54-6.80);
- secondly, sought to identify the capacity and expandable capacity of the Mount Newman railway line (paragraphs 6.81-6.160);
- then compared foreseeable demand for the limited Mindy Mindy service to the total capacity and expandable capacity of the Mount Newman railway line and concluded that the Mount Newman line capacity could be expanded to satisfy reasonably foreseeable demand and therefore, given the scale economies of rail infrastructure, it was unlikely to be economical in terms of costs to develop another facility – see paragraphs 6.161-6.162; and

- considered actual evidence about costs (ie, considered evidence as to whether it was less costly from a social perspective to satisfy demand via access to the existing facility or via construction of another facility 6.163-6.299).

6.17 Importantly, the 'point to point' nature of the Mount Newman Application meant that the Council was essentially considering a single service rather than multiple services, as here.

6.18 In this case, it is impossible for Council to be satisfied that criterion (b) is met for four reasons:

- first, the TPI Applications are for an infinite number of services, none of which is particularised by TPI. In such circumstances, it is impossible for the Council to make any assessment of whether there would be economies of scale in the provision of 'each and every service provided by the facility' or whether there would be economies of scope. A meaningful description of the services sought to be declared is essential before the natural monopoly test can sensibly be applied;
- secondly, the reasonably foreseeable demand for each service cannot be forecast in any meaningful way. In the absence of reasonable demand forecasts it is impossible to apply criterion (b), let alone be satisfied that it is met;
- thirdly, whatever view is taken about third party demand, there is unlikely to be any spare capacity available on the key segments of the Hamersley and Robe railway lines over the proposed 20 year life of the declaration, given how dramatically RTIO's demand for use of the RTIO Rail Network is growing; and
- finally, the costs (especially the massive diseconomy costs) that would be caused by granting access mean that the costs of providing access to the Hamersley and Robe Rail Services would dwarf the costs of a new facility, whatever approach is taken.

6.19 Each of these four reasons is discussed in more detail below.

Failure to specify particular services

6.20 As discussed above, the TPI Applications seek declaration of an infinite number of services (being all services that could conceivably be provided between any points on the Hamersley railway line or the Robe railway line). There is no description of any particular service for which declaration is sought nor any attempt to identify and describe services that are more likely in practice to be used than any other services. It is therefore impossible for the Council to test whether the requisite economies of scale exist in relation to each and every service provided by the facility, or whether it is more cost efficient for the relevant facility to provide the entire set of services (economies of scope). The dilemma can be demonstrated by taking possible examples of services that might be provided by the facilities. One such service might be for the entire length of that facility. Another such service might be for a short distance. A conclusion on whether foreseeable demand for each of these services could be satisfied more cheaply by the existing facility may well differ. To illustrate this point, we note that Cape Lambert Iron Ore Limited (***Cape Lambert Iron Ore***) has announced that it has a JORC compliant resource of 2.5 billion tonnes at 30% FE located approximately 10 kilometres from the port of Cape Lambert. Very clearly it would be economically viable (on either a natural monopoly or private investment test) for

Cape Lambert Iron Ore to construct a slurry pipeline or transport ore by road to the Cape Lambert port rather than seeking access to the Robe railway line. By definition one of the infinite number of services TPI is seeking to have declared would, however, be the service comprising access to the last 10 kilometres of the Robe railway line to Cape Lambert. The Council cannot be satisfied that it would be uneconomic to develop another facility to provide this service.

6.21 Given the infinite number of services sought (including potential services to transport ore over very short distances), it is inconceivable that the Council or the Minister could be satisfied that it is more economically efficient for the Hamersley railway line or the Robe railway line to provide 'each and every service' provided by the facility or to be satisfied that the requisite economies of scope exist. Similarly, without knowing which services are actually likely to be used it is impossible to be satisfied that there are economies of scope in having all those services provided using the one facility, rather than having a second facility provide some of those services.

Impossible to reasonably forecast demand

6.22 The first step in applying a natural monopoly test is to forecast the reasonably foreseeable demand for the service over the declaration period. For example in paragraph 4.79 of the Council Guide, the Council states:

> If the capacity of the facility is sufficient to meet reasonably foreseeable demand for the service subject to declaration, then the facility is a natural monopoly and criterion (b) is satisfied.

6.23 In this case, no reasonable forecast of demand for the services TPI seeks to have declared can be made.

6.24 The first difficulty in forecasting reasonably foreseeable demand stems from the fact that TPI seeks to have all conceivable services that the facility might provide declared. It is impossible to determine:

- the section or sections of the facility that will be affected;
- the direction that loaded and empty trains will run on the facility; or
- the likely third party demand for the relevant section of the facility.

6.25 The second difficulty in forecasting reasonably foreseeable demand is that, even if the relevant section or sections of the facility were identified, none of TPI, the Council, RTIO nor any other person could forecast the likely demand for the Hamersley Service or the Robe Service over the 20 year proposed declaration period.

6.26 In paragraph 3.8 of the TPI Hamersley Application, TPI has nominated seven companies that might produce iron ore that might use TPI's haulage service on the Hamersley railway line and in paragraph 5.10 of the Supplementary Submission, it has sought to flesh this out in some respects (although qualified by the comment that it is not more than an 'educated guess'). In paragraph 3.10 of the TPI Robe Application, TPI nominates five companies that might produce iron ore and that might therefore use TPI's haulage service on the Robe railway line (TPI does not attempt even an 'educated guess' as to the quantities involved). There is no basis to assume that the companies nominated by TPI would be the only non-

RTIO producers of iron ore that would be likely to utilise the Hamersley and Robe Services and there is no basis to estimate the extent of demand from such users.

6.27 RTIO has conducted its own research on non-RTIO companies with tenements in the vicinity of the Hamersley and Robe railway lines and has examined publicly available documents to identify the resources that those companies hope to prove up.

6.28 Tables summarising the results of that public information tenement review are set out in Part 1 of Annexure 2 (Hamersley) and Part 2 of Annexure 2 (Robe). These tables identify companies holding tenements within 50 kilometres of the Hamersley or Robe railway lines (referred to in the tables as 'Relevant Tenements') that have stated an intention of producing iron ore and, for each such company, what is known about the announced reserves and resources within the company's Relevant Tenements.

6.29 As can be seen from the tables, there are a total of 34 companies or individuals identified in relation to the Hamersley railway line with total JORC compliant resources in the Pilbara of more than 11 billion tonnes and total resources claimed (including targeted mineralisation) of nearly 15 billion tonnes. Similarly, 22 companies have been identified in relation to the Robe railway line with JORC compliant resources in the Pilbara of nearly 3 billion tonnes and total resources including non-JORC compliant resources in the Pilbara of in excess of 5 billion tonnes[46].

6.30 The tables behind Annexure 2 simply reflect publicly available information about tenements as at today. As exploration and development activities continue, known resources and production plans can change very quickly. This is illustrated by the fact that in the last six months alone:

- FMG has announced that it has inferred resources of over 1.7 billion tonnes in the Solomon Project (November 2007);
- Brockman Resources announced that it has a 1.1 billion tonne resource at its Marillana Project in the Pilbara (5 March 2008);
- Aquila announced that its Western Pilbara Project has almost doubled in size and has a 493 million tonne hematite iron ore resource (7 March 2008).

6.31 Whether these tenements ultimately translate into non-RTIO demand for the Hamersley Service or the Robe Service over the proposed 20 year declaration period and, if so, the extent of that demand, is entirely speculative. TPI concedes that it does not even know its own foreseeable demand let alone demand by other third parties (see paragraph 5.10 of TPI's Supplementary Submission where it says 'the answer is always going to be nothing more than an educated guess'). The extent of third party demand depends on the success of exploration programs that have yet to be undertaken, it depends on the demand and price for iron ore and it depends on the extent to which customers' quality requirements change from those currently demanded. Many iron ore projects now being undertaken or considered would not have progressed to their current status without the substantial demand and price increases that have been experienced in the last several years. Thus, a

[46] There is some overlap between the two groups because some Relevant Tenements are located within 50 kilometres of both the Hamersley and Robe Rail Networks.

projection five years ago of the likely demand for railing of iron ore over the foreseeable future, would probably have predicted modestly increased demand by the existing producers (RTIO and BHPBIO) and perhaps some demand from Hope Downs. In five years things have changed dramatically, with unprecedented expansions being undertaken by RTIO and BHPBIO, the development and foreshadowed expansion of Hope Downs, the expected production by FMG from its Cloud Break and Christmas Creek deposits, the plans by FMG to develop various other deposits and the aspirations for development by the companies referred to in paragraph 6.29 above.

6.32 No one can possibly predict what third party developments are likely to materialise over the next five years, let alone the 20 year period for which declaration of the Hamersley Service and Robe Service is sought. As outlined in the PJP Report, analysts consider that it is more likely than not that buoyant iron ore market conditions will continue and, although analysts predict a price decline from about 2010 (Exhibit 6 of the PJP Report), demand is likely to continue to grow. It must also be noted that analyst pricing and demand forecasts over the last few years have proved to be very conservative and have consistently been revised upwards (Exhibit 3 of the PJP Report). Further, although prices are forecast to decline, they are forecast to remain well above the long term trend line.

6.33 In these circumstances, no one can accurately forecast the likely demand for the Hamersley Service or the Robe Service. If overall demand cannot be forecast with any confidence, then the demand for specific sections of the Hamersley and Robe railway lines cannot be forecast. It is therefore not surprising that the TPI Applications and the Supplementary Submission do not specify:

- the likely quantity of ore from each source;
- the likely destination of ore from each source (whether that be a port or a rail interconnection); or
- the likely pathway on the Hamersley or the Robe railway railway lines that would be required for ore from each source.

6.34 The natural monopoly approach to criterion (b) requires each of these matters to be addressed so that, in respect of all sections of the Hamersley and the Robe railway lines, the foreseeable demand can be forecast and then an analysis can be undertaken to assess 'whether [that section of] the facility can serve the range of foreseeable demand for the service at less cost than two or more facilities'.

6.35 The matters raised above have been addressed by Professor Janusz Ordover, upon whose analysis the Council relies in applying the natural monopoly test when applying criterion (b). A copy of the report from Professor Janusz Ordover is set out behind Annexure 9. Professor Ordover concludes that, in a situation where the demand cannot be confidently predicted over the period of the declaration, it is impossible for anyone to be satisfied that 'it would be uneconomical for anyone to develop another facility to provide the service' (at page 12).

6.36 Professor Ordover contrasts the position in relation to the Hamersley Service with the situation in the Moomba - Sydney gas pipeline declaration application, where there was a very clear understanding by all of the likely demand for the pipeline facility and there was no prospect of another facility being constructed.

6.37 In these circumstances, it is impossible to be satisfied that the Natural Monopoly Test is satisfied.

6.38 As Professor Ordover says (at pages 5 to 6):

> In light of the wording of s44G(2)(b), which requires the Council to be **satisfied** that it would be uneconomical to duplicate the facility, it is my view that the only conclusion that can be reached in these circumstances is that Council **cannot** be so satisfied if there is a wide range of plausible joint demands for the facility from the incumbent and third parties (including the access-seeker) that would exceed a reasonable measure of the facility's capacity. Accordingly the facility should not be declared. In addition to the impossibility of the Council being so satisfied, there are compelling public policy and economic rationales for not declaring in circumstances where demand cannot plausibly be known. The most compelling is that it is inappropriate in such circumstances for regulatory intervention to be hanging over the incumbent in any negotiation relating to access with potential access seekers. When demand and the extent to which augmentation or duplication will be required are unknown, there are very serious private property, private investment and market economy issues at stake. The market will be much more likely to produce an appropriate outcome than a determination by a regulatory body.

6.39 Professor Joseph Kalt reaches a similar conclusion. Professor Kalt concludes (at page 5):

> In short, natural monopoly is only meaningfully defined in the context of reasonably reliable, quantitative estimates of market demand. An applicant's representation that demand cannot be reasonably estimated and is "nothing more than an educated guess" must leave any assertion that the service in question here is a natural monopoly baseless. In terms of the applicable economics, The Council cannot begin to evaluate the market to apply Criterion (b) without a reasonable and reliable estimate of the demand for TPI's service.

Capacity

6.40 As discussed in section 3 above, RTIO is undertaking an unprecedented expansion of its Pilbara iron ore operations:

- RTIO is currently implementing expansions that will increase production to approximately 220mtpa by early 2009;
- RTIO intends to be operating at 320mtpa from the Pilbara by 2013;
- RTIO has foreshadowed that it is considering further increasing production capacity by 100mtpa through expansion of Cape Lambert, taking RTIO's Pilbara production capacity to 420mtpa.

6.41 In light of RTIO's rapid expansion projects, it is impossible for the Council to be satisfied that there will be spare capacity available for third parties on the network or that the network could be further expanded to accommodate third parties at less cost than the cost of constructing a new facility or indeed at all.

FMG's claims about capacity

6.42 As TPI notes at paragraph 5.11 of the TPI Hamersley Application, if RTIO is to meet its objective of increasing Pilbara production to around 320mtpa by 2013, this will of necessity require a duplication of key sections of its rail network. In particular, a section of rail track between the Emu and Rosella Sidings has already been duplicated to facilitate the current rapid expansion programs (see the schematic maps in the SMS Report and TSG Report).

6.43 In the Supplementary Submission, FMG claims that the capacity of a fully duplicated stretch of railway is around 400mtpa, based on theoretical calculations set out in paragraph 5.12.

6.44 However, even TPI's modellers do not agree with the 400mtpa dual track capacity assertion by TPI. The SMS Report estimates that the capacity on the dual track Emu to Rosella segment of the Hamersley Rail Network would be 345mtpa. Even this estimate, however, contains serious flaws. Annexure 8 contains a report from TSG Consulting (the ***TSG Report***) which identifies the flaws contained in the SMS modelling work and presents more realistic estimates of the likely capacity of a dual track railway line between Rosella and Emu.

6.45 The flawed assumptions or outputs of the SMS modelling are identified in the TSG Report, but can be illustrated by the following examples:

- SMS does not take into account end effects that are common to all users (eg, dumping, loading and mine production variability and interruptions on spur lines leading to or departing from the relevant section). SMS instead wrongly assumes that there are 'always loaded trains waiting to enter the track and similarly that there are always empty trains waiting to return'[47];
- SMS assumes 350 hours of major planned maintenance each year. [redacted]
- SMS asserts that ***increasing*** grinding frequency by 50% (which would reduce the amount of time railtrack is actually available) would ***increase*** capacity when clearly it would ***reduce*** capacity[48];
- SMS calculates that the capacity of the section between Emu and Dampier is currently 197mtpa[49]. Recently RTIO has spent significant capital in building a new siding (Dove siding) to allow 140mtpa to be railed between Emu and Dampier as part of the Dampier port upgrade to 140mtpa. [redacted]

  Errors of a similar order of magnitude have been made in relation to other segments of track.

<u>Rail usage by RTIO and capacity modelling</u>

[redacted]

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[47] SMS Report, page 3.

* Confidential

[48] SMS Report, page 11, Table 4.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

6.49 TSG has undertaken modelling for RTIO with a view to answering three key questions:

[40] SMS Report, page 11, Table 3.

* Confidential

- what is the Maximum Rail System Capacity for the entire RTIO Rail Network, adopting the infrastructure enhancements proposed by RTIO for its expansion to 320mtpa?
- is the Emu/Rosella section the major bottleneck in the RTIO rail system when RTIO is operating at the 320mtpa rate?
- what is the capacity of the Dampier/Emu section?

6.50 In the TSG Report TSG makes the following observations in relation to these tasks:

- there is a difference between the Maximum Rail System Capacity (***Maximum Capacity***) calculated by reference to a model assuming unlimited rolling stock, and the Economically Viable Rail System Capacity (***Economic Capacity***). Economic Capacity is reached when it becomes less efficient to add rolling stock to increase capacity than to build further rail infrastructure. The Economic Capacity is always lower than the Maximum Capacity;
- end effects that are not peculiar to RTIO (eg loading and unloading variability) must be applied in determining capacity irrespective of whether RTIO or a third party is using the line;
- the generic end effects described above are the only end effects taken into account by TSG when it is modelling RTIO rail system capacity;
- it is not sensible (and very difficult) to model the capacity of separate sections of a rail system as no section of track operates independently of other sections. End effects (such as loading and unloading variability as well as disruptions on the spur lines leading to and from the section being modelled) will have a significant impact on each section's capacity.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6.58 In summary, RTIO's rapid expansion plans mean that there is no basis on which the Council can be satisfied that the RTIO Rail Network, which includes the Hamersley and Robe railway lines, will have spare capacity (or could be expanded further to create spare capacity) for third party users that could be provided at a cheaper cost than the cost of constructing an alternative facility.

Costs

Capital and diseconomy costs

6.59 Paragraphs 5.11 to 5.103 of the submission discussing criterion (f) outlined the enormous diseconomy costs that would be caused by third party access. These costs, which are in the tens of billions of dollars would dwarf the cost of building a new facility. According to TPI's estimates, the costs of duplicating the entire Hamersley railway line would be approximately $2.5 billion, a fraction of the likely costs of access. Similarly, TPI estimates that the costs of constructing a duplicate Robe railway line would be between $735 and $945 million, again a fraction of the likely diseconomy costs. For the reasons given in paragraph 6.9 to 6.11 above, the true comparison should not be with the amount it would cost to duplicate the entire Hamersley and Robe railway lines, but rather with the amount it would cost to connect to FMG's proposed Kennedy railway line to serve specific deposits. On this basis the costs of developing 'another facility to provide the service' would be considerably lower than the figures quoted above (this probably would not entail construction of more than 100 kilometres of new rail track, although the precise distance and costs cannot be determined without knowing the deposits to be served. This is another illustration of the problem created because TPI's application has not specified particular services, thus is making it impossible to meaningfully apply criterion (b)).

6.60 In any event, whether you look at the costs of connecting to the Kennedy/Chichester railway lines or the cost of duplicating the entire RTIO Rail Network, it is clear that the costs of building such another facility would be much lower than the costs that would be caused by access.

Operating costs

6.61 In addition to these capital costs it is likely that TPI would incur higher operating costs operating on the RTIO Rail Network than operating on its own rail line. This is because of differences between the permitted axle loads on the RTIO Rail Network and the higher permitted axle loads on FMG's network.

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[*] Confidential

6.62 RTIO's Rail Network operates on a maximum average axle load of 33 tonnes, representing an ore car mass of 20 tonnes and payload of up to 112 tonnes. In reality, variance in distribution of load within the car is likely to lead to individual axle loads up to approximately 35 tonnes.

6.63 The consequences of exceeding the designed axle load are increased damage to rail, leading to fatigue, rail defects (propagation of cracks from the rail head) and ultimately broken rails. This, in turn, can lead to derailment.

6.64 For many mines, the ore car volume constrains the total mass of ore that can be carried, which may be below 112 tonnes for lower density products. However, some mines produce ore with a density high enough to exceed 112 tonnes per car if overloaded. The loading of trains is monitored at the loadout, and a wheel impact detector also measures the loading of each axle en-route. Overall, typical car loadings are 106-107 tonnes, giving an average axle load of 32 tonnes.

6.65 While factors such as the ride of cars and the maintenance regime for the track can create some additional axle load capacity, the limit will be dictated by design criteria, including rail and ballast specification and sleeper mass and spacing. It is likely that much of the RTIO track is operating close to its design limits and any increases to axle loading would require significant upgrade of the track.

6.66 Open access rail infrastructure owners will generally specify a hard limit for axle loads.[50] In the event of third party access to the RTIO Rail Network, a maximum axle load would need to be set. To provide a safe limit this would need to be set no higher than RTIO's current axle loading of 33 tonnes.

6.67 FMG ore cars are designed to operate at up to 40 tonne axle loads.[51] Therefore, any access onto RTIO tracks would require them to be limited to 33 tonnes. This would result in cars carrying 20% less than their design capacity. This restriction would need to be monitored and enforced to ensure that:

- cars were not loaded above the axle load limit;
- cars approaching the RTIO network were monitored and any train with overloaded cars have those cars removed or the load reduced;
- any corrective action would need to take place clear of and prior to entry on to RTIO tracks;
- monitoring equipment would need to be regularly calibrated to the satisfaction of the rail regulator.

6.68 Having FMG's ore cars only part loaded to thirty three tonne axle loads would presumably increase operating costs by about 20% (40/33). FMG suggests that the marginal cost of transporting iron ore by railway is approximately $2.50 per tonne (TPI Hamersley Supplementary Submission paragraph 6.18). A 20% increase in this figure is 50 cents per

[50] For an example, refer to Queensland Rail's network access requirements http://www.networkaccess.qr.com.au/. This states axle load limitations for each track section.

[51] FMG website http://www.fmgl.com.au/ claims that 200 car trains will carry 28,000 tonnes of ore. With a tare weight no greater than RTIO cars (20 tonnes) this gives a gross mass of 160 tonnes and an axle load of 40 tonnes

tonne. If demand was say 100 million tonnes per annum (for the purpose of this illustration only – demand is unknowable) then the increase in operating costs over a 20 year declaration period would be $1 billion.

6.69 Although 'small' when compared with the diseconomy costs access will cause, this increase in operating costs adds to the reasons why building and operating another facility would be less costly than allowing access.

Conclusion on social cost analysis

6.70 The following table summarises, based on the above analysis, the net outcome when assessing 'the costs and benefits to the community as a whole' (ie, the social costs) of access being granted over the RTIO Rail Network compared with the construction of an alternative facility to provide the equivalent service.

Table 5: Comparison of Social Cost of Access vs Separate Facility

Access		Separate Facility	
Direct construction costs of duplicate railway line	A$1 billion minimum[52]	Direct Cost of Minimum alternative facility	A$400 million [53]
Additional operating cost (axle loads)	A$ 1 billion[54]		-
Delays to Expansion Costs and Loss of System Capacity Costs	A$29.6 billion[55]		-
Net Displacement Costs	A$ Unquantified[56]		-
Under Investment due to disincentive effect	A$ unquantifiable		-

6.71 TPI does not even attempt to quantify any public benefits that would be generated by the grant of access.

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[52] A duplicate rail line would need to be built to accommodate third party declaration. A$1 billion calculated based on 250 kilometre parallel facility from Rosella to Dampier or Lambert and mid point of TPI railway cost estimate pf $3.5 – 4.5m/km (7.17 of the TPI Robe Application).

[53] Based on 100 kilometre maximum distance required to join third parties to anticipated TPI rail infrastructure and TPI cost estimate as above.

[54] Assumes 100mtpa being carried at 20% higher opex based on TPI estimated marginal opex of A$2.50/t – see paragraph 6.18 of the TPI Hamersley Supplementary Submission.

[55] Australia economy wide GDP cost as per the AE Report.

[56] Approximately A$2 billion gross loss of revenue assuming 10% quality/price differential, but Australia economy wide GDP cost not calculated.

6.72 For the reasons set out in paragraphs 6.14 – 6.71 above, it is clear that the Council cannot be satisfied that criterion (b) is met.

(h) Response to Gans Report

6.73 TPI has attached to the Supplementary Submission a report from Professor Gans (the ***Gans Report***) which considers how criterion (b) should be applied to long haul rail services. Professor Ordover's report, which is Annexure 9 to this submission, comments in Part 3 on the Gans Report.

6.74 In summary, four key points can be made about the Gans Report.

6.75 First, and most fundamentally, Professor Gans overlooks completely the fact that converting an unregulated single-user facility into a regulated multi-user facility will cause enormous diseconomies and other costs of the type discussed in relation to criterion (f) above. As discussed above, these costs dwarf the costs of constructing an entirely new facility. The failure to take these costs into account undermines all of the Gans Report.

6.76 Secondly, in the final part of the Gans Report, Professor Gans suggests an 'evidentiary test' to determine whether criterion (b) is met (at page 14):

> Consider the following hypothetical scenario whereby the demand of all seekers is transferred to the infrastructure provider. Then, a facility will be considered uneconomic to duplicate if the provider would rather augment their own existing network than build a new rail network to accommodate that demand.

6.77 This evidentiary test suffers from the same flaw identified above. The test presupposes that the only additional costs of having multiple users on the railway line as a result of access is that the infrastructure provider must accommodate more demand on its existing network or undertake augmentations of that network (ie. it fails to take into account the fact that having multiple users on a system causes enormous diseconomy costs). In fact, when there are multiple iron ore producers, it will be most efficient in a social costs benefit sense to have those producers operating on separate rail networks, as illustrated by the fact that RTIO, BHPBIO and FMG have all successfully constructed separate rail tracks and the fact that the Pilbara iron ore industry is expanding successfully as a result.

6.78 As Professor Ordover explains (at page 11):

> Finally, and most importantly, this test assumes that it costs the same in terms of transactions costs as well as the timing and the nature of augmentation to accommodate the access-seeker's (or seekers') demand as it costs the incumbent to accommodate this hypothetical increase in its own demand. This is plainly not the case for a variety of reasons. First of all, the putative access provider will not need to engage in potentially complex negotiations with itself when and how to "augment" its existing facility.[57] Secondly, the incumbent can better deal with the vicissitudes of demand for its own product than it can deal with the same uncertainties facing the third parties that have unimpeded access to its facility.

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[57] Indeed, the access-seeker's demand can originate from different locations along the existing line as compared with where the incumbent's likely incremental demand would come from. This aspect of demand is ignored in the cost functions analyzed by Professor Gans and in the basic natural monopoly test. Yet, in railroading, such location issues cannot be ignored.

6.79 Thirdly, as Professor Ordover explains (at page 9):

> Professor Gans does not suggest that the phrase "uneconomic for anyone to develop another facility" means (as it plainly can mean) whether under some appropriate conditions another firm (or group of firms) can build a competing facility (notwithstanding that the question posed by the phrase is whether it is uneconomic for **anyone** to develop another facility). Instead, he suggests that a "net social benefits test" should be applied. Under this test, even if it would be necessary to build the additional facility because of capacity constraints, and it would be profitable for the access-seeker to build such facility, Professor Gans claims that (in some circumstances) it should be the incumbent's burden to construct such facility in a timely fashion, presumably with the hope (or expectation) that the access-seeker will agree to defray its share of the construction costs and that its expanded capacity will not be stranded at some future date if the access-seeker decides to construct its own facility. It is obvious that the application of the "net social benefits test" is apt to vastly extend the range of market settings in which criterion (b) is putatively satisfied and could require, in principle, that many facilities be opened to access seekers, unless some proper safeguards are put in place. In essence, this proposal carries the risk of extinguishing most basic property rights (at least in network industries) and imposes on the incumbent not only an already onerous role of provider of access but also of a public utility that has an obligation to meet inchoate demands for additional capacity with very little limitation.[58]

6.80 Finally, we note that TPI suggests at paragraph 5.4 of the Supplementary Submission that Professor Gans' analysis shows that:

> Without capacity constraints ... under reasonable assumptions ... it is always uneconomic to develop another facility.

6.81 We assume that this is a reference to section 3.4.3 of the Gans Report. Two observations are made. First, and as noted above, this analysis fails to take into account diseconomy costs caused by having multiple users on a single system. Second, the analysis in section 3.4.3 of the Gans Report proceeds on the assumption that:

> 'There are no capacity constraints and also the provider is likely to augment its facility in any event.'

6.82 A scenario in which there are no capacity constraints but in which the provider is likely to be augmenting its facility in any event is highly artificial and is as removed from the reality in the Pilbara as is possible to imagine.

Conclusion on Natural Monopoly Test

6.83 In summary, it is impossible for the Council to be satisfied that criterion (b) is met by applying a natural monopoly test given that:

- TPI has not specified which particular services it wishes to have declared, making it impossible to assess whether there are economies of scale in relation to the provision of each and every service or economies of scope;

[58] Professor Gans' proposal carries also additional risks which he fails to even acknowledge. For example, his proposal would expose the access-provider to possibly huge financial losses in the event that the access-seeker goes bankrupt. At the other end, the proposal could be used as a vehicle for price fixing or output restriction if it necessitates the parties jointly deciding how much additional transportation capacity to build and when.

- it is impossible to make any estimate of reasonably foreseeable demand for the services given the lack of particularity about the services and uncertainty about the development of iron ore resources over a 20 year period;
- RTIO is expanding its Pilbara iron ore operations as rapidly as possible and realistic modelling work (and commercial common sense) suggests that it is highly unlikely that RTIO will have spare capacity available on its network for third parties; and
- the diseconomy costs that access will cause would dwarf the costs of constructing another facility.

(i) Applying a Private Investment Test

6.84 If, as RTIO contends, a private investment test should be applied, then again, the Council cannot be satisfied that criterion (b) will be met.

6.85 As with the natural monopoly test, if it is impossible to make any estimate of reasonably foreseeable demand it is impossible for the Council to be positively satisfied that criterion (b) is met. Without being able to forecast demand it is not possible to know whether a private investor will, in fact, find it economical to build another facility. If (as is a real possibility here) demand was high enough then it may well be economical, in a private investment sense, for another facility to be built. Certainly, in this case, there are no prohibitive barriers to developing another facility, as illustrated by the fact that the FMG is currently building railways in the Pilbara and is considering an extension of its railway system to its Solomon and Flying Fish prospects. The fact that railway facilities are now being constructed demonstrates that there are no insurmountable economic or other barriers to the building of another railway line, whether that be a spur line to connect with TPI's existing facility or a new independent facility. In short, if the demand exists, investment in a rail facility can and will be made.

6.86 If demand is not sufficient to justify building a railway line, there may well be other transport options available such a trucking the ore to the nearest accessible railway line or port. For example, we understand FMG is considering trucking ore from its Christmas Creek deposit to Cloud Break. If there is not sufficient demand to justify the cost of building a separate railway line then such a level of demand would also not justify the cost of granting access to current facilities.

7. Criterion (a) – Promote a material increase in competition in another market

7.1 Section 44G(2)(a) provides that the Council cannot recommend declaration of a service unless it is satisfied:

> that access (or increased access) to the service would promote a **material increase** in competition in at least one market (whether or not in Australia), other than the market for the services (emphasis added).

(a) Meaning of criterion (a)

7.2 The *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) (the ***Access Amendment Act***) inserted into criterion (a) the words 'a material increase in'. Prior to the commencement of the Access Amendment Act, criterion (a) required only 'that access ... **would promote competition** in at least one market ... other than the market for the service'. Significantly, the Mount Newman Final Recommendation was made prior to the amendment of criterion (a).

7.3 The Access Amendment Act followed the Productivity Commission's 2001 *Review of the National Access Regime* (the ***Productivity Commission Report***). The Productivity Commission criticised Part IIIA, stating that:

> the national access regime does not do enough to guard against the possibility that investment in essential infrastructure will be deterred.[59]

7.4 The Productivity Commission considered the standard applied by the Tribunal in *Re Sydney Airport*, where the Tribunal said that the promotion of competition necessary to ground a recommendation for declaration was a 'likelihood of increased competition that is not trivial',[60] but held that the notion of 'promoting competition':

> ... involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would without declaration.[61]

7.5 The Productivity Commission said that such a standard 'would hardly ever not be met' and concluded that:

> this quote from the Tribunal reinforces the case for bolstering criterion (a) with a requirement for a substantial increase in competition.[62]

7.6 The Productivity Commission considered that criterion (a):

> can be seen as a proxy ... for the achievement of efficient outcomes [but] to be an effective proxy, the competition to be promoted needs to be 'effective' or 'substantial'. If as a result of mandated access there were only a minor improvement in competition, declaration would be

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[59] Productivity Commission Report, page xxi.

[60] (2000) ATPR ¶41-754, 40,748.

[61] Ibid, 40, 775.

[62] Productivity Commission Report, page 179.

> of little practical benefit and, given the potential costs of intervention, could be damaging for the economy.[63]

7.7 It said the balance should be shifted to require a **material** effect [emphasis added], and:

> [requiring] a *substantial* increase in competition in another market, rather than simply promoting competition in that other market ... should help to guard against the possibility of declarations where there would be little prospect of a gain in efficiency, given the likely costs of intervention.[64]

7.8 Moreover, and also in response to the Productivity Commission Report, the Access Amendment Act inserted section 44AA, an objects clause for Part IIIA, which provides that one of the aims of Part IIIA is to:

> promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.

7.9 The Productivity Commission Report and the consequential amendments to Part IIIA make it clear that criterion (a) requires the Council to be satisfied that access will result in a material increase in competition, and not merely foster an environment which may be more conducive to competition. Further, it is also clear that the threshold in criterion A is significantly higher than the 'non-trivial' increase in competition standard which applied at the time that the Mount Newman Application was determined by the Council. The Council must now be satisfied that access would promote a demonstrable (not a hypothetical) increase in competition and this increase in competition must be 'material'.

7.10 With this new test in mind, RTIO is strongly of the view that:

- the dependent markets claimed to exist by TPI (the 'tenements market' and 'rail haulage' market) are, in fact, not separate markets from the global iron ore market or the market for the service to which access is sought; and
- even if it were assumed that there are separate tenements and rail haulage markets, access would not result in a material increase in competition in these markets because, in each case:
  - RTIO does not have the ability and incentive to exercise market power, with the result that each market is already the subject of effective competition; and
  - access would not, in any event, promote competition in either market.

(b) Market definition

Markets asserted by TPI

7.11 TPI claims that access to the Hamersley Service and the Robe Service would promote a material increase in competition in the following dependent markets:

[63] Productivity Commission Report, page 171.

[64] Productivity Commission Report, page xxiii.

- the markets for rail haulage services on the Hamersley railway line and the Robe railway line and in the Pilbara; and
- the markets for prospective iron ore or other bulk mineral tenements in the vicinity of the Hamersley and the Robe railway lines and in the Pilbara.

7.12 Importantly, TPI does not contend that access to the Hamersley Service or the Robe Service would promote competition in the global iron ore market. This is not surprising given that, as the Council recognised, at paragraph 7.159 of the Mount Newman Final Recommendation, the market for iron ore is already subject to effective competition.

7.13 Each of the dependent markets alleged by TPI is discussed below.

Market for iron ore or other bulk mineral tenements

Tenements market not separate from global iron ore market

7.14 The product dimension of the tenements market asserted by the Applicant is claimed to be 'the right to exploit a proven deposit of a bulk mineral (including iron ore) within a mineral tenement'.[65] This adopts the wording of the Council in the Mount Newman Recommendation,[66] where the Council also said that the tenement market was 'limited to those tenements that contain iron ore in quantities sufficient to be capable of efficient exploitation'.[67] The fact that the claimed dependent market is limited to 'proven' deposits (a term defined in the JORC Code as incorporating the economic viability of extraction) makes it unlikely that any owner of a proven deposit is not mining or hoping to mine such deposits.

7.15 Attached as Annexure 11 is a report from Dr Phillip Williams of Frontier Economics (the ***Williams Report***).

7.16 That report demonstrates that iron ore tenements should only be described as a separate functional market if the activities involved in prospecting, initial exploration and development are undertaken by distinct firms from those that subsequently mine and market iron ore. The report states at paragraphs 72 to 73:

> If rights to iron or bulk mineral ore tenements are bought and sold this is not of itself reason to conclude that there is a distinct market for mineral tenements. If both the buyers and sellers of rights to the tenements are engaged in the same range of activities (prospecting for, mining, and marketing iron ore) these activities should be regarded as occurring within the same market. This point is clear if we consider, as an example, that the assets for sale are iron ore mines rather than rights to tenements. The fact that mines are periodically bought and sold by mining companies does not suggest that the buyers and sellers are operating in different markets
>
> If discrete components of the work involved in prospecting and initial exploration are contracted out but the project as a whole is typically managed by firms that subsequently mine and market the mineral ore, it is unlikely that iron ore tenements should be defined as a market that is distinct from the subsequent mining and marketing.

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[65] 6.47 Hamersley Supplementary Application; 8.51 Robe Application.

[66] Mount Newman Recommendation at 7.57.

[67] Mount Newman Recommendation at 7.58.

7.17 Accordingly, in order to establish that a distinct dependent market for iron ore tenements exists, FMG would need to show that the firms buying and selling iron ore tenements do not also mine iron ore and do not intend to do so in future. Otherwise, prospecting, exploration and initial development of iron ore resources is correctly defined as part of the international iron ore market.

7.18 TPI has not produced any evidence that there are persons whose objectives are merely to acquire and trade iron ore tenements. In fact, the companies listed by TPI in the TPI Applications are all seeking to develop mines – none could be characterised as a 'trader' in tenements.

7.19 In the Mount Newman Final Recommendation, at 7.67, the Council asserted that:

> It is sufficient that there are companies that, whatever their intentions, will either choose or be obliged to sell part or all of their 'find' due to a lack of funding to exploit a deposit and/or a lack of access to the necessary rail infrastructure.

7.20 However, as RTIO noted,[68] the Council's:

> statement does not establish the existence of a separate market. All that it demonstrates is that, when deposits are proven, development is the objective and to achieve development, transactions of this nature often taken place. But this activity is simply part of the 'iron ore development, mining, processing and sales market' that was the subject of analysis in the Robe application, and is the market that should properly be the subject of analysis here.[69]

7.21 The buying and selling of Pilbara tenements occurs between companies that either are, or intend to become, involved in the **production** of iron ore. This commonality indicates that a right to exploit proven iron ore deposits in the Pilbara is correctly seen as a part of the iron ore market.

Any tenements market is global

7.22 If, contrary to the submissions above, the Council forms the view that there is a separate tenements market, that market is global.

7.23 In the Mount Newman Final Recommendation, the Council found that the pool of potential purchasers for iron ore tenements in the Pilbara appears to be limited essentially to entities that already had rail and port infrastructure in place in the Pilbara (paragraph 7.80), with the result that the geographic extent of the market was limited to the Pilbara (paragraph 7.87):

> If rail access is not in existence or is otherwise unavailable, it is highly unlikely that anyone other than those entities that already have a substantial presence in the relevant geographic area would respond to a small yet significant non-transitory change in price such that a wider geographic extent of the tenements market from that proposed by the Council (ie the Pilbara) would be appropriate.

7.24 As discussed further in paragraphs 7.40 to 7.43 below, there has, in the last few years, been very significant trading in relation to iron ore tenements and companies that own iron ore tenements. Notably, in almost all cases the purchasers of tenements do not own rail

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[68] In 7.67 of the Mount Newman Draft Recommendation.

[69] RTIO Submission in Response to the Draft Recommendation, paragraph 4.30.

and port infrastructure in the Pilbara. Moreover, it is not surprising that parties other than RTIO and BHPB are buying tenements in the Pilbara. The history of the Pilbara shows that where an economically viable deposit has been found, an infrastructure solution can also be found. The potential purchasers of iron ore tenements in the Pilbara include, in addition to RTIO, BHPB and FMG, other international iron ore companies (including, notably, Vale and Anglo American), international steel mills (in particular, Chinese steel mills) and a plethora of smaller companies looking to establish iron ore mines whether in the Pilbara, mid-west or anywhere else in Australia, or indeed globally.

7.25 Any suggestion that, in the current market, entities other than those with infrastructure in the Pilbara would not purchase a tenement in the Pilbara ignores reality. There is no basis on which the Council could conclude that any market for iron ore tenements is other than a global market.

7.26 In summary, the Council cannot be satisfied that a tenement market exists separately from a global iron ore market (which, as the Council has previously recognised, is a market that is already subject to effective competition). To the extent that the Council forms the view that there is a tenements market separate from the global iron ore market, that market must be a global market.

Rail haulage market

Rail haulage / Track access not separate from global iron ore market

7.27 The seminal legal definition of markets was given by the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd*,[70] (**QCMA**) (at page 190):

> the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.

7.28 According to Professor Maureen Brunt, the market:

> is the network of actual and potential transaction between buyers and sellers of goods or services which are, or could be, close substitutes. Under what circumstances, we may ask, would the potential for transactions not exist? Answer: when there are such efficiencies of vertical integration ... that market co-ordination between buyers and sellers is superseded by in-house co-ordination. There would be, in such a case, no functional split to create market transactions between stages of production.[71]

7.29 In RTIO's submission, rail haulage and track access are part of the global iron ore market. There have been no actual transactions in rail haulage or track access in the Pilbara. Further, the efficiencies of vertical integration are such that, save for compliance with State Agreement obligations as discussed below, there is no potential for transactions to occur on the RTIO Rail Network, which includes the Hamersley railway line and the Robe railway line, unless TPI is artificially subsidised to provide rail haulage services.

[70] (1976) 25 FLR 169.

[71] Maureen Brunt, *Economic Essays on Australian and New Zealand Competition law*, International Competition law Series, Vol 8, Kluwer Law International, 229.

7.30 Both Hamersley and Robe are, of course, subject to State Agreement obligations to carry third party freight, provided that doing so 'does not unduly prejudice, or interfere with, their operations'. In the current environment, for the same reasons discussed in relation to criterion (f) above, carrying any significant volume of third party freight is likely to unduly prejudice or interfere with Hamersley and Robe's operations. In any event, neither Hamersley nor Robe has received any application to provide rail haulage services pursuant to its State Agreement obligations.

7.31 As noted above, the absence of actual transactions does not mean that there is no relevant market if there is the potential for transactions to occur. As noted in relation to criterion (f) above, the provision of rail haulage services or track access services would cause enormous diseconomy costs. Hamersley and Robe are therefore unlikely to provide rail haulage services in future, other than pursuant to their State Agreement obligations where doing so would not unduly prejudice or interfere with their operations. To provide rail haulage services in any other circumstance, whether or not the Hamersley and Robe Services are declared, would simply increase diseconomy costs. TPI claims that it will provide haulage services on the Hamersley and Robe railway lines, but does not provide any detail as to how or where it intends to do so. Further, the TPI's claims are only sustainable if TPI will not have to bear, or pass onto third party iron ore producers, the diseconomy costs associated with access. Whether TPI will, in fact, have to bear those costs depends upon the extent to which it can augment its bargaining power, such as through seeking or obtaining regulatory intervention in the commercial process. If TPI is not, in effect, subsidised, and must bear the true diseconomy costs, there will be no potential for haulage transactions in the purported market.

7.32 In the absence of actual or potential transactions, the Council cannot be satisfied that there is a market for rail haulage services on the Hamersley or Robe railway lines.

No separate markets for rail haulage and track access

7.33 Even if a market for rail haulage exists in the Pilbara (which RTIO strongly rejects), there are not separate markets in the Pilbara for rail haulage and track access. For the reasons outlined above, there are neither actual nor potential transactions in any market for either haulage or track access. Further, TPI has not established any substantive difference in the product, geographic or functional dimensions of the putative rail track and rail haulage markets. Most significantly, TPI fundamentally bases its assertion that railway track services and haulage services are in functionally distinct markets on a passing observation made by the Tribunal in *Re Sydney Airport*.[72] However, that decision did not examine the structure of rail markets. The Tribunal's remarks cannot be construed as authority for the proposition that track and rail haulage services are always functionally distinct. The Tribunal simply stated that there were parallels between the complementarities of, on the one hand, Sydney International Airport's physical infrastructure and the ramp handling and Cargo Terminal Operator Service, and on the other hand, railway track and train services.

[72] *Re Review of Declaration of Freight Handling Services at Sydney International Airport* (2000) ATPR ¶41-754, [97]. See the TPI Hamersley Application at paragraph 8.7, TPI Hamersley Supplementary Application at 6.4, and TPI Robe Application at 8.8

At most, the Tribunal's observation suggests that, in circumstances where freight services *have been separated* from track services, the markets *may be* functionally distinct.

7.34 The instances on Australia's East Coast of the separation of track access and rail haulage services, to which the Tribunal was most likely referring, are clearly very different from the situation in the Pilbara. In the Pilbara, rail infrastructure was built as part of fully integrated, dedicated iron ore production facilities. The Pilbara rail networks were built to transport the iron ore produced by parties to the State Agreements. Transportation of the minerals of third parties was only intended to the extent that this would not prejudice parties to State Agreements. In contrast, the East Coast rail networks (such as NSW Rail Infrastructure Corporation, VicTrack and Austrack) were created as publicly-owned services for the carriage of diverse goods and/or passengers. From the outset, the purpose of those State-owned rail networks was the provision of rail transportation. It is only through the relatively recent processes of privatisation and corporatisation that the functional separation of track access and rail haulage services has become possible. A case in point is the Queensland rail industry which was the subject of TPI's second purported authority, *PN v QR*.[73]

7.35 Accordingly, there is no basis for the functional separation of a putative Pilbara rail services market from the global iron ore market, or, for that matter, functionally separating track access from rail haulage services in the Pilbara.

(c) No promotion of competition in Pilbara iron ore tenements market

Introduction

7.36 If, contrary to RTIO's submission, the Council considers there is a Pilbara iron ore tenements market, it is clear that:

- any such market is already subject to effective competition; and
- even if that were not the case, access would still not promote a material increase in competition in that market.

Any Pilbara iron ore tenements market is already the subject of effective competition

<u>*Competitive trading of tenements*</u>

7.37 There are no bases for TPI's claims that:

- purchasers of iron ore tenements are 'largely limited' to BHPBIO, RTIO, FMG and other parties who have access to infrastructure such as the proposed TPI railway;[74] or
- iron ore tenements are currently underdeveloped and underpriced.[75]

7.38 There are approximately 39 entities with interests in approximately 200 iron ore tenements in the vicinity of the Hamersley and Robe railway lines, **excluding** BHPBIO, RTIO and FMG. Of these 200 tenements, an estimated 43 have been granted in the past two years

[73] [2006] FCA 91, [935] – [966]. See TPI Hamersley Application at paragraph 8.8, Supplementary Submission at paragraph 6.4 and TPI Robe Application at paragraph 8.8.

[74] Paragraph 8.28 of the TPI Hamersley Application; Paragraph 8.100 of the TPI Robe Application.

[75] Paragraph 8.36 of the TPI Hamersley Application; Paragraph 8.100 of the TPI Robe Application.

and approximately 58 were applied for within the past two years. The presence of 39 other iron ore tenement holders in the vicinity of the Hamersley and Robe railway lines demonstrates that barriers to entry are not high. Further, that a significant number of these entities were involved in transactions involving their iron ore tenements illustrates that there is already competition for tenements, and iron ore tenements are not, as TPI claims, underdeveloped and underpriced.

7.39 As the Council previously identified in the Mount Newman Final Recommendation,[76] 'transactions' may take several forms, including:

- sale of shares in the corporate entity which holds a licence to explore or exploit the tenement;
- transfer of a licence (for consideration); and
- joint venture arrangements whereby the entity which has a licence to mine the tenement shares the proceeds of mining with another entity, usually in return for capital to construct the mining infrastructure.

7.40 Within the past two years, approximately 21 iron ore tenements in the vicinity of the Hamersley and Robe railway lines have been subject to a change in ownership that did not involve BHPBIO, RTIO or FMG (and even excluding tenements located very close to the coast which would not require rail haulage in any event). For example:

- Iron Ore Holdings Limited (***IOH***) acquired PEL Iron Ore Pty Ltd (a subsidiary of Fusion Resources Limited), which owned 10 iron ore tenements in the Pilbara, for a consideration of 3.5 million IOH shares at $0.75 each ($2.625 million);
- United Minerals Corporation NL (***UMC***) purchased three iron ore tenements in the Pilbara from DFD Rhodes Pty Ltd for $200,000 cash, 5 million UMC shares at $0.16 each ($800,000) and a 1.5% gross royalty;
- Mt Gibson Iron Limited acquired Aztec Resources Limited, which owned, amongst other assets, three iron ore tenements in the Pilbara, for $297,905;
- Polaris Metals NL (***Polaris***) acquired the iron ore assets of Heron Resources Limited, including a significant number of iron ore tenements in the Pilbara, for 29,729,730 Polaris shares at $0.185 per share ($5.5 million), plus 15 million options at the exercise price of $0.30 each;
- Murchison Metals Limited acquired one tenement from Austral Gold Limited and the iron ore rights on an adjoining tenement from Joytell Pty Ltd for a total cash consideration of $9 million and $1 per tonne royalty payable to Joytell Pty Ltd;
- Prime Minerals Limited acquired Megaworld Pty Ltd, the holder of three iron ore tenements in the Pilbara, for $50,000; and
- AusQuest Limited (***Ausquest***) acquired one iron ore tenement in the Pilbara (E47/1206) from Panco Pty Ltd/Rodney Bellotti, for a consideration of 150,000 Ausquest shares.

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[76] At paragraph 7.60.

7.41 In addition, several joint ventures involving tenements in the vicinity of the Hamersley and Robe railway lines have been formed with companies other than BHPB, RTIO and FMG. For example:

- Aquila and AMCI in the API joint venture. API was formed in February 2005 and based initially upon the iron ore tenements held by Aquila in the Pilbara (including a number in the vicinity of the Hamersley Service), but has since developed commercial arrangements with Cullen Resources Limited, Red Hill Iron Limited and Helix Resources Limited (each a holder of iron ore tenements in the Pilbara) to explore for and develop iron ore resources in prospective areas located adjacent to, or in reasonable commercial proximity of, iron ore tenements owned by Aquila; and
- Red River Resources Limited (***Red River***) and Iron Mountain Mining Limited (***Iron Mountain***) are parties to a joint venture, pursuant to which Iron Mountain can earn up to 70% interest in Red River's Miaree Magnetite Trend Project in the Pilbara.

7.42 Set out behind Annexure 3 is a summary of recent transactions in tenements in the vicinity of the Hamersley and Robe railway lines.

7.43 From these transactions, it is clear that tenements are actively and competitively traded by parties other than owners of rail infrastructure, and TPI's assertion that tenements are underdeveloped and under priced is baseless. Further, as noted above, there is no basis for TPI's claim that Hamersley or Robe possess market power, or, if that market power exists (an assumption RTIO strongly rejects), that they have exercised that market power to adversely affect any putative market for tenements in the Pilbara.

<u>Access is unnecessary for deposits to be developed</u>

7.44 It is not surprising that there is active trading in tenements in the Pilbara, notwithstanding the fact that the Hamersley and Robe Services have not been declared. The history of the Pilbara (as outlined in section 3 above) demonstrates that if viable iron ore deposits are found, then infrastructure solutions will also be found. This point is further illustrated by the discussion at paragraphs 5.106 to 5.120 above which considers, by way of example, the alternative infrastructure solutions available to FMG in relation to its Solomon deposit, the API Joint Venture in relation to its Western Pilbara project and Brockman Resources in relation to its Marillana Project.

7.45 Companies considering buying iron ore tenements are well aware of this history and know that a commercial solution can be found to enable iron ore from tenements in the Pilbara to reach market.

Access would not promote competition

7.46 Even if, contrary to RTIO's submission above, the Pilbara iron ore tenements market is not already the subject of effective competition, there is no basis on which the Council could be satisfied that access to the Hamersley and Robe Services would promote a material increase in competition in the Pilbara iron ore tenements market for three reasons.

TPI can use its own rail line

7.47 As discussed above, TPI has already built its Chichester rail line and is considering constructing the Kennedy railway. If TPI wishes to provide rail haulage services to third parties, as it claims, it could do so by using the Chichester/Kennedy line and, where necessary, by constructing a spur line to serve a particular deposit (which is unlikely to entail construction of more than 100 kilometres of new rail track, although the precise distance cannot be determined without knowing the deposits to be served). As discussed at paragraph 5.118 the cost of TPI using its own rail lines to provide haulage services is likely to be considerably cheaper than obtaining access to the RTIO Rail Network, given the diseconomy costs access would cause (unless TPI does not have to bear the true diseconomy costs, in which case RTIO would be subsidising TPI's activities). Using TPI's rail line rather than the RTIO Rail Network is also more likely to be of use to third parties as the TPI rail line connects to TPI's own open access port at Port Hedland (see further discussion below).

7.48 In summary, access will not increase the likelihood of TPI (or any other party) actually providing rail haulage services. TPI can do so already (and can do so more economically) by using its own rail lines and/or extensions to those lines. As a result access can have no impact on any claimed tenements market.

Access to ports uncertain

7.49 Access to the Hamersley and Robe Services could only conceivably promote competition in the Pilbara iron ore tenements market if it would result in the increased shipping of iron ore through a port.

7.50 It is not possible for the Council to be so satisfied in respect of the port facilities listed in the TPI Hamersley Application that are said to 'be potentially available to export ore from tenements in the vicinity of the Hamersley Rail Networks'.[77] Neither of the TPI Applications describe:

- the particular port facility or facilities to which iron ore railed on the Hamersley or Robe Services is likely to be destined; or
- how any such port facility or facilities are likely to be accessed.

7.51 Of the ports listed in the TPI Hamersley Application, only Hamersley's Dampier facility is served by the Hamersley railway line, and only Robe's Cape Lambert facility is served by the Robe railway line. Both ports are governed by State Agreements,[78] which stipulate that the use of those ports by third parties (such as TPI) is subject to:

- agreement between each of the relevant parties and with the State of Western Australia; and
- such use not unduly prejudicing or interfering with Hamersley or Robe's operations.

7.52 None of the other ports listed in the TPI Hamersley Application is serviced by the Hamersley or Robe Services. For iron ore to reach those ports, it would have to be

[77] TPI Hamersley Application, paragraph 3.11.

transported by other means from some point on the Hamersley or Robe railway lines. For the Council to be satisfied that access would lead to the shipping of ore through a port, at least one of the following contingencies must be fulfilled:

- third party access being obtained to a relevant port facility;
- third party access being obtained to a railway line that could be used to transport ore from the Hamersley railway line or the Robe railway line to a relevant port facility;
- the construction of unspecified rail facilities (which would be available to TPI and any third party haulage operator) to link the Hamersley railway line or the Robe railway line to a relevant port facility or to another railway that is connected to a port facility;
- the availability of a feasible means, other than rail, to transport ore from the Hamersley railway line or the Robe railway line to a relevant port facility or to another railway connected to a relevant port facility.

7.53 None of these contingencies is addressed in the TPI Applications.

7.54 Further, where fulfilment of a contingency would require access to a facility (rail or port) to which TPI or any other third party haulage operator does not have a guaranteed right of access, it would not be possible for the Council or the Minister to be satisfied that such access would be achieved as this would require the Council and Minister to conclude that:

- the relevant criteria to justify access are likely to be satisfied;
- all requisite approvals or decisions by Governments (State and Federal) to facilitate access will be achieved;
- any litigation regarding jurisdictional, constitutional and other legal issues will be finally decided in favour of the access seeker; and
- access terms will ultimately be agreed or determined by a tribunal with jurisdiction.

7.55 In the circumstances, the Council could only be satisfied that access could result in any change in any relevant market (assuming the existence of such a market and the state of competition in that market) if TPI committed to constructing a rail link to its own rail and port facilities from the RTIO Rail Network. Any such proposal must be spelt out from the outset.

<u>*No incentives to lessen competition*</u>

7.56 Even if, ***contrary to RTIO's submissions and all of the available evidence***:

- there was spare capacity available on the RTIO Rail Network that could accommodate third party demand; and
- there are deposits that could be developed if they obtained access to the RTIO Rail Network that would not be economic to develop (or would be more costly to develop) if they built their own infrastructure or connected to the FMG Chichester/Kennedy lines,

[78] *Iron Ore (Hamersley Range) Agreement Act 1963*; *Iron Ore (Robe River) Agreement Act 1964* (WA).

access would still not promote a material increase in competition.

7.57 It needs to be remembered that, as found by the Council and seemingly now accepted by TPI, the global iron ore market is effectively competitive. In the theoretical scenario described above, the deposit holder is dependent upon RTIO access if the deposit is to be economically developed (or a larger profit can be realised if RTIO provides access). RTIO is equally dependent, however, on the deposit holder if it wishes to obtain a share of the profits that can be generated from that deposit. In such a scenario, without access, commercial incentives will lead RTIO and the deposit holder to reach an agreement under which the deposit is developed using RTIO's infrastructure and the resulting profit (or the increase in profit achieved if RTIO provides access) shared between RTIO and the deposit holder.

7.58 It is not the case therefore that access would enable deposits to be developed that would not otherwise be developed. Even if all of TPI's assertions were accepted, any economically viable tenement in the position described above will still be developed through commercial agreements between RTIO and the tenement holder. The only consequence of access is that rather than negotiating with RTIO the tenement holder may negotiate with RTIO or TPI. This may lead to a redistribution of profits as between RTIO, TPI and the deposit holder, but it would not result in any tenements being developed that would not be developed absent access. As a result it would not result in increased exploration activity or otherwise promote a material increase in competition in any tenements or other market (see the discussion in section 3 of the Williams Report).

7.59 RTIO reiterates, however, that this scenario is purely hypothetical and that as discussed elsewhere in this submission:

- RTIO is expanding its Pilbara iron ore operations as rapidly as possible and will not have spare capacity available on key segments of its network in the foreseeable future to accommodate third parties; and
- the costs that access would cause (especially the diseconomy costs) would dwarf the cost of a deposit owner constructing its own infrastructure or building a spur line to link up with TPI's Chichester/Kennedy rail lines.

(d) No promotion of competition in Pilbara rail haulage market

No incentive or ability to exercise market power to affect competition in rail haulage market

7.60 RTIO does not currently provide rail haulage services because of the diseconomy costs of doing so (see discussion above in relation to criterion (f)). Furthermore, no third party iron ore producers have sought rail haulage services from Hamersley or Robe pursuant to the State Agreements. TPI's suggestion that Hamersley and Robe are withholding rail haulage services and that this is evidence of Hamersley and Robe exercising market power is clearly wrong. Obviously, Hamersley and Robe are not making 'monopoly rents' either from haulage charges or in the global iron ore market. The suggested implication that RTIO is able to leverage its power in relation to rail haulage in the putative Pilbara tenements market ignores the evidence of the competitive nature of trading in tenements discussed above.

7.61 As a result, it is clear that RTIO has no incentive or ability to exercise market power, and is not in fact exercising market power, in any 'rail haulage' market. Far from being suggestive of market power, the absence of transactions in the rail haulage market confirms RTIO's submissions about the likely diseconomies that would arise from converting the RTIO Rail Network, including the Hamersley and Robe railway lines, from a single-user to a multi-user facility and reinforces that there is no rail haulage market separate from the global iron ore market.

TPI's claims about RTIO's market power

7.62 TPI cites three examples of RTIO and/or BHPB allegedly exercising market power to deny access to their Pilbara railways,[79] implying that this market power would be reduced by access. However, none of the examples given supports TPI's assertion that RTIO holds any relevant market power or that it has exercised its market power to deny access to its railways:

- In 1998, Hamersley sought and obtained a declaration in the Federal Court that the Council did not have power to accept or review Robe's 1998 declaration application in respect of part of the Hamersley railway line. Hamersley has not, to date, provided rail haulage services to third parties with whom it does not have a relationship because the diseconomies of doing so would unduly prejudice its core business. Anyone in such a situation, regardless of its market power, would resist an application for declaration of such a fundamental and integral part of its production facilities.
- Following the 2003 decision of the Western Australian Court of Appeal in *Hancock Prospecting Pty Ltd v BHP Billiton Iron Ore Pty Ltd*,[80] negotiations between Hope Downs and BHPB did not result in Hope Downs' ore being carried on the Mount Newman railway. TPI does not explain how this is an example of BHPB exercising market power. It is impossible to conclude from TPI's allegation that BHPB possessed market power at the relevant time, or, even if such power is assumed, that the breakdown of commercial negotiations has any causal connection with that market power. In any event the example concerns BHPB and says nothing about whether RTIO has market power.
- BHPB has vigorously resisted FMG's efforts to have the Mount Newman railway declared. Given that BHPB also faces diseconomies and prejudice to its core iron ore business if it provides rail haulage or track access services, it is not unreasonable for BHPB to object to declaration. Anyone in a similar position would act this way, regardless of its market power or lack thereof. Again, the example says nothing about RTIO's market position.

7.63 It is not at all clear why any of RTIO's or BHPB's actions in respect of access to its railways either demonstrate the possession of market power or, assuming such power is held (an assumption Rio Tinto strongly rejects), constitutes an exercise of that market power. It is

[79] Supplementary Submission at paragraphs 6.73-6.92; TPI Robe Application at paragraphs 8.79-8.98.

[80] [2003] WASCA 259.

clear that there are legitimate business reasons for the actions undertaken in all three examples.

Access would not promote competition in any event

7.64 If, contrary to RTIO's submissions, the Council concludes that RTIO does have the incentive and ability to exercise power in the rail haulage market, access would not promote competition in that market in any event for four reasons.

TPI can use its own rail line

7.65 First, for the reasons given in relation to the tenements market in paragraphs 7.47 to 7.48 above, it would be cheaper for TPI to use its own rail line to provide rail haulage services, rather than obtain access to the RTIO Rail Network. Using TPI's rail line is also more likely to be of use to third parties as the TPI rail line connects to TPI's own open access port at Port Hedland. As a result, access would not increase the likelihood of TPI (or any other party) actually providing rail haulage services and so could not promote competition in any rail haulage market.

Access to ports uncertain

7.66 Secondly, for the reasons given in relation to the tenements market in paragraphs 7.49 to 7.55 above, the Council cannot be satisfied that access to the Hamersley and Robe railway lines could result in any additional iron ore being shipped because of the uncertainties about which, if any, ports additional iron ore could be shipped through.

No incentive to lessen competition

7.67 Thirdly, again for the reasons given in relation to the tenements market, even if (contrary to RTIO's submissions and all the available evidence) the situation were as described by TPI, access would still not promote a material increase in competition in any rail haulage market. Access in such a scenario may result in a redistribution of profits between RTIO, TPI and tenement holders, but this would not promote material increase in competition.

Monopoly Rail Haulage Operator

7.68 Fourthly, access would create, in TPI, a monopoly rail haulage operator - it would not lead to a competitive Pilbara rail haulage market. Hamersley and Robe are unlikely to enter the asserted rail haulage market. They are integrated iron ore producers, not rail haulage service providers, and, as explained above, the provision of general rail haulage services would simply increase the massive diseconomies that access will cause.

7.69 TPI gives two purported examples of how competition in the putative rail haulage and tenement markets would be promoted by access:[81]

- FMG's negotiations with BC Iron Limited; and
- FMG's joint venture arrangements with Flinders Diamonds Limited.

However, neither of these examples is analogous to the Hamersley or Robe Services. Both companies in these examples have tenements that are located in close proximity to FMG's railway, which was explicitly established as a multi-user service under the relevant

[81] Supplementary Submission at paragraphs 6.96 – 6.101; TPI Robe Application at paragraphs 8.106 – 8 111

State Agreement. Further, TPI expressly represents that it is a provider of haulage services to third parties. In contrast, the Hamersley and Robe railway lines were, from the outset, established as the means for transporting iron ore within integrated iron ore production and supply businesses. Hamersley and Robe (and, for that matter, BHPB) do not hold themselves out as rail haulage service providers. They are integrated producers and suppliers of iron ore to the global iron ore market, and, as such, they are not potential competitors in a putative rail haulage market.

(g) Conclusion

7.70 The Council must be satisfied that access would promote a material increase in competition in a dependent market before it can recommend declaration. That is, the Council must be satisfied that the level of competition in the dependent market with access will be materially greater than it will be in the absence of access. Even if there are markets for rail haulage and iron ore or bulk minerals tenements in the Pilbara (a position Rio Tinto rejects), it is clear that access will not promote a material increase in competition in those markets.

7.71 The evidence shows the tenements market is already subject to effective competition. As a result, access would not promote a material increase in competition in any Pilbara tenements market. Even if the Pilbara tenements market is not already subject to effective competition, access will not promote competition in that market. Unless the Council can be positively satisfied that a port, available for third party use, could be accessed using the RTIO Rail Network, access to that Network will not result in any changes in the market place, much less result in a material increase in competition. In any event, even if all of TPI's claims were true (which RTIO strongly rejects) at most, access may result in a transfer of profits between RTIO, TPI and other tenement holders; it would not result in any additional tenements being developed and hence would not promote exploration activity. It would therefore not promote a material increase in competition.

7.72 RTIO has no incentive or ability to exercise market power in any Pilbara rail haulage market. RTIO is not currently providing services in that market and as a result is clearly not making any 'monopoly rent' from doing so. TPI's suggestion that RTIO is leveraging its power in relation to rail haulage in the tenements market is clearly not credible given that the tenements market is already competitive. In any case, access to the Hamersley and Robe railway lines would not promote competition in the rail haulage market for the same reasons given in relation to the tenements market.

8. Criterion (d) - Health and Safety

8.1 Section 44G(2)(d) of the TPA requires the Council to be satisfied:

> that access to the service can be provided without undue risk to human health and safety.

8.2 The various State Agreements under which RTIO operates its railway require it to do so in a 'safe and proper manner'. In addition the RTIO railway lines are regulated under various Western Australian Acts and Regulations.

8.3 TPI states that paragraph 10.1 of the TPI Applications that:

> TPI undertakes that if access to the [Hamersley Service/Robe Service] is granted, its operations will be in accordance with best practice and comply with all relevant safety and other legislation. TPI will ensure its operations are safely and effectively integrated with the Provider's safety and operating procedures in a manner that ensures there will be no undue risk to human health or safety as a result of access being made available.

8.4 TPI has made no attempt to describe the manner in which its operations are capable of being 'safely and effectively integrated with the provider's safety and operating procedures' in light of the legislative and operational requirements outlined above. Until arrangements concerning safety issues in respect of TPI's operation on RTIO's rail lines are put in place and are capable of analysis, it is not possible for the Council to be satisfied that the access sought in the TPI Applications can be provided without 'undue risk to human health or safety'. In other words, RTIO submits that the Council cannot be satisfied that criterion (d) is satisfied.

8.5 In the Mount Newman Final Recommendation the Council suggested at paragraph 9.3 that:

> the language of criterion (d) suggests that it is concerned with the potential for access to be provided in a manner that does not impose undue risks to health and safety. The criterion is not concerned with whether a proposed use of the Mount Newman Service by a specific third party would impose a risk to health and safety, except insofar as a third party's proposal may provide evidence of the ability of an access agreement or determination to avoid such risks.

8.6 The Council statements ignores the fact that it must be ***positively satisfied*** that criterion (d) is met and that access can be provided without undue risk to human health and safety. The only specific third party user identified to date is TPI. There is no evidence on which the Council could be satisfied that TPI could operate on the RTIO's system without undue risk to human health and safety. There is therefore no basis for the Council to conclude on a general basis that access can be provided without undue risk.

8.7 The Council should not underestimate the health and safety issues that arise as a result of an access application of this type. Heavy haul railways are specialist infrastructure, with RTIO trains carrying up to 24,000 tonnes of ore each. The length of each train is about 2.5 kilometres and the skills required to operate a train of this type safely are significant. It takes 1.5 to 4 kilometres (depending on gradient) to bring to a halt a train travelling at a speed of 65 kilometres per hour. Many of the tasks required of a train driver are counter-intuitive – for example notwithstanding that the locomotive accommodating the driver at the head of the train might be travelling uphill, the driver could be required to brake as most of the train behind the driver is still travelling downhill. The consequence of accelerating rather than braking could be a 'broken train', meaning decoupling of sections of the train and possible derailment.

8.8 Similarly maintenance and other regimes to protect track and consist integrity must be scrupulously planned and adhered to. Further they need to be consistent. For example problem detection devices on a railway line, such as hot bearing detectors or dragging equipment detectors, must be compatible with the type of equipment using the railway line.

8.9 A superficial answer to safety is to say that with appropriate regulation under legislation, such as the *Rail Safety Act 1998* (WA), safety can be ensured. However this overlooks the fact that because of miscommunications, different standards of skill levels or training regimes, or different approaches to maintenance, accidents are far more likely to occur if there is more than one operator on a railway line like the Hamersley and Robe railway lines. The inevitability of a decline in safety being brought about by multi-usage of a facility is as apparent as the inevitability of a decline in capacity and ability to respond to surges in demand (addressed above). The Council should therefore exercise great caution in deciding whether criterion (d) is met.

8.10 Finally, as discussed in paragraphs 5.60 to 5.67 above, RTIO is moving to automated, driverless trains. Whilst concurrent usage of a rail system by a manned train and a driverless train may theoretically be possible, when the manned train is operated by a different party from the one controlling the automated system, the chance of accidents must increase. As pointed out in paragraph 5.66, automated train systems that currently exist throughout the world are almost universally 'closed' systems, (ie are wholly dedicated to automated trains). The access contemplated by the TPI Applications would result in the Pilbara being the exception to this normal practice.

9. Criterion (c) – National Significance and Criterion (e) – Effective Access Regime

9.1 Because the Council cannot be satisfied that criteria (a), (b), (d) or (f) are satisfied, this submission does not go on to address criterion (c) (national significance) or criterion (e) (effective access regime). RTIO reserves its right to make further submissions on these criteria.

E. OTHER MATTERS

10. Protected Contractual Rights

10.1 Section 44W(1)(c) of the TPA provides that the ACCC must not make a determination in respect of an access dispute that would have the effect of 'depriving any person of a protected contractual right'. 'Protected contractual right' is defined in section 44W(5) of the TPA as 'a right under a contract that was in force at the beginning of 30 March 1995'.

10.2 As is evident from Part C of this Submission, RTIO's operations in the Pilbara have been developed and occur under the framework created by several State Agreements. In return for RTIO's substantial investment and other commitments made under these State Agreements, RTIO has received a contractual assurance of rights that were recognised, between the State and RTIO, as being necessary for the establishment and conduct of RTIO's operations. In respect of railway operations, Hamersley and Robe obtained, under the Hamersley Range State Agreement and the Robe River State Agreement respectively, a contractual assurance for the grant of special leases to cover railways developed.

10.3 The special leases covering the Hamersley and Robe Services are:

(a) **Dampier to Tom Price (Lease 3116/4984; Crown Lease Number 144/1975)**

This special lease was granted pursuant to clause 9(1)(b) of the original Hamersley Range State Agreement. This provision gave Hamersley the right to call for the grant of special leases for various purposes associated with the original Tom Price development, including for the purpose of the railway described in its State-approved proposal for the initial development.

(b) **Tom Price to Paraburdoo (Lease 3116/4592, Crown Lease Number 162/1974)**

This special lease was granted pursuant to the Second Supplementary Agreement to the Hamersley Range State Agreement, which provided for the development of the mine at Paraburdoo. Clause 6(2)(b) of the Second Supplementary Agreement contained an equivalent provision to clause 9(1)(b) of the original Agreement (as referred to above). Again, once Hamersley's proposal for the Paraburdoo development was approved, clause 6(2)(b) gave Hamersley the right to call for the grant of special leases for various purposes associated with the development. One prescribed purpose was for the railway connecting Paraburdoo with Hamersley's existing Dampier to Tom Price railway.

(c) **Rosella to Juna Downs (Marandoo Extension) (Lease 3116/11869, Crown Lease Number 268/1997)**

This special lease was granted following the approval in November 1992 of Hamersley's proposals for the Marandoo development, which were submitted and approved under clause 10K(3) of the Hamersley Range State Agreement. That clause was inserted as part of amendments to provide for the Marandoo development. It seems that the special lease was then granted pursuant to the original clause 9(1)(b), on the basis that, once the Marandoo proposals were accepted, clause 9(1)(b) operated to allow Hamersley to request the grant of a special lease for the railway extension to Marandoo.

(d) **Brockman Railway Spur (Lease 3116/11805)**

This special lease was granted following the approval of Hamersley's proposals in relation to the Brockman No 2 Detritals Deposit, which were submitted and approved under clause 10I of the Hamersley Range State Agreement. Clause 10I was inserted as part of amendments to provide for the development of the Brockman No 2 mine. It appears that, like the lease in relation to the Marandoo Extension, this special lease was granted pursuant to the original clause 9(1)(b) once the developments were approved.

(e) **Cape Lambert to Pannawonica (Lease 3116/4622)**

This special lease was granted pursuant to clause 8(1)(b) of the original Robe River State Agreement, which gave Robe the right to call for the grant of special leases for various purposes associated with the development of mining operations, including for the purpose of the proposed railway.

10.4 Each of the special leases has been granted pursuant to section 116 of the *Land Act*[82], as amended by the relevant State Agreement to allow for a longer lease term and to remove the requirement for the consent of the Minister for Lands in respect of any assignment, mortgage or similar dealing with the lease. While each special lease contains a number of reservations to allow representatives of the State or local government to access the land the subject of the lease, the leases confer on Hamersley and Robe the right to:

> ...peaceably hold and enjoy the demised premises during the ... term without any interruption by [the Crown, the Minister for Lands] or any person rightfully claiming under or in trust for [the Crown].

10.5 As a consequence of the rights conferred by the Hamersley Range and Robe River State Agreements and the special leases issued thereunder, each of Hamersley and Robe is entitled to the exclusive right to occupy the relevant land comprising the rail corridor, and the right to exclusive possession of its rail facilities, for the purpose of conducting its railway operations. Because the Agreements and the relevant leases were in force at the beginning of 30 March 1995, each of these rights is a protected contractual right within the meaning of sections 44W(1)(c) and 44W(5) of the TPA.

10.6 Accordingly, the ACCC would be prevented by section 44W(1)(c) of the TPA from making an arbitration decision that required RTIO to provide a service comprising use of the Hamersley and Robe Services to a third party. This is because any such decision would necessarily involve the imposition of rights of occupation and use of the rail corridor and rail facilities which would be inconsistent with, and therefore deprive Hamersley/Robe of, these exclusive rights of occupation and possession. It follows that, with or without declaration, a third party could not obtain an arbitration decision from the ACCC that required RTIO to provide such a service. Third parties will continue to have an enforceable right to negotiate and enter into a contract for the carriage of iron ore products by RTIO pursuant to clause 10(2)(a) of the Hamersley State Agreement and clause 9(2)(a) of the Robe River

[82] *The Land Act 1933* (WA) was repealed in 1997 with the introduction of the *Land Administration Act 1997* (WA) (***LAA***). However, under section 31 of Schedule 2 of the LAA, leases granted under section 116 of the repealed Act continue to subsist as if they had been granted under the LAA.

State Agreement respectively. This right does not, however, extend to track access, as is sought by TPI Applications.

10.7 As a consequence of the above, declaration of the Hamersley and Robe Services would be futile, and would serve only to increase costs for all parties concerned, a consequence that would not be in the public interest. Accordingly the Council should exercise its residual discretion not to declare the Hamersley and Robe Services.

11. Confidentiality

11.1 Consistent with the practice adopted in other matters before the Council and in accordance with the procedure described in the Council's submission guidelines, RTIO has prepared a confidential version and a general release version of this submission.

11.2 The general release version of the submission is available to interested parties. The confidential version of the submission contains information that is highly commercially sensitive and confidential and under no circumstances may the information which is designated as confidential be released in the public domain. The commercially sensitive and confidential sections contain information about RTIO and its business that is not in the public domain. More particularly, the confidential information cannot be disclosed or revealed:

(a) to any person (other than members of the Council) without the Council first nominating to RTIO the individual or individuals to whom disclosure is proposed to be made, obtaining the written consent of RTIO to such disclosure and the relevant individual or individuals entering into an appropriate confidentiality undertaking with RTIO in a form satisfactory to RTIO;

(b) in any reasons for decision which may be published by the Council or by any other means, without the prior written consent of RTIO.

ANNEXURES

1. Information about third party developments and tenements in the Pilbara.
2. Tenements review.
3. Market for tenements – changes in ownership/joint ventures/offtake agreements/new applications.
4. Report of Dr Brian Fisher.
5. Report of Port Jackson Partners.
6. Report of Access Economics.
7. Report of Professor Joseph Kalt.
8. Report of TSG Consulting.
9. Report of Professor Janusz Ordover.
10. Report of CANAC Railway Services.
11. Report of Dr Philip Williams.
12. Report of Dr Brian Fisher and Roger Rose, 'Export Infrastructure …', Australian Commodities (June Quarter 2006).
13. Report to the Prime Minister by the Exports and Infrastructure Taskforce, 'Australia's Export Infrastructure' (May 2005).